



AQUIND Limited

AQUIND INTERCONNECTOR

**Explanatory Memorandum supporting S106
Agreement with Portsmouth City Council**

The Planning Act 2008

Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009
Regulation 5(2)(c)

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AQUIND INTERCONNECTOR ORDER 202[X]

SECTION 106 AGREEMENT EXPLANATORY NOTE

1. INTRODUCTION

- 1.1 On 14 November 2019, AQUIND Limited (the '**Applicant**') submitted an application for the AQUIND Interconnector Order (the '**Order**') pursuant to section 37 of the Planning Act 2008 (as amended) (the '**Act**') to the Secretary of State ('SoS') (the '**Application**').
- 1.2 This Application was accepted by the Planning Inspectorate ('**PINS**') on 12 December 2019, with the examination of the Application commencing on 8 September 2020.
- 1.3 In accordance with the timetable for the examination of the Application, most recently varied by the Examining Authority (the '**ExA**') in their letter of 11 January 2021, signed and dated agreements pursuant to Section 106 of the Town and Country Planning Act 1990 (if required) are required to be submitted at Deadline 7.
- 1.4 The Applicant is in discussions with both Hampshire County Council and Portsmouth City (respectively) in relation to the securing of planning obligations in connection with the making of the Order.
- 1.5 This note is submitted on behalf of the Applicant at Deadline 7 to provide the ExA with an update on the status of discussions between the parties and to provide drafts of the respective draft agreements so that the ExA are aware of their contents and may raise any points they wish to at this time in relation to these before the end of the examination of the Application in March 2021.

2. SECTION 106 AGREEMENT – GENERAL PROVISIONS

- 2.1 Each draft planning obligation agreement has been drafted on the same terms. Set out below is a brief summary of the general terms of the draft agreement, with the position in respect of the obligations with each of the authorities explained further below (see sections 3 and 4 of the note (respectively)).
- 2.2 **Legal Effect (Clause 2)** – the agreements are to be entered into pursuant to section 106 of the Town and Country Planning Act 1990, as well as section 1 of the Localism Act 2011, section 111 of the Local Government Act 1972 and all other powers so enabling. The obligations will be binding on the Undertaker (and the Undertaker's Successors) in respect of its "Qualifying Interest" in the DCO Land.
- 2.3 "Qualifying Interest" means such interest in the land sufficient to meet the requirements of Section 106(1) of the 1990 Act, which shall include the Undertaker's status as undertaker for the purposes of the DCO in accordance with the provisions of article 8(4) of the DCO, whereby the undertaker is deemed to be a person interested in the DCO Land for the purposes of Section 106(1) of the 1990 Act. The Approach taken by the Applicant in this regard aligns with that seen in other DCO's, for example the Thames Water Utilities (Thames Tideway Tunnel) Order 2014.
- 2.4 **Land Bound (Clause 3)** – the planning obligations will bind the "DCO Land" i.e. all land within the Order limits which is within the administrative boundary of the respective authority. Necessary caveats are included at clauses 3.2 and 3.3 such that this does not make any person with an interest in such land subject to the planning obligations other than the Undertaker, unless such person itself undertakes any part of the Proposed Development.

- 2.5 **Conditionality (Clause 4)** – provides that save for the covenant in clause 17.1 (payment of legal fees), the obligations in the Section 106 Agreements shall not take effect unless and until:
- 2.5.1 the DCO has been duly made by the Secretary of State (and any judicial review proceedings are finally determined); and
 - 2.5.2 the Proposed Development has Commenced i.e. a material operation as defined in section 155 of the Planning Act 2008 has taken place, save that Onshore Site Preparation Works shall not be construed as triggering Commencement.
- 2.6 This is to ensure that the planning obligations within the DCO do not bite before they are intended to do so, as is a common approach taken in planning obligation agreements. Where actions are required to be undertaken prior to Commencement, a breach would only arise where those obligations are not satisfied before Commencement is undertaken, and this ensures the necessary enforceability of the planning obligations.
- 2.7 **Obligations (Clauses 5 and 6)** – the substantive obligations are contained in the schedules to the planning obligation agreements and are summarised in more detail in this note below. The Undertaker will be under an obligation to notify Hampshire County Council ('HCC') and Portsmouth City Council ('PCC') (respectively) twenty Working Days in advance of the proposed Commencement Date, being the date on which the obligations take effect, so that they are aware of the status of the Proposed Development in relation to the effect of the planning obligation agreement.
- 2.8 These clauses ensure the planning obligations only take effect once the conditionality of the agreement (discussed above) is settled.
- 2.9 **Other (Clauses 7 to 23)** – in addition to the general provisions listed above and the substantive obligations described in more detail below, clauses 7 to 23 of the planning obligation agreements contain standard boiler plate provisions in relation to: the expiry and release of obligations, registration of the agreement as a local land charge, no waiver of breaches, remedies, certificates of compliance, resolution of disputes, notices, no fetter on statutory rights, powers, discretions or duties, good faith, good practice and reasonableness, compliance with the Community Infrastructure Regulations 2010, legal fees, interest on late payments, VAT, third party rights, jurisdiction, counterparts and date of delivery.
- 2.10 All of these Clauses, so far as the Applicant's solicitors are concerned, are of standard use and circulation in relation to such agreements, and are drafted to ensure a fair and clear administration of the planning obligation agreements for all parties.
3. **SECTION 106 AGREEMENT WITH HAMPSHIRE COUNTY COUNCIL**
- 3.1 A draft of the planning obligation agreement being progressed with HCC (the '**HCC Section 106 Agreement**') is appended to this note at **Appendix 1**.
- 3.2 Discussions between HCC and the Applicant in relation to the matters to be secured in the HCC Section 106 Agreement progressed during the hearings in the weeks commencing 7 and 14 December 2020.
- 3.3 The Applicant subsequently issued a draft of the HCC Section 106 Agreement to HCC on Monday 18 January 2021, and the parties have since discussed this draft on 21 January 2021 and the terms contained within it are now substantially agreed between the parties.
- 3.4 The planning obligations contained within the HCC Section 106 Agreement are explained below. Where capitalised terms are used which are not defined in this note, they refer to the terms as defined in the HCC Section 106 Agreement.

3.5 Converter Station Access Works Highways Agreement

- 3.5.1 It is agreed between the Applicant and HCC that an agreement pursuant to sections 38 and 278 of the Highways Act 1980 will be entered into in connection with the delivery of the Converter Station Access Works;
- 3.5.2 To ensure that agreement (the 'Converter Station Access Works Highway Agreement') is entered into in connection with those works and so as to ensure the necessary land ownerships are confirmed for dedication of a visibility splay, paragraph 1 of Schedule 1 to the HCC Section 106 Agreement requires the land ownership position to be confirmed and the Converter Station Access Works Highways Agreement to be entered into before the Proposed Development is Commenced.
- 3.5.3 Further, the Commencement of the Proposed Development is restricted until the Converter Station Access Works have been certified as complete. This ensures those works are undertaken first, which is necessary to ensure an acceptable traffic situation once construction of the remainder of the Proposed Development Commences.
- 3.5.4 The draft form of the Converter Station Access Works Highways Agreement is to be appended to the HCC Section 106 Agreement to provide certainty of its terms now. The Applicant can confirm a draft is well progressed, having been discussed between the parties on 21 January 2021. The Applicant is to issue a revised draft to HCC for agreement shortly.

3.6 Temporary Construction Access Highways Agreements

- 3.6.1 It has also been agreed between the Applicant and HCC that agreements pursuant to section 278 of the Highways Act 1980 will be entered into in connection with the delivery of Temporary Construction Accesses (the 'Temporary Construction Access Highways Agreements').
- 3.6.2 The Temporary Construction Access Highways Agreements are, under paragraph 2 of Schedule 1 to the HCC Agreement, required to be entered into prior to the works to construct any relevant Temporary Construction Access Commencing.
- 3.6.3 Further, the use of any Temporary Construction Access for the purposes of constructing the Proposed Development, is not to be permitted unless and until the Temporary Construction Access has been certified as complete.
- 3.6.4 This ensures the Temporary Construction Access Highways Agreements are entered into and those works undertaken in a manner acceptable to the highway authority prior to their use.
- 3.6.5 The draft form of the Temporary Construction Access Highways Agreement is to be appended to the HCC Section 106 Agreement to provide certainty of its terms now. The Applicant can confirm a draft is well progressed, having been discussed between the parties on 21 January 2021. The Applicant is to issue a revised draft to HCC for agreement shortly.

3.7 CAVAT Payment for highway trees

- 3.7.1 It has been agreed between the Applicant and HCC, in line with HCC policy in relation to this matter, that where it is determined any Highways Tree needs to be removed in connection with the Proposed Development, a CAVAT Compensation Amount will be paid to HCC, which HCC must use towards the provision of replacement trees.

3.7.2 Paragraph 3 of Schedule 1 secures the required process for determining the CAVAT Compensation Amount, and also secures its payment by the Undertaker in connection with the removal of any Highways Tree.

3.8 **Travel Plan Monitoring Annual Fees**

3.8.1 HCC will be responsible for auditing and monitoring the construction related worker Travel Plan that is to be submitted and approved pursuant to Requirement 21 of the dDCO.

3.8.2 To ensure that HCC are remunerated for this role, the Applicant has agreed to the payment of the Travel Plan Monitoring Annual Fee, which is a fee of £3,000 per annum and which is to be paid on an annual basis until the Completion of Construction of the Proposed Development.

3.9 Whilst the Applicant has explained above that the terms within the HCC Section 106 Agreement are substantially agreed, discussions are continuing with HCC in relation to any contributions that may be required to mitigate impacts on buses. Whilst the Applicant has clearly set out its position that based on the assessments undertaken there is no evidenced need for any such contributions, and whilst HCC are yet to provide any evidence which would suggest otherwise, this matter is included in this note so that the ExA are aware discussions continue in this regard.

4. **SECTION 106 AGREEMENT WITH PORTSMOUTH CITY COUNCIL**

4.1 A draft of the planning obligation agreement being progressed with PCC (the '**PCC Section 106 Agreement**') is appended to this note at **Appendix 2**.

4.2 Whilst it has been difficult to progress meaningful discussions with PCC on relevant matters to date, the Applicant has produced the PCC Section 106 Agreement so as to cover matters where mitigation is required and/or would assist with lessening the impacts of the construction of the Proposed Development.

4.3 A draft of the PCC Section 106 Agreement was issued to PCC on 21 January 2021, following the issue of a heads of terms document by PCC (attached at **Appendix 3** to this note) on 19 January 2021. Further commentary in relation to the heads of terms to explain the reasons why they are not included in the PCC Section 106 Agreement is provided further below.

4.4 The planning obligations contained within the PCC Section 106 Agreement are explained below. Where capitalised terms are used which are not defined in this note, they refer to the terms as defined in the PCC Section 106 Agreement.

4.5 **Car park resurfacing**

4.5.1 It is agreed between the parties that the Applicant will undertake the Car Park Resurfacing Works in respect of the car park at Fort Cumberland. Paragraph 1 of Schedule 1 to the PCC Section 106 Agreement provides for the submission and approval of a Car Park Resurfacing Specification, and once approved the undertaking of the Car Park Resurfacing Works by the Applicant (with all costs to be borne by it).

4.6 **Sports pitch realignment and reinstatement**

4.6.1 Parts of the Proposed Development are to be undertaken on recreational areas of land which provide sports pitches (i.e. the "Playing Fields" as defined in the PCC Section 106 Agreement). To avoid impacts on the Playing Fields in so far as is possible, the Applicant is seeking agreement that it will undertake Pre-Construction Realignment of pitches, Pitch Reinstatement Works, and Post-

Construction Realignment of pitches. These matters are covered at paragraph 2 of Schedule 1 to the PCC Section 106 Agreement.

- 4.6.2 Such realignment and reinstatement works are to be undertaken in accordance with an approved Recreational Management Plan, which is to accord with the Framework Management Plan for Recreational Impacts in so far as it is relevant to those.
- 4.6.3 The Applicant is separately seeking landowner consent from PCC by way of a licence to undertake the realignment on that land which lies outside the Order limits so as to further minimise the impacts to be experienced by the residents of Portsmouth, and taking into account this stated aim the Applicant is hopeful PCC will seek to work with the Applicant to allow for the realignment to be undertaken for in the event the Order is made.

4.7 Highways trees

- 4.7.1 Similar to the position with HCC, where it is determined that any Highways Tree is to be removed and not replaced, a CAVAT Compensation Amount shall be paid to PCC, which they must use towards the provision of replacement trees.
- 4.7.2 Paragraph 3 of Schedule 1 secures the required process for determining the CAVAT Compensation Amount, and also secures its payment by the Undertaker in connection with the removal of any Highways Tree.

4.8 Temporary Construction Access Highways Agreements

- 4.8.1 Similar to the position agreed between the Applicant and HCC that an agreement pursuant to section 278 of the Highways Act 1980 will be entered into in connection with the delivery of Temporary Construction Accesses, the same obligation is offered to PCC.
 - 4.8.2 The Temporary Construction Access Highways Agreements are, in accordance paragraph 4 of Schedule 1 to the PCC Agreement, required to be entered into prior to the works to construct any relevant Temporary Construction Access Commencing.
 - 4.8.3 Further, the use of the use of any Temporary Construction Access for the purposes of constructing the Proposed Development is not to be permitted unless and until the Temporary Construction Access has been certified as complete.
 - 4.8.4 This ensures the Temporary Construction Access Highways Agreements are entered into and those works undertaken in a manner acceptable to the highway authority prior to their use.
 - 4.8.5 The draft form of the Temporary Construction Access Highways Agreement is to be appended to the PCC Section 106 Agreement to provide certainty of its terms now. The Applicant can confirm a draft was issued to PCC on 21 January 2021, on the same terms as discussed with HCC.
- 4.9 As noted above the Applicant also received draft section 106 heads of terms from PCC on 19 January 2021 (the “**s106 heads of terms**”), a copy of which is located at **Appendix 3** to this note.
- 4.10 The Applicant acknowledges that the planning obligation agreements do not address all of the matters raised in the s106 heads of terms. In respect of those additional matters, the Applicant notes:
- 4.10.1 **Employment and Skills** – the Applicant has submitted an Employment and Skills Strategy at Deadline 7 and the production and approval of an Employment and Skills Plan will be secured by way of a DCO Requirement, with a new Requirement 27 included within the dDCO submitted at Deadline 7 in this

respect. Given the Proposed Development spans over multiple local authority areas, and a holistic approach is needed to employment and skills in relation to the Proposed Development as a whole, securing a single Employment and Skills Plan by way of a DCO Requirement is the most appropriate response to this issue.

- 4.10.2 **Decommissioning Bond** – the Applicant is not agreeable to a decommissioning bond being provided as this is not considered necessary to mitigate the effects of the Proposed Development and therefore this has not been included. In reaching this conclusion the Applicant has considered other projects of similar scale and complexity for which a DCO has been made and notes that, so far as it is aware, none are subject to the need to provide a decommissioning bond.
- 4.10.3 So far as the Applicant is aware, the types of projects which are usually subject to such requirements are nuclear power stations and landfills, reflecting the long term contamination liabilities associated with those. These are not a matter relevant to the Proposed Development, or indeed a matter which falls within the remit of the Planning Act 2008 regime.
- 4.10.4 **Community Fund** - the recreational impacts are addressed in the PCC Section 106 Agreement through the Recreational Management Plan to avoid impacts during the period of the works, and therefore provision of community fund is not necessary and has not been included.
- 4.10.5 **Bus Mitigation** – the Applicant notes that PCC are seeking contributions to mitigate impacts on buses. The Applicant is somewhat surprised to see this given the acknowledgement on PCC’s behalf at ISH2 that it was not considered there was a need for such mitigation, with paragraph 17 of PCC’s post-hearing notes in relation to ISH2 (REP6-081) stating in relation to impacts on passenger transport:
- (A) *“Within Portsmouth, the route is largely not located in areas where buses would have priority. As a consequence the effect of the works on bus services is largely the same as that on general traffic is largely the same. The effect will be on the bus headway and the journey time. And the time between buses rather than the capacity or the ability to get there any quicker.*
- Therefore PCC are not of the view that we would need to put additional buses into that network to reduce that headway”*
- 4.10.6 The Applicant has in any event clearly set out its position that based on the assessments undertaken there is no evidenced need for any additional mitigations in relation to buses, and no evidence has been provided to date which would suggest otherwise.
- 4.11 The s106 heads of terms also sought a section 106 obligation to secure the funding of the council’s services in connection with the discharge of requirements under the DCO. A section 106 agreement is not considered to be an appropriate mechanism for this and indeed would be unusual. Instead, the discharge of requirements is proposed to be dealt with through a post-consent planning performance agreement (“**PPA**”) with each of the relevant authorities.¹ Draft post-consent PPAs were sent to each of the authorities for comment on 20 January 2021. Transfer provisions have been included within the PPAs to address PCC’s concerns in relation to transfer and assignment.

¹ Hampshire County Council, Portsmouth City Council, Winchester City Council, East Hampshire District Council, Havant Borough Council and South Downs National Park Authority.

5. **SECTION 106 AGREEMENT WITH THE SOUTH DOWNS NATIONAL PARK AUTHORITY**

- 5.1 On 20 January 2021 the Applicant was issued with further information on behalf of the South Downs National Park Authority ('**SDNPA**') seeking planning contributions in relation to landscape impact on the National Park.
- 5.2 The contributions sought by the SDNPA are summarised as follows:
- 5.2.1 £300k toward woodland improvements in the SDNP within 10km of the Converter Station site;
 - 5.2.2 £25k for the project 'Revealing Grandfather's Bottom' – a chalk grassland restoration project at Butser Hill National Nature Reserve;
 - 5.2.3 £25k for the Whitelands Project, which is a social enterprise at Butser Hill, aiming to restore the native woodland ecosystem and the local community's connection with it;
 - 5.2.4 £20k toward improvements to the PROW network within 2km of the converter station site;
 - 5.2.5 £5k for the SDNPA's costs in monitoring the section 106 agreement; and
 - 5.2.6 SDNPA suggest that any contributions provided for in the section 106 agreement and not spent within 10 years of receipt be returned to the Applicant.
- 5.3 The Applicant acknowledges that there is harm to the landscape remaining following the implementation of the necessary landscape mitigation measures proposed in connection with the Converter Station, but considers that this has been mitigated as far as practicable through careful design, siting and landscaping.
- 5.4 In this regard the Applicant notes the statements at paragraph 5.9.8 of NPS EN-1 that:
- 5.4.1 *"Virtually all nationally significant energy infrastructure projects will have effects on the landscape. Projects need to be designed carefully, taking account of the potential impact on the landscape. Having regard to siting, operational and other relevant constraints the aim should be to minimise harm to the landscape, providing reasonable mitigation where possible and appropriate".*
- 5.5 The Applicant has had regard to all of the factors stated in paragraph 5.9.8 of NPS EN-1 and has carefully designed the Converter Station Area, specifically taking into account the impacts on the landscape, including the potential harmful effects on the South Downs National Park, and in so doing has minimised the residual harm to the landscape.
- 5.6 The statements at paragraphs 5.9.14 to 5.9.17 of NPS EN-1 are also noted, and the Applicant confirms its position that the compelling public benefits of the Proposed Development, explained in the Needs and Benefits Report (APP-115), the Needs and Benefits Report Addendum (REP1-136) and the second Addendum to the Needs and Benefits Report submitted at Deadline 7, which are largely unchallenged, offset the residual harm of the Proposed Development on the landscape of the South Downs National Park. The SDNPA's suggested obligations are not justified by reference to the residual impacts of the Proposed Development.
- 5.7 Whilst this is the Applicant's position, the Applicant will seek to discuss matters further with the SDNPA and provide an update to the ExA on these matters in due course.

Herbert Smith Freehills LLP

25 January 2021

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APPENDIX 1
Draft HCC Section 106 Agreement

DATED _____ **2021**

(1) AQUIND LIMITED

(2) HAMPSHIRE COUNTY COUNCIL

**DEED OF DEVELOPMENT CONSENT
OBLIGATIONS**

pursuant to section 106 of
the Town and Country Planning Act 1990
relating to the AQUIND Interconnector

Herbert Smith Freehills LLP

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THIS DEED made on

2021

BETWEEN:

- (1) **AQUIND LIMITED** (company registration number 06681477) whose registered office is at OGN House, Hadrian Way, Wallsend NE28 6HL (the "**Undertaker**"); and
- (2) **HAMPSHIRE COUNTY COUNCIL** of Hampshire County Council, the Castle, Winchester, SO23 8UJ (the "**County Council**")

WHEREAS:

- (A) On 14 November 2019 the Undertaker submitted the DCO Application to the Secretary of State for Business, Energy & Industrial Strategy in respect of the Proposed Development. The DCO Application was accepted for examination on Thursday 12 December 2019 and the examination commenced on 8 September 2020.
- (B) The terrestrial elements of the Proposed Development are to be located between Eastney, Portsmouth and the National Grid Substation at Lovedean, being part of the Project comprising a high voltage direct current electrical interconnector between France and the UK.
- (C) The County Council is a local highway authority and lead local flood authority for the area within which the DCO Land is situated. The County Council is also a local planning authority with the capacity to enter into planning obligations in accordance with section 106 of the 1990 Act.
- (D) It is intended that the Undertaker will be the undertaker for the purposes of the Development Consent Order. The Undertaker intends to construct, operate and maintain the Proposed Development as authorised by the Development Consent Order.
- (E) The Parties to this Deed have agreed to enter into this Deed in order to secure the performance of the development consent obligations contained in it pursuant to the provisions of section 106 of the 1990 Act and all other enabling powers.

IT IS AGREED as follows:

1. **DEFINITIONS AND INTERPRETATION**

- 1.1 In this Deed (which includes the Recitals to it) the following words and expressions have the following meanings unless the context otherwise requires:

"1990 Act"	means the Town and Country Planning Act 1990;
"2008 Act"	means the Planning Act 2008;
"Access and Rights of Way Plans"	means the plans certified as the access and rights of way plans by the Secretary of State under article 43 (Certification of plans, etc.) and identified in Schedule 6 to the DCO;
"Application"	means the application for the DCO submitted to the Secretary of State for the Proposed Development and accepted by the Planning Inspectorate on 12 December 2019 with reference EN020022;

“CAVAT Assessment”	means the assessment of the value of any Highways Tree to be removed in connection with the construction of the Proposed Development to be undertaken in accordance with the CAVAT Assessment Methodology and which shall calculate the CAVAT Compensation Amount for the Highways Tree to be removed;
“CAVAT Assessment Methodology”	means the Capital Asset Value of Amenity Trees methodology produced by the London Tree Officers Association dated January 2020 or any replacement thereof;
“CAVAT Compensation Amount”	means the compensation to be paid to the County Council in connection with the removal of any Highways Tree which is to be determined in accordance with the CAVAT Assessment and which is to be applied by the County Council towards the provision of replacement trees;
“Commencement”	means the carrying out of a material operation as defined in section 155 of the 2008 Act comprised in the Proposed Development on the DCO Land other than operations consisting of Onshore Site Preparation Works and the words "Commence" and "Commenced" and cognate expressions shall be construed accordingly;
“Commencement Date”	means the date of Commencement;
“Completion of Construction”	means the date of service of a notice on the County Council by the Undertaker stating that the construction of the Proposed Development is complete prior to the commissioning of the Proposed Development;
“Converter Station”	means the converter station and associated electrical equipment to be constructed as part of the Proposed Development and which comprises Work No.2;
“Converter Station Access Works”	means the permanent access junction and associated gated highway link to be constructed as part of the Proposed Development and which comprises Work No.2 (bb) in general accordance with drawing number [xxx] ¹ located at Appendix [2] ² together with the [x] passing places to be constructed on Day Lane in connection with the construction of the Proposed Development;
“Converter Station Access Works Completion Certificate”	means a certificate to be issued by the County Council pursuant to the Converter Station Access Works Highways Agreement to denote the completion of the Converter Station Access Works to the satisfaction of the County Council;
“Converter Station Access Works Highways Agreement”	means an agreement to be entered into between the Undertaker and the County Council pursuant to section 278 of the Highways Act 1980 in relation to the delivery of the Converter Station Access Works substantially in form located at Appendix [3];
“County Council”	means Hampshire County Council;

¹ HSF: Intended this will be the General Arrangement Plan located in the FCTMP.

² HSF: TBC

“DCO Land”	means the land shown hatched and edged [xxx] on the DCO Land Plan and described in Schedule [3] ³ ;
“DCO Land Plan”	means the plan located at Appendix [1] of this Deed;
“Development Consent Order”	means the development consent order to be made pursuant to the Application and any variation properly made to that development consent order and references to “DCO” shall be construed accordingly;
“Dispute”	means any dispute, issue, difference or claim as between the parties in respect of any matter contained in or arising from or relating to this Deed or the parties' obligations and rights pursuant to it (other than in respect of any matter of law);
“Expert”	means an independent person appointed in accordance with the provisions of clause [12] to determine a Dispute between the parties to this Deed;
“Highways Tree”	means a tree which is located on the public highway within the DCO Land and which is in the ownership of the County Council;
“Onshore Site Preparation Works”	means operations consisting of: <ul style="list-style-type: none">a) pre-construction archaeological investigations;b) environmental surveys and monitoring;c) site clearance;d) removal of hedgerows, trees and shrubs (excluding any Highways Tree);e) investigations for the purpose of assessing ground conditions;f) remedial work in respect of any contamination or adverse ground conditions;g) receipt and erection of construction plant and equipment;h) the temporary display of site notices and advertisements;i) erection of temporary buildings, structures or enclosures; andj) Work No.2 (bb) (access junction and associated gated highway link);
“Project”	means AQUIND Interconnector a new 2,000 MW subsea and underground High Voltage Direct Current (‘HVDC’) bi-directional electric power transmission link between the South Coast of England and Normandy in France with the capacity to transmit up to 16,000,000 MWh of electricity per annum;
“Proposed Development”	means those elements of the Project located in the UK and the UK Marine Area for which the DCO is granted;

³ HSF: This will be a plan denoting all land within the Order limits which is within the administrative boundary of Hampshire County Council.

“Qualifying Interest”	means such interest in the land sufficient to meet the requirements of Section 106(1) of the 1990 Act which shall include the Undertaker’s status as undertaker for the purposes of the DCO in accordance with the provisions of article 8(4) of the DCO whereby the undertaker is deemed to be a person interested in the DCO Land for the purposes of Section 106(1) of the 1990 Act;
“Successor”	means any person deriving title from the Undertaker in respect of its Qualifying Interest and for the purposes of Section 106(3)(b) of the 1990 Act shall include any person to whom powers are transferred further to Article 7 of the DCO;
“Temporary Construction Access”	means such new temporary means of access or improved existing means of access within the DCO Land (including in the locations identified on the Access and Rights of Way Plans) as the Undertaker reasonably requires for the purposes of the construction of the Proposed Development and which for the avoidance of doubt excludes the permanent access junction comprised in the Converter Station Access Works;
“Temporary Construction Access Completion Certificate”	means a certificate to be issued by the County Council pursuant to a Temporary Construction Access Highways Agreement to denote the completion of a Temporary Construction Access to the satisfaction of the County Council;
“Temporary Construction Access Highways Agreement”	means an agreement to be entered into between the Undertaker and the County Council pursuant to section 278 of the Highways Act 1980 in relation to the delivery of any Temporary Construction Access substantially in form located at Appendix [4];
“Travel Plan”	means any and all travel plans for the contractor’s workforce submitted to and approved by the County Council pursuant to Requirement 21 of the DCO;
“Travel Plan Monitoring Annual Fee”	means the sum of £3,000 per annum until the Completion of the Construction of the Proposed Development payable by the Undertaker to be applied towards the auditing and monitoring of the Travel Plan;
“Working Day”	means any day apart from Saturday, Sunday and any statutory bank holiday on which clearing banks are open in England for the transaction of ordinary business; and
“Undertaker”	means AQUIND Limited and any Successors;

1.2 In this Deed, unless stated otherwise:

1.2.1 reference to the masculine feminine and neuter genders shall include other genders;

- 1.2.2 reference to the singular include the plural and vice versa unless the contrary intention is expressed;
- 1.2.3 references to natural persons include firms, companies, corporations, and vice versa;
- 1.2.4 references to the County Council include the successors to the County Council's statutory functions as the lead flood authority, local highway authority and local planning authority;
- 1.2.5 references to the Undertaker shall include its Successors and its respective successors in respect of its Qualifying Interest (except where the contrary is expressly provided);
- 1.2.6 references to "Work Nos." or to a "Work No." are references to the works forming part of the Proposed Development listed in Schedule 1 to the DCO;
- 1.2.7 a reference to a clause, sub-clause, paragraph, sub-paragraph, Schedule, recital or appendix is (unless the context otherwise requires) a reference to the relevant clause, sub-clause, paragraph, sub-paragraph, Schedule, recital or appendix to this Deed;
- 1.2.8 words denoting an obligation on a party to do any act, matter or thing include an obligation to procure that it be done and words placing a party under a restriction include an obligation not to cause, permit or suffer any infringement of the restriction;
- 1.2.9 references in this Deed to any statute or statutory provision include references to:
 - (A) all Acts of Parliament and all other legislation having legal effect in the United Kingdom as enacted at the date of this Deed;
 - (B) any orders, regulations, instruments or other subordinate legislation made or issued under that statute or statutory provision; and
 - (C) in each case shall include any re-enactment thereof for the time being in force and any modifications or amendments thereof for the time being in force;
- 1.2.10 where in this Deed the County Council is required to give any approval, consent or agreement then such approval, consent or agreement by the County Council shall not be deemed to have been given unless given in writing;
- 1.2.11 if any provision of this Deed shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions of this Deed shall not in any way be deemed thereby to be affected, impaired or called into question;
- 1.2.12 the recitals, table of contents and headings in this Deed are for convenience only and shall not affect its construction, interpretation or otherwise have any binding legal effect;
- 1.2.13 in the event of any conflict between the terms, conditions and provisions of this Deed and of any document appended hereto or referred to herein, the terms, conditions and provisions of this Deed shall prevail;
- 1.2.14 reference to "the parties" shall mean the parties to this Deed and reference to a "party" shall mean any one of the parties;
- 1.2.15 references to "notice" shall mean notice in writing;
- 1.2.16 references to "including" shall mean "including without limitation or prejudice to the generality of any description, defining terms or phrase preceding that word" and the word "include" and its derivatives shall be construed accordingly;
- 1.2.17 the Interpretation Act 1978 shall apply to this Deed; and

1.2.18 where any payment in this Deed is expressed to be payable before an event or activity that event or activity shall not commence until the relevant payment has been made.

2. LEGAL EFFECT

2.1 This Deed contains planning obligations that are development consent obligations for the purposes of section 106 of the 1990 Act and is also entered into pursuant to section 1 of the Localism Act 2011, section 111 of the Local Government Act 1972 and all other powers so enabling.

2.2 The planning obligations contained within this Deed are enforceable by the County Council as local planning authority in accordance with section 106(3) of the 1990 Act against:

2.2.1 the Undertaker in respect of its Qualifying Interest in the DCO Land as bound under clause [3];

2.2.2 the Undertaker's Successors to its Qualifying Interest in the DCO Land as bound under clause [3].

3. LAND BOUND

3.1 Subject to clause [4] (Conditionality) and clause [7] (Release and Expiry) the planning obligations in this Deed bind the DCO Land.

3.2 The parties agree that the planning obligations contained in this Deed will not be enforceable against any other owner of any land interest in the DCO Land who is not a party to this Deed nor against any successors in title to or any person claiming through or under the other such owner's interest in the DCO Land (save for the Undertaker) unless that person itself undertakes any part of the Proposed Development.

3.3 The parties agree that the planning obligations contained in this Deed shall not be enforceable against any mortgagee or chargee of the whole or any part of the DCO Land from time to time or any person deriving title from such mortgagee or chargee unless and until any such party takes possession of the DCO Land (or any part thereof to which such obligation relates) in which case it will be bound by the obligations as a person deriving title from the Undertaker PROVIDED THAT neither any mortgagee or chargee or person deriving title through such mortgagee or chargee will be liable for any breach of the obligations contained in this Deed unless committed at a time when that person is in possession of the DCO Land (or any part thereof to which such obligation relates).

4. CONDITIONALITY

4.1 Subject to clauses 4.2 and 4.3, the parties agree that, save for the covenant in clause 17.1, none of the terms, conditions or provisions of this Deed shall have operative effect unless and until:

4.1.1 the Development Consent Order has been duly made; and

4.1.2 the Proposed Development has been Commenced.

4.2 Where the Development Consent Order becomes the subject of any judicial review proceedings:

4.2.1 until such time as such proceedings including any appeal have been finally determined, the terms and provisions of this Deed will remain without operative effect unless the Proposed Development has been Commenced;

4.2.2 if following the final determination of such proceedings the Development Consent Order is quashed and, in the event that the court orders the Application to be remitted to the Secretary of State, the Application is subsequently refused, this Deed will cease to have any further effect and any money paid to the County Councils pursuant to Schedule 1 and not spent or committed by the County Councils shall be repaid in full within 20 Working Days of the final determination of such proceedings; and

- 4.2.3 if following the final determination of such proceedings the Development Consent Order is capable of being Commenced, then this Deed will take effect in accordance with its terms.
- 4.3 Wherever in this Deed reference is made to the final determination of judicial review proceedings (or cognate expressions are used), the following provisions will apply:
 - 4.3.1 proceedings by way of judicial review are finally determined;
 - 4.3.2 when permission to bring a claim for judicial review has been refused and no further application may be made;
 - 4.3.3 when the court has given judgment in the matter and the time for making an appeal expires without an appeal having been made or permission to appeal is refused; or
 - 4.3.4 when any appeal is finally determined and no further appeal may be made.

5. OBLIGATIONS OF THE UNDERTAKER

- 5.1 The Undertaker covenants with the County Council to observe and perform or cause to be observed and performed the obligations on the part of the Undertaker contained in Schedule 1 at the times and in the manner provided therein.
- 5.2 The Undertaker covenants with the County Council to serve written notice to the County Council at least twenty Working Days in advance of the proposed Commencement Date.
- 5.3 Where the proposed Commencement Date provided in clause 5.2 does not take place, the Undertaker shall provide written notice to the County Council of the revised date as soon as is reasonably practicable and in any event at least 10 Working Days in advance of the revised date.
- 5.4 The Undertaker covenants with the County Council to serve written notice to the County Council notifying of the Completion of Construction as soon as reasonably practicable following the Completion of Construction of the Proposed Development.

6. OBLIGATIONS OF THE COUNTY COUNCIL

- 6.1 The County Council covenants with the Undertaker to observe and perform or cause to be observed and performed the obligations on the part of the County Council contained in Schedule 2 at the times and in the manner provided therein.

7. RELEASE AND EXPIRY

- 7.1 The Undertaker shall not be liable for a breach of any of its obligations under this Deed after it has parted with all of its interests in the DCO Land (including Qualifying Interests) or the part in respect of which the breach arises (as the case may be) save in either case for antecedent breaches.
- 7.2 If the Development Consent Order expires without having been Commenced or is revoked prior to the Commencement Date then this Deed shall forthwith determine and cease to have effect.
- 7.3 Nothing in this Deed shall prohibit or limit the right to develop any part of the DCO Land in accordance with a planning permission or development consent order or other statutory authority (other than the DCO) granted (whether or not on appeal) after the date of this Deed.
- 7.4 No Successor to the Undertaker shall be liable for any breach of any obligation which occurs in relation to any area of the DCO Land which that Successor does not own or control or which is carried out by any person other than that Successor.
- 7.5 Upon the performance discharge or other fulfilment of the covenants and obligations (of any of them) of the Undertaker, any Successor, or the County Council under the terms of this Undertaking such covenant, obligation or obligations shall absolutely cease and determine save in respect of any antecedent breach.

8. LOCAL LAND CHARGES

8.1 This Deed is a local land charge and may be registered as such by the County Council.

9. WAIVER

9.1 No waiver (whether express or implied) by the County Council of any breach or default by the Undertaker in performing or observing any of the obligations, covenants or conditions on the Undertaker's part contained in this Deed shall constitute a continuing waiver and no such waiver shall prevent the County Council from enforcing any of the said obligations, covenants and conditions or from acting upon any subsequent breach or default in respect thereof by the Undertaker.

10. REMEDIES

10.1 Where the County Council becomes aware of a breach or non-compliance with a provision of this Deed by the Undertaker, the County Council may serve notice of such breach upon the Undertaker and the notice of breach shall state the nature of the breach, the steps reasonably required to remedy the breach and a reasonable timescale for remedying the breach.

10.2 The Undertaker shall within 10 Working Days of receiving a notice served pursuant to clause [10.1] give written notification to the County Council of its response to the notice including any claim that it will remedy the breach within the stated timescale, that the timescale is too short or that that it rejects the notice for the reason that no breach has occurred.

10.3 The County Council and the Undertaker shall hold discussions about the notice of the breach where either party so requests.

10.4 In the event of a dispute arising regarding any notice of breach served pursuant to clause [10.1], the matter shall be determined under clause [12]

11. CERTIFICATES OF COMPLIANCE

11.1 The County Council will without delay upon request by the Undertaker certify compliance or partial compliance (as and if appropriate) with the provisions of this Deed⁴.

12. RESOLUTION OF DISPUTES

12.1 In the event of any Dispute arising between the parties then the parties will attempt to resolve that Dispute amicably including holding a meeting attended by at least 3 representatives from each party.

12.2 If the parties are unable to resolve the Dispute amicably pursuant to clause [12.1], one party may by serving notice on all the other parties (the "Notice") refer the Dispute to an Expert for determination.

12.3 The Notice must specify:

12.3.1 the nature, basis and brief description of the Dispute;

12.3.2 the clause or paragraph of this Deed pursuant to which the Dispute has arisen;
and

12.3.3 the proposed Expert.

12.4 In the event that the parties are unable to agree whom should be appointed as the Expert within 10 Working Days after the date of the Notice then either party may request the President of the Law Society to nominate the Expert at their joint expense, and the parties shall request that such nomination shall be made within 10 Working Days of the request, and any failure for such nomination to be made within 10 Working Days shall entitle any party to withdraw from the process of appointing an Expert and to refer the Dispute to the courts of England and Wales instead.

⁴ HCC: TBC

- 12.5 If the appointed Expert is or becomes unable or unwilling to act, any party may within 5 Working Days of the Expert being or becoming unable or unwilling to act, serve a notice on all the other parties proposing a replacement Expert and the parties will follow the process at Clause [12.4] to settle the appointment of the replacement Expert.
- 12.6 The Expert shall act as an expert and not as an arbitrator and his decision will (in the absence of manifest error) be final and binding on the parties hereto and at whose cost shall be at his discretion or in the event that he makes no determination, such costs will be borne by the parties to the Dispute in equal shares.
- 12.7 The Expert is to have regard to all representations and evidence before him when making his decision, which is to be in writing, and is to give reasons for his decision.
- 12.8 The Expert will be appointed subject to an express requirement that he reaches his decision and communicates it to the parties within the minimum practicable timescale allowing for the nature and complexity of the dispute and in any event not more than 30 Working Days from the date of his appointment to act.
- 12.9 The Expert will be required to give notice to each of the said parties inviting each of them to submit to him within 10 Working Days written submissions and supporting material and will afford to each of the said parties an opportunity to make counter submissions within a further 10 Working Days in respect of any such submission and material.
- 12.10 Nothing in this Deed shall fetter any party's right to bring an action in Court.

13. NOTICES

- 13.1 Any notice, consent or approval or other communication required to be given under or in connection with this Deed to or upon the parties must be in writing and shall be addressed as provided for in clause [13.3].
- 13.2 Any such notice must be delivered by hand (including by courier or process server) or by pre-paid recorded delivery post and shall conclusively be deemed to have been received:
- 13.2.1 if delivered by hand, upon delivery at the relevant address; and
- 13.2.2 if sent by first class post, at 9:00 a.m. on the second Working Day after the date of posting,
- except that where any such notice or other communication is or would be deemed to be received after 5:30 p.m., such notice shall be deemed to be received at 9:00 a.m. on the next Working Day.

- 13.3 Subject to clause 13.4, the address, relevant addressee and reference for each party are:

- 13.3.1 in the case of the County Council:

Address: Hampshire County Council, [relevant department tbc], The Castle, Winchester, SO23 8UJ with a copy also sent by e-mail to [xxx].

Relevant addressee: [xxx]

Reference: [xxx]

- 13.3.2 For the Undertaker:

Address: AQUIND Limited, 78 Pall Mall, London, SW1Y 5ES with a copy also sent by e-mail to [xxx].

Relevant addressee: [xxx]

Reference: AQUIND Interconnector S106

- 13.4 Any party may give notice of a change to its name, address, or relevant addressee for the purposes of this clause 13 provided that such notification shall only be effective on:

- 13.4.1 the date specified in the notification as the date on which the change is to take place; or
- 13.4.2 if no date is specified or the date specified is less than five clear Working Days after the date on which the notice is received or deemed to be received, the fifth Working Day after the notice of any such change is given.

14. NO FETTER ON DISCRETION

- 14.1 Nothing in this Deed shall be taken to operate so as to fetter or prejudice the statutory rights, powers, discretions or duties of the County Council or the Undertaker.

15. GOOD FAITH, GOOD PRACTICE AND REASONABLENESS

- 15.1 The parties agree with one another to act reasonably and in good faith in the fulfilment of their respective obligations in this Deed.
- 15.2 Unless expressly stated otherwise where under this Deed any approval, agreement, consent, certificate, confirmation or an expression of satisfaction or response is required to be given by or reached or taken by any party or any response is requested by any such approval, agreement, consent, certificate, confirmation or an expression of satisfaction or response, it will not be unreasonable or unreasonably withheld or delayed and the parties will act reasonably at all times.

16. COMMUNITY INFRASTRUCTURE LEVY

- 16.1 The Parties agree that the planning obligations contained in the Schedules to this Deed are necessary to make the Proposed Development acceptable in planning terms, are directly related to the Proposed Development and are fairly and reasonably related in scale and kind to the Proposed Development and thus satisfy the three tests set out in regulation 122(2)(a) – (c) of the Community Infrastructure Regulations 2010.

17. LEGAL FEES AND COSTS

- 17.1 The Undertaker shall pay on the date of this Deed to the County Council its reasonable legal costs up to the amount of £[xxx]⁵ and development control costs to the amount of £[xxx]⁶ properly incurred in the negotiation and completion of this Deed.

18. INTEREST ON LATE PAYMENTS

- 18.1 Without prejudice to any other right remedy or power herein contained or otherwise available to the County Council if any payment of any sum referred to herein shall have become due but shall remain unpaid for a period exceeding 5 Working Days the Undertaker shall pay on demand to the County Council interest thereon at the interest rate of four percent per annum above the base lending rate of National Westminster Bank plc from the date when the same became due until payment thereof.

19. VAT

- 19.1 All consideration given in accordance with the terms of this Deed shall be exclusive of any VAT properly payable in respect thereof.
- 19.2 The Undertaker acknowledges and agrees that if at any time VAT is required to be paid in respect of any of the payments made under this Deed then to the extent that VAT had not been previously charged in respect of that payment the County Council shall have the right to issue a VAT invoice to the Undertaker in respect of any vatiable supplies properly incurred under this Deed and the VAT shall be paid by the Undertaker accordingly following the receipt of a valid VAT invoice.

⁵ HCC: TBC

⁶ HCC: TBC

20. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

20.1 Without prejudice to clauses [1.2.4] and [1.2.5], a person who is not a party to this Deed does not have any right to enforce any term of this Deed under the Contract (Rights of Third Parties) Act 1999.

21. JURISDICTION

21.1 This Deed including its construction, validity, performance and enforcement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with English law.

21.2 Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Deed or its subject matter or formation (including non-contractual disputes or claims).

22. COUNTERPARTS

22.1 This Deed may be executed in any number of counterparts, each of which is an original and all of which may together evidence the same agreement.⁷

23. DATE OF DELIVERY

23.1 This Deed is delivered on the date of this Deed.

⁷ HCC: TBC

**SCHEDULE 1
UNDERTAKER OBLIGATIONS**

1. CONVERTER STATION ACCESS WORKS

- 1.1 The Undertaker shall not Commence the Proposed Development unless and until it has:
- 1.1.1 provided evidence of ownership of the land that is to be dedicated as highway in accordance with the Converter Station Access Works Highways Agreement or of the agreement of all persons with ownership of that land to the dedication of that land in the future to the satisfaction of the County Council prior to entering into the Converter Station Access Works Highways Agreement with the County Council referred to in paragraph 1.1.2 below; and
 - 1.1.2 entered into the Converter Station Access Works Highways Agreement with the County Council.
- 1.2 The Undertaker shall not Commence the Proposed Development unless and until the Converter Station Access Works have been completed and the County Council has issued the Converter Station Access Works Completion Certificate in respect of the whole of the Converter Station Access Works.

2. TEMPORARY CONSTRUCTION ACCESSES

- 2.1 The Undertaker shall not Commence the construction of any Temporary Construction Access unless and until it has entered into a Temporary Construction Access Highways Agreement with the County Council in relation to that Temporary Construction Access.
- 2.2 The Undertaker shall not permit the use of any Temporary Construction Access for the purposes of constructing the Proposed Development unless and until that Temporary Construction Access has been completed and the County Council has issued the Temporary Construction Access Completion Certificate in relation to it.

3. HIGHWAYS TREES

- 3.1 The Undertaker shall not remove any Highways Tree in connection with the construction of the Proposed Development unless and until:
- 3.1.1 the Undertaker has submitted to the County Council a CAVAT Assessment for that Highways Tree for agreement; and
 - 3.1.2 the CAVAT Assessment for that Highways Tree has been agreed by the County Council and the Undertaker.
- 3.2 The Undertaker must within not more than 20 Working Days of the date of removal of any Highways Tree pay to the County Council the CAVAT Compensation Amount in accordance with the CAVAT Assessment agreed between the Undertaker and the County Council for that Highways Tree pursuant to paragraph [3.1.2] of this Schedule.

4. TRAVEL PLAN MONITORING FEES

- 4.1 The Undertaker must pay to the County Council the Travel Plan Monitoring Annual Fee prior to the Commencement of the Proposed Development and shall not Commence the Proposed Development unless and until such time as the Travel Plan Monitoring Fee has been paid to the County Council.
- 4.2 The Undertaker must pay to the County Council the Travel Plan Monitoring Annual Fee within not more than 20 Working Days following each anniversary of the Commencement Date until the Completion of Construction of the Proposed Development.

**SCHEDULE 2
COUNTY COUNCIL'S OBLIGATIONS**

1. USE OF CONTRIBUTIONS

- 1.1 The County Council shall use the Travel Plan Monitoring Annual Fee and any CAVAT Compensation Amount paid to the County Council for the purposes for which they are paid only.

2. HIGHWAYS AGREEMENTS

- 2.1 The County Council covenants with the Undertaker to use reasonable endeavours to enter into:
- 2.1.1 the Converter Station Access Works Highways Agreement; and
 - 2.1.2 any and all Temporary Construction Access Highways Agreements.

3. HIGHWAYS TREES

- 3.1 Where the County Council is requested to provide agreement of a CAVAT Assessment pursuant to paragraph [3.1.1] of Schedule 1 the County Council shall use reasonable endeavours within 10 Working Days of that request from the Undertaker to:
- 3.1.1 confirm the agreement of the CAVAT Assessment in writing to the Undertaker; or
 - 3.1.2 give notice in writing to the Undertaker of the reasons why CAVAT Assessment cannot be agreed to by the County Council including any further information that it may require from the Undertaker
- and where the County Council is unable to satisfy the requirements of paragraph [3.1.1] or paragraph [3.1.2] within 10 Working Days it shall provide the Undertaker with a reasonable explanation of the reasons for not being able to do so.
- 3.2 The procedure set out in paragraph [3.1] above shall be repeated following the provision of any updated CAVAT Assessment or the provision of any further information in relation to any CAVAT Assessment to address the reasons specified in the notice given by the County Council pursuant to paragraph [3.1.2] SAVE THAT nothing in this paragraph 3 shall restrict the ability of either party to refer any Dispute in respect of the CAVAT Assessment (including the CAVAT Compensation Amount) to an Expert for determination in accordance with clause [12].

SCHEDULE 3
DESCRIPTION OF THE DCO LAND

[xxx]

DRAFT

IN WITNESS whereof this Deed has been duly executed by the parties to this Deed on the date which appears at the head of this document.

EXECUTED as a **DEED** by)
affixing the common seal of)
HAMPSHIRE COUNTY)
COUNCIL in the presence of: -)

Authorised signatory

Name

Position

SIGNED as a **DEED** by)
AQUIND LIMITED)
acting by two directors or one director)
and the company secretary:)

Director

Director/Secretary

**APPENDIX 1
DCO LAND PLAN**

DRAFT

**APPENDIX 2
CONVERTER STATION ACCESS WORKS DRAWING**

DRAFT

**APPENDIX 3
CONVERTER STATION ACCESS WORKS HIGHWAYS AGREEMENT**

DRAFT

**APPENDIX 4
TEMPORARY CONSTRUCTION ACCESS WORKS HIGHWAYS AGREEMENT**

DRAFT

APPENDIX 2
Draft PCC Section 106 Agreement

HSF Draft: 21 January 2021

DATED _____ 2021

(1) AQUIND LIMITED

(2) PORTSMOUTH CITY COUNCIL

**DEED OF DEVELOPMENT CONSENT
OBLIGATIONS**

pursuant to section 106 of
the Town and Country Planning Act 1990
relating to the AQUIND Interconnector

Herbert Smith Freehills LLP

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THIS DEED is made on

2021

BETWEEN:

- (1) **AQUIND LIMITED** (company registration number 06681477) whose registered office is at OGN House, Hadrian Way, Wallsend NE28 6HL (the "**Undertaker**"); and
- (2) **PORTSMOUTH CITY COUNCIL** of Civic Offices, Guildhall Walk, PO1 2AL (the "**Council**")

WHEREAS:

- (A) On 14 November 2019 the Undertaker submitted the DCO Application to the Secretary of State for Business, Energy & Industrial Strategy in respect of the Proposed Development. The DCO Application was accepted for examination on Thursday 12 December 2019 and the examination commenced on 8 September 2020.
- (B) The terrestrial elements of the Proposed Development are to be located between Eastney, Portsmouth and the National Grid Substation at Lovedean, being part of the Project comprising a high voltage direct current electrical interconnector between France and the UK.
- (C) The Council is a local planning authority and local highway authority for the area within which the DCO Land is situated and it has the capacity to enter into planning obligations in accordance with section 106 of the 1990 Act.
- (D) It is intended that the Undertaker will be the undertaker for the purposes of the Development Consent Order. The Undertaker intends to construct, operate and maintain the Proposed Development as authorised by the Development Consent Order.
- (E) The Parties to this Deed have agreed to enter into this Deed in order to secure the performance of the development consent obligations contained in it pursuant to the provisions of section 106 of the 1990 Act and all other enabling powers.

IT IS AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

- 1.1 In this Deed (which includes the Recitals to it) the following words and expressions have the following meanings unless the context otherwise requires:

"1990 Act"	means the Town and Country Planning Act 1990;
"2008 Act"	means the Planning Act 2008;
"Access and Rights of Way Plans"	means the plans certified as the access and rights of way plans by the Secretary of State under article 43 (Certification of plans, etc.) and identified in Schedule 6 to the DCO;
"Application"	means the application for the DCO submitted to the Secretary of State for the Proposed Development and accepted by the Planning Inspectorate on 12 December 2019 with reference EN020022;
"Arboriculture Method Statement"	means an arboriculture method statement produced and approved pursuant to requirement [15(3)(c)(iv)] of the Development Consent Order;

“Car Park Plan”	means the plan located at Appendix [1] of this Deed;
“Car Park Resurfacing Outline Specification”	means the outline specification for the Car Park Resurfacing Works located at Appendix [2];
“Car Park Resurfacing Specification”	means a detailed design specification for the Car Park Resurfacing Works in accordance with the Car Parking Resurfacing Outline Specification to be submitted to the Council for approval and which shall include: <ul style="list-style-type: none">a) relevant technical information and drawings, including a plan identifying the extent of the area to be resurfaced;b) details of drainage;c) details of materials to be used; andd) estimated programming and costs.
“Car Park Resurfacing Works”	means the works to resurface the area shown [edged red] on the Car Park Plan to be carried out in accordance with the approved Car Park Resurfacing Specification;
“CAVAT Assessment”	means the assessment of the value of any Highways Tree to be removed in connection with the construction of the Proposed Development to be undertaken in accordance with the CAVAT Assessment Methodology and which shall calculate the CAVAT Compensation Amount for the Highways Tree to be removed;
“CAVAT Assessment Methodology”	means the Capital Asset Value of Amenity Trees methodology produced by the London Tree Officers Associated dated January 2020 or any replacement thereof;
“CAVAT Compensation Amount”	means the compensation to be paid to the Council in connection with the removal of any Highways Tree which is to be determined in accordance with the CAVAT Assessment and which is to be applied by the Council towards the provision of replacement trees;
“Commencement”	means the carrying out of a material operation as defined in section 155 of the 2008 Act comprised in the Proposed Development on the DCO Land other than operations consisting of Onshore Site Preparation Works and the terms "Commence" and "Commenced" and cognate expressions shall be construed accordingly;
“Commencement Date”	means the date of Commencement;
“Council”	means Portsmouth City Council;
“DCO Land”	means the land shown hatched and edged [xxx] on the DCO Land Plan and described in Schedule [x] ¹ ;
“DCO Land Plan”	means the plan located at Appendix [3] of this Deed;

¹ HSF: This will be a plan denoting all land within the Order limits which is within the administrative boundary of Portsmouth City Council.

“Development Consent Order”	means the development consent order to be made pursuant to the Application and any variation properly made to that development consent order and references to “DCO” shall be construed accordingly;
“Dispute”	means any dispute, issue, difference or claim as between the parties in respect of any matter contained in or arising from or relating to this Deed or the parties' obligations and rights pursuant to it (other than in respect of any matter of law);
“Expert”	means an independent person appointed in accordance with the provisions of clause [8] to determine a Dispute between the parties to this Deed;
“Framework Management Plan for Recreational Impacts”	[means the Framework Management Plan for Recreational Impacts submitted to the Planning Inspectorate as part of the Application and located at Appendix [4] of this Deed];
“Highways Tree”	means a tree which is located on the public highway within the DCO Land and which is in the ownership of the Council;
“Onshore Site Preparation Works”	means operations consisting of: <ul style="list-style-type: none">a) pre-construction archaeological investigations;b) environmental surveys and monitoring;c) site clearance;d) removal of hedgerows, trees and shrubs (excluding any Highways Tree);e) investigations for the purpose of assessing ground conditions;f) remedial work in respect of any contamination or adverse ground conditions;g) receipt and erection of construction plant and equipment;h) the temporary display of site notices and advertisements; andi) erection of temporary buildings, structures or enclosures,
“Operation”	means the operation of the Proposed Development for the purpose for which it is designed after construction and commissioning is complete and the term “Operational” and cognate expressions shall be construed accordingly;
“Pitch Reinstatement Works”	means the reinstatement works to be carried out following the construction of the Proposed Development at each of the Playing Fields in accordance with the relevant Recreational Management Plan;
“Plan 1”	means the plan located at Appendix [5] of this Deed;
“Plan 2”	means the plan located at Appendix [6] of this Deed;
“Plan 3”	means the plan located at Appendix [7] of this Deed;

“Playing Field”	means each of the following areas: <ul style="list-style-type: none">a) Bransbury Park (as shown hatched [x] on Plan [1]);b) Farlington Playing Fields (as shown hatched [x] on Plan [2]); andc) Zetland Field (as shown hatched [x] on Plan [3]); together the “Playing Fields”;
“Post-Construction Pitch Realignment Works”	means, in respect of each Playing Field, the works to realign the sports pitches and/or move recreational equipment in accordance with the relevant approved Recreational Management Plan following completion of the Pitch Reinstatement Works at each Playing Field;
“Pre-Construction Pitch Realignment Works”	means, in respect of each Playing Field, the works to realign the sports pitches and/or move recreational equipment in accordance with the relevant approved Recreational Management Plan prior to the Commencement of construction works at each Playing Field;
“Project”	means AQUIND Interconnector a new 2,000 MW subsea and underground High Voltage Direct Current (‘HVDC’) bi-directional electric power transmission link between the South Coast of England and Normandy in France with the capacity to transmit up to 16,000,000 MWh of electricity per annum;
“Proposed Development”	means those elements of the Project located in the UK and the UK Marine Area for which the DCO is granted;
“Qualifying Interest”	means such interest in the land sufficient to meet the requirements of Section 106(1) of the 1990 Act which shall include the Undertaker’s status as undertaker for the purposes of the DCO in accordance with the provisions of article 8(4) of the DCO whereby the undertaker is deemed to be a person interested in the DCO Land for the purposes of Section 106(1) of the 1990 Act;
“Recreational Management Plan”	means a plan prepared for each Playing Field in accordance with the Framework Management Plan for Recreational Impacts setting out details relating to the delivery of pitch reinstatement and realignment works and which shall include: <ul style="list-style-type: none">(a) estimated programming and costs for the Pre-Construction Pitch Realignment Works and the Post-Construction Pitch Realignment Works;(b) estimated programming for the Pitch Reinstatement Works;(c) technical specifications for the Pitch Reinstatement Works;(d) [scaled drawings]²; and(e) details of any drainage potentially affected by the construction of the Proposed Development.

² TBC what scaled drawings will be required.

“Successor”	means any person deriving title from the Undertaker in respect of its Qualifying Interest and for the purposes of Section 106(3)(b) of the 1990 Act shall include any person to whom powers are transferred further to Article 7 of the DCO;
“Temporary Construction Access”	means such new temporary means of access or improved existing means of access within the DCO Land (including in the locations identified on the Access and Rights of Way Plans) as the Undertaker reasonably requires for the purposes of the construction of the Proposed Development;
“Temporary Construction Access Completion Certificate”	means a certificate to be issued by the Council pursuant to a Temporary Construction Access Highways Agreement to denote the completion of a Temporary Construction Access to the satisfaction of the Council;
“Temporary Construction Access Highways Agreement”	means an agreement to be entered into between the Undertaker and the Council pursuant to section 278 of the Highways Act 1980 in relation to the delivery of any Temporary Construction Access substantially in form located at Appendix [8];
“Working Day”	means any day apart from Saturday, Sunday and any statutory bank holiday on which clearing banks are open in England for the transaction of ordinary business; and
“Undertaker”	means AQUIND Limited and any Successors.

- 1.2 In this Deed, unless stated otherwise:
- 1.2.1 reference to the masculine feminine and neuter genders shall include other genders;
 - 1.2.2 reference to the singular include the plural and vice versa unless the contrary intention is expressed;
 - 1.2.3 references to natural persons include firms, companies, corporations, and vice versa;
 - 1.2.4 references to the Council include the successors to the Council's statutory functions as the local planning authority local highway authority;
 - 1.2.5 references to the Undertaker shall include its Successors and its respective successors in respect of its Qualifying Interest (except where the contrary is expressly provided);
 - 1.2.6 references to “Work Nos.” or to a “Work No.” are references to the works forming part of the Proposed Development listed in Schedule 1 to the DCO;
 - 1.2.7 headings in this Deed are for reference purposes only and shall not be taken into account in its construction or interpretation;
 - 1.2.8 a reference to a clause, sub-clause, paragraph, sub-paragraph, Schedule, recital or appendix is (unless the context otherwise requires) a reference to the relevant clause, sub-clause, paragraph, sub-paragraph, Schedule, recital or appendix to this Deed;
 - 1.2.9 words denoting an obligation on a party to do any act, matter or thing include an obligation to procure that it be done and words placing a party under a restriction include an obligation not to cause, permit or suffer any infringement of the restriction;

- 1.2.10 references in this Deed to any statute or statutory provision include references to:
- (A) all Acts of Parliament and all other legislation having legal effect in the United Kingdom as enacted at the date of this Deed;
 - (B) any orders, regulations, instruments or other subordinate legislation made or issued under that statute or statutory provision; and
 - (C) in each case shall include any re-enactment thereof for the time being in force and any modifications or amendments thereof for the time being in force;
- 1.2.11 where in this Deed the Council is required to give any approval, consent or agreement then such approval, consent or agreement by the Council shall not be deemed to have been given unless given in writing;
- 1.2.12 if any provision of this Deed shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions of this Deed shall not in any way be deemed thereby to be affected, impaired or called into question;
- 1.2.13 the recitals, table of contents and headings in this Deed are for convenience only and shall not affect its construction, interpretation or otherwise have any binding legal effect;
- 1.2.14 in the event of any conflict between the terms, conditions and provisions of this Deed and of any document appended hereto or referred to herein, the terms, conditions and provisions of this Deed shall prevail;
- 1.2.15 reference to “the parties” shall mean the parties to this Deed and reference to a “party” shall mean any one of the parties;
- 1.2.16 references to “notice” shall mean notice in writing;
- 1.2.17 references to “including” shall mean “including without limitation or prejudice to the generality of any description, defining terms or phrase preceding that word” and the word “include” and its derivatives shall be construed accordingly;
- 1.2.18 the Interpretation Act 1978 shall apply to this Deed; and
- 1.2.19 where any payment in this Deed is expressed to be payable before an event or activity that event or activity shall not commence until the relevant payment has been made.

2. LEGAL EFFECT

- 2.1 This Deed contains planning obligations that are development consent obligations for the purposes of section 106 of the 1990 Act and is also entered into pursuant to section 1 of the Localism Act 2011, section 111 of the Local Government Act 1972 and all other powers so enabling.
- 2.2 The planning obligations contained within this Deed are enforceable by the Council as local planning authority in accordance with section 106(3) of the 1990 Act against:
- 2.2.1 the Undertaker in respect of its Qualifying Interest in the DCO Land as bound under clause [3]; and
 - 2.2.2 the Undertaker’s Successors to its Qualifying Interest in the DCO Land as bound under clause [3].

3. LAND BOUND

- 3.1 Subject to clause [4] (Conditionality), clause [7] (Release and Expiry) and clause [x] ([xxx]) the planning obligations in this Deed bind the DCO Land.
- 3.2 The parties agree that the planning obligations contained in this Deed will not be enforceable against any other owner of any land interest in the DCO Land who is not a party to this Deed nor against any successors in title to or any person claiming through or

under the other such owner's interest in the DCO Land (save for the Undertaker) unless that person itself undertakes any part of the Proposed Development.

- 3.3 The parties agree that the planning obligations contained in this Deed shall not be enforceable against any mortgagee or chargee of the whole or any part of the DCO Land from time to time or any person deriving title from such mortgagee or chargee unless and until any such party takes possession of the DCO Land (or any part thereof to which such obligation relates) in which case it will be bound by the obligations as a person deriving title from the Undertaker PROVIDED THAT neither any mortgagee or chargee or person deriving title through such mortgagee or chargee will be liable for any breach of the obligations contained in this Deed unless committed at a time when that person is in possession of the DCO Land (or any part thereof to which such obligation relates).

4. CONDITIONALITY

- 4.1 Subject to clauses 4.2 and 4.3, the parties agree that, save for the covenant in clause 17.1, none of the terms, conditions or provisions of this Deed shall have operative effect unless and until:

- 4.1.1 the Development Consent Order has been duly made; and
- 4.1.2 the Proposed Development has been Commenced.

- 4.2 Where the Development Consent Order becomes the subject of any judicial review proceedings:

- 4.2.1 until such time as such proceedings including any appeal have been finally determined, the terms and provisions of this Deed will remain without operative effect unless the Proposed Development has been Commenced;
- 4.2.2 if following the final determination of such proceedings the Development Consent Order is quashed and, in the event that the court orders the Application to be remitted to the Secretary of State, the Application is subsequently refused, this Deed will cease to have any further effect and any money paid to the Council pursuant to Schedule 1 and not spent or committed by the Council shall be repaid in full within 20 Working Days of the final determination of such proceedings; and
- 4.2.3 if following the final determination of such proceedings the Development Consent Order is capable of being Commenced, then this Deed will take effect in accordance with its terms.

- 4.3 Wherever in this Deed reference is made to the final determination of judicial review proceedings (or cognate expressions are used), the following provisions will apply:

- 4.3.1 proceedings by way of judicial review are finally determined;
- 4.3.2 when permission to bring a claim for judicial review has been refused and no further application may be made;
- 4.3.3 when the court has given judgment in the matter and the time for making an appeal expires without an appeal having been made or permission to appeal is refused; or
- 4.3.4 when any appeal is finally determined and no further appeal may be made.

5. OBLIGATIONS OF THE UNDERTAKER

- 5.1 The Undertaker covenants with the Council to observe and perform or cause to be observed and performed the obligations on the part of the Undertaker contained in Schedule 1 at the times and in the manner provided therein.
- 5.2 The Undertaker covenants with the Council to serve written notice to the Council at least twenty Working Days in advance of the proposed Commencement Date.
- 5.3 Where the proposed Commencement Date provided in clause 5.3 does not take place, the Undertaker shall provide written notice to the Council of the revised date as soon as is

reasonably practicable and in any event at least 10 Working Days in advance of the revised date.

6. OBLIGATIONS OF THE COUNCIL

- 6.1 The Council covenants with the Undertaker to observe and perform or cause to be observed and performed the obligations on the part of the Council contained in Schedule 2 at the times and in the manner provided therein.

7. RELEASE AND EXPIRY

- 7.1 The Undertaker shall not be liable for a breach of any of its obligations under this Deed after it has parted with all of its interests in the DCO Land (including Qualifying Interests) or the part in respect of which the breach arises (as the case may be) save in either case for antecedent breaches.
- 7.2 If the Development Consent Order expires without having been Commenced or is revoked prior to the Commencement Date then this Deed shall forthwith determine and cease to have effect.
- 7.3 Nothing in this Deed shall prohibit or limit the right to develop any part of the DCO Land in accordance with a planning permission or development consent order or other statutory authority (other than the DCO) granted (whether or not on appeal) after the date of this Deed.
- 7.4 No Successor to the Undertaker shall be liable for any breach of any obligation which occurs in relation to any area of the DCO Land which that Successor does not own or control or which is carried out by any person other than that Successor.
- 7.5 Upon the performance discharge or other fulfilment of the covenants and obligations (or any of them) of the Undertaker, any Successor, or the Council under the terms of this Undertaking such covenant, obligation or obligations shall absolutely cease and determine save in respect of any antecedent breach.

8. LOCAL LAND CHARGES

- 8.1 This Deed is a local land charge and may be registered as such by the Council.

9. WAIVER

- 9.1 No waiver (whether express or implied) by the Council of any breach or default by the Undertaker in performing or observing any of the obligations, covenants or conditions on the Undertaker's part contained in this Deed shall constitute a continuing waiver and no such waiver shall prevent the Council from enforcing any of the said obligations, covenants and conditions or from acting upon any subsequent breach or default in respect thereof by the Undertaker.

10. REMEDIES

- 10.1 Where the Council becomes aware of a breach or non-compliance with a provision of this Deed by the Undertaker, the Council may serve notice of such breach upon the Undertaker and the notice of breach shall state the nature of the breach, the steps reasonably required to remedy the breach and a reasonable timescale for remedying the breach.
- 10.2 The Undertaker shall within 10 Working Days of receiving a notice served pursuant to clause [10.1] give written notification to the Council of its response to the notice including any claim that it will remedy the breach within the stated timescale, that the timescale is too short or that it rejects the notice for the reason that no breach has occurred.
- 10.3 The Council and the Undertaker shall hold discussions about the notice of the breach where either party so requests.
- 10.4 In the event of a dispute arising regarding any notice of breach served pursuant to clause [10.1], the matter shall be determined under clause [12]

11. CERTIFICATES OF COMPLIANCE

- 11.1 The Council will without delay upon request by the Undertaker certify compliance or partial compliance (as and if appropriate) with the provisions of this Deed.

12. RESOLUTION OF DISPUTES

- 12.1 In the event of any Dispute arising between the parties then the parties will attempt to resolve that Dispute amicably including holding a meeting attended by at least 3 representatives from each party.
- 12.2 If the parties are unable to resolve the Dispute amicably pursuant to clause [12.1], one party may by serving notice on all the other parties (the "Notice") refer the Dispute to an Expert for determination.
- 12.3 The Notice must specify:
- 12.3.1 the nature, basis and brief description of the Dispute;
 - 12.3.2 the clause or paragraph of this Deed pursuant to which the Dispute has arisen; and
 - 12.3.3 the proposed Expert.
- 12.4 In the event that the parties are unable to agree whom should be appointed as the Expert within 10 Working Days after the date of the Notice then either party may request the President of the Law Society to nominate the Expert at their joint expense, and the parties shall request that such nomination shall be made within 10 Working Days of the request, and any failure for such nomination to be made within 10 Working Days shall entitle any party to withdraw from the process of appointing an Expert and to refer the Dispute to the courts of England and Wales instead.
- 12.5 If the appointed Expert is or becomes unable or unwilling to act, any party may within 5 Working Days of the Expert being or becoming unable or unwilling to act, serve a notice on all the other parties proposing a replacement Expert and the parties will follow the process at Clause [12.4] to settle the appointment of the replacement Expert.
- 12.6 The Expert shall act as an expert and not as an arbitrator and his decision will (in the absence of manifest error) be final and binding on the parties hereto and at whose cost shall be at his discretion or in the event that he makes no determination, such costs will be borne by the parties to the Dispute in equal shares.
- 12.7 The Expert is to have regard to all representations and evidence before him when making his decision, which is to be in writing, and is to give reasons for his decision.
- 12.8 The Expert will be appointed subject to an express requirement that he reaches his decision and communicates it to the parties within the minimum practicable timescale allowing for the nature and complexity of the dispute and in any event not more than 30 Working Days from the date of his appointment to act.
- 12.9 The Expert will be required to give notice to each of the said parties inviting each of them to submit to him within 10 Working Days written submissions and supporting material and will afford to each of the said parties an opportunity to make counter submissions within a further 10 Working Days in respect of any such submission and material.
- 12.10 Nothing in this Deed shall fetter any party's right to bring an action in Court.

13. NOTICES

- 13.1 Any notice, consent or approval or other communication required to be given under or in connection with this Deed to or upon the parties must be in writing and shall be addressed as provided for in clause [13.3].
- 13.2 Any such notice must be delivered by hand (including by courier or process server) or by pre-paid recorded delivery post and shall conclusively be deemed to have been received:
- 13.2.1 if delivered by hand, upon delivery at the relevant address; and

13.2.2 if sent by first class post, at 9:00 a.m. on the second Working Day after the date of posting,

except that where any such notice or other communication is or would be deemed to be received after 5:30 p.m., such notice shall be deemed to be received at 9:00 a.m. on the next Working Day.

13.3 Subject to clause 13.4, the address, relevant addressee and reference for each party are:

13.3.1 in the case of the Council:

Address: Portsmouth City Council, [*relevant department tbc*],
[*address*] with a copy also sent by e-mail to [*xxx*].

Relevant addressee: [*xxx*]

Reference: [*xxx*]

13.3.2 For the Undertaker:

Address: AQUIND Limited, 78 Pall Mall, London, SW1Y 5ES with a copy also sent by e-mail to [*xxx*].

Relevant addressee: [*xxx*]

Reference: AQUIND Interconnector S106

13.4 Any party may give notice of a change to its name, address, or relevant addressee for the purposes of this clause 13 provided that such notification shall only be effective on:

13.4.1 the date specified in the notification as the date on which the change is to take place; or

13.4.2 if no date is specified or the date specified is less than five clear Working Days after the date on which the notice is received or deemed to be received, the fifth Working Day after the notice of any such change is given.

14. **NO FETTER ON DISCRETION**

14.1 Nothing in this Deed shall be taken to operate so as to fetter or prejudice the statutory rights, powers, discretions or duties of the Council or the Undertaker.

15. **GOOD FAITH, GOOD PRACTICE AND REASONABLENESS**

15.1 The parties agree with one another to act reasonably and in good faith in the fulfilment of their respective obligations in this Deed.

15.2 Unless expressly stated otherwise where under this Deed any approval, agreement, consent, certificate, confirmation or an expression of satisfaction or response is required to be given by or reached or taken by any party or any response is requested by any such approval, agreement, consent, certificate, confirmation or an expression of satisfaction or response, it will not be unreasonable or unreasonably withheld or delayed and the parties will act reasonably at all times.

16. **COMMUNITY INFRASTRUCTURE LEVY**

16.1 The Parties agree that the planning obligations contained in the Schedules to this Deed are necessary to make the Proposed Development acceptable in planning terms, are directly related to the Proposed Development and are fairly and reasonably related in scale and kind to the Proposed Development and thus satisfy the three tests set out in regulation 122(2)(a) – (c) of the Community Infrastructure Regulations 2010.

17. **LEGAL FEES**

17.1 The Undertaker shall pay on the date of this Deed to the Council its reasonable legal costs properly incurred in the negotiation and completion of this Deed up to the sum of [*xxx*].

18. INTEREST ON LATE PAYMENTS

- 18.1 Without prejudice to any other right remedy or power herein contained or otherwise available to the Council if any payment of any sum referred to herein shall have become due but shall remain unpaid for a period exceeding 5 Working Days the Undertaker shall pay on demand to the Council interest thereon at the interest rate of four percent per annum above the base lending rate of National Westminster Bank plc from the date when the same became due until payment thereof.

19. VAT

- 19.1 All consideration given in accordance with the terms of this Deed shall be exclusive of any VAT properly payable in respect thereof.
- 19.2 The Undertaker acknowledges and agrees that if at any time VAT is required to be paid in respect of any of the payments made under this Deed then to the extent that VAT had not been previously charged in respect of that payment the Council shall have the right to issue a VAT invoice to the Undertaker in respect of any vatatable supplies properly incurred under this Deed and the VAT shall be paid by the Undertaker accordingly following the receipt of a valid VAT invoice.

20. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

- 20.1 Without prejudice to clauses [1.2.4] and [1.2.5], a person who is not a party to this Deed does not have any right to enforce any term of this Deed under the Contract (Rights of Third Parties) Act 1999.

21. JURISDICTION

- 21.1 This Deed including its construction, validity, performance and enforcement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with English law.
- 21.2 Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Deed or its subject matter or formation (including non-contractual disputes or claims).

22. COUNTERPARTS

- 22.1 This Deed may be executed in any number of counterparts, each of which is an original and all of which may together evidence the same agreement.

23. DATE OF DELIVERY

- 23.1 This Deed is delivered on the date of this Deed.

SCHEDULE 1
UNDERTAKER OBLIGATIONS

1. CAR PARK RESURFACING

- 1.1 The Undertaker shall submit the Car Park Resurfacing Specification to the Council for approval by not later than [x]³.
- 1.2 The Undertaker shall carry out the Car Park Resurfacing Works in accordance with the approved Car Park Resurfacing Specification and shall use reasonable endeavours to carry out those works in accordance with the estimated programme set out in the approved Car Park Resurfacing Specification and in any event shall ensure that the Car Parking Resurfacing Works are carried out prior to the Operation of the Proposed Development.
- 1.3 For the avoidance of doubt, the full costs of the Car Park Resurfacing Works shall be borne by the Undertaker.

2. SPORTS PITCH REALIGNMENT AND REINSTATEMENT

- 2.1 The Undertaker shall submit a Recreational Management Plan to the Council for approval in respect of each Playing Field;
- 2.2 The Undertaker shall not Commence any construction works on the relevant Playing Field unless and until the Council has approved the Recreational Management Plan in respect of that Playing Field.
- 2.3 No later than [1] month prior to the Commencement of construction of the Proposed Development on any of the Playing Fields the Undertaker shall provide to the Council notice of its anticipated start date for those works.
- 2.4 The Developer shall at its own cost carry out:
 - 2.4.1 the Pre-Construction Pitch Realignment Works prior to the anticipated start date of construction works at the relevant Playing Field;
 - 2.4.2 the Pitch Reinstatement Works following completion of the construction works at the relevant Playing Field; and
 - 2.4.3 the Post-Construction Pitch Realignment Works following the completion of the Pitch Reinstatement Works at the relevant Playing Field.
- 2.5 The works carried out pursuant to paragraph [2.4] shall in each case be carried out in accordance with the relevant approved Recreational Management Plan PROVIDED THAT the Developer may at any time submit an alternative Recreational Management Plan to the Council for approval should it wish to vary the Pitch Realignment Works or the manner or timing of the working thereof.

3. HIGHWAY TREES

- 3.1 The Undertaker shall not remove any Highways Tree in connection with the construction of the Proposed Development unless:
 - 3.1.1 the Undertaker has agreed to replace that Highways Tree in accordance with the relevant approved Arboriculture Method Statement; or
 - 3.1.2 the Undertaker has submitted to the Council a CAVAT Assessment for that Highways Tree for agreement and the CAVAT Assessment for that Highways Tree has been agreed by the Council and the Undertaker.
- 3.2 Where paragraph [3.1.2] applies, the Undertaker must within not more than 20 Working Days of the date of removal of any Highways Tree pay to the Council the CAVAT Compensation Amount in accordance with the CAVAT Assessment agreed between the

³ HSF: Trigger for obligation to be agreed

Undertaker and the Council for that Highways Tree pursuant to paragraph [3.1.2] of this Schedule.

4. TEMPORARY CONSTRUCTION ACCESSES

- 4.1 The Undertaker shall not Commence the construction of any Temporary Construction Access unless and until it has entered into a Temporary Construction Access Highways Agreement with the Council in relation to that Temporary Construction Access.
- 4.2 The Undertaker shall not permit the use of any Temporary Construction Access for the purposes of constructing the Proposed Development unless and until that Temporary Construction Access has been completed and the Council has issued the Temporary Construction Access Completion Certificate in relation to it.

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SCHEDULE 2
COUNCIL'S OBLIGATIONS

1. CAR PARK RESURFACING

1.1 Where the Council is requested to provide agreement of a Car Park Resurfacing Specification pursuant to paragraph [1.1] of Schedule 1 the Council shall use reasonable endeavours within 20 Working Days of that request from the Undertaker to:

1.1.1 confirm the agreement of the Car Park Resurfacing Specification in writing to the Undertaker; or

1.1.2 give notice in writing to the Undertaker of the reasons why the Car Park Resurfacing Specification cannot be agreed to by the Council including any further information that it may require from the Undertaker

and where the Council is unable to satisfy the requirements of paragraph [2.1.1] or paragraph [2.1.2] of this Schedule 2 within 20 Working Days it shall provide the Undertaker with a reasonable explanation of the reasons for not being able to do so.

2. RECREATIONAL MANAGEMENT PLAN

2.1 Where the Council is requested to provide agreement of a Recreational Management Plan pursuant to paragraph [2.1] of Schedule 1 the Council shall use reasonable endeavours within 10 Working Days of that request from the Undertaker to:

2.1.1 confirm the agreement of the Recreational Management Plan in writing to the Undertaker; or

2.1.2 give notice in writing to the Undertaker of the reasons why the Recreational Management Plan cannot be agreed to by the Council including any further information that it may require from the Undertaker

and where the Council is unable to satisfy the requirements of paragraph [2.1.1] or paragraph [2.1.2] of this Schedule 2 within 10 Working Days it shall provide the Undertaker with a reasonable explanation of the reasons for not being able to do so.

2.2 For the avoidance of doubt the Council covenants that it shall approve any Recreational Management Plan which substantially conforms with the Framework Management Plan for Recreational Impacts.

3. HIGHWAY TREES

3.1 Where the Council is requested to provide agreement of a CAVAT Assessment pursuant to paragraph [2.1.2] of Schedule 1 the Council shall use reasonable endeavours within 10 Working Days of that request from the Undertaker to:

3.1.1 confirm the agreement of the CAVAT Assessment in writing to the Undertaker; or

3.1.2 give notice in writing to the Undertaker of the reasons why the CAVAT Assessment cannot be agreed to by the Council including any further information that it may require from the Undertaker

and where the Council is unable to satisfy the requirements of paragraph [2.1.1] or paragraph [2.1.2] of this Schedule 2 within 10 Working Days it shall provide the Undertaker with a reasonable explanation of the reasons for not being able to do so.

3.2 The procedure set out in paragraph [2.1] above shall be repeated following the provision of any updated CAVAT Assessment or the provision of any further information in relation to any CAVAT Assessment to address the reasons specified in the notice given by the Council pursuant to paragraph [2.1.2] SAVE THAT nothing in this paragraph 3 shall restrict the ability of either party to refer any Dispute in respect of the CAVAT Assessment (including the CAVAT Compensation Amount) to an Expert for determination in accordance with clause [12].

4. TEMPORARY CONSTRUCTION ACCESSES

- 4.1 The Council covenants with the Undertaker to use reasonable endeavours to enter into any and all Temporary Construction Access Highways Agreements.

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SCHEDULE 3
DESCRIPTION OF THE DCO LAND

[xxx]

DRAFT

IN WITNESS whereof this Deed has been duly executed by the parties to this Deed on the date which appears at the head of this document.

The **COMMON SEAL** of **PORTSMOUTH**)
CITY COUNCIL was)
hereunto affixed in the presence of:)

Authorised signatory

SIGNED as a **DEED** by)
AQUIND LIMITED)
acting by two directors or one director)
and the company secretary:)

Director

Director/Secretary

DRAFT

**APPENDIX 1
CARK PARK PLAN**

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**APPENDIX 2
CAR PARK RESURFACING OUTLINE SPECIFICATION**

[The Car Park Resurfacing Specification shall include:

- Details relating to landscaping within the area hatched green on the Car Park Plan
- A minimum of 106 replacement car parking spaces]

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**APPENDIX 3
DCO LAND PLAN**

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**APPENDIX 4
FRAMEWORK MANAGEMENT PLAN FOR RECREATIONAL IMPACTS**

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**APPENDIX 5
PLAN 1 - BRANSBURY PARK**

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**APPENDIX 6
PLAN 2 - FARLINGTON PLAYING FIELDS**

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**APPENDIX 7
PLAN 3 - ZETLAND FIELD**

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**APPENDIX 8
TEMPORARY CONSTRUCTION ACCESS HIGHWAYS AGREEMENT**

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APPENDIX 3
PCC Section 106 Agreement Heads of Terms

MEMO: Local Authority HoT's for Aquind DCO s.106

From: Error! Unknown document property name., Legal Services, Portsmouth City Council

To: Martyn Jarvis, Herbert Smith Freehills LLP

CC: Tim Guymer, Hampshire County Council; Holly Drury, Hampshire County Council; Caroline Stickland, Hampshire County Council; Steven Cornwell, Winchester City Council; Nick Parker; Winchester City Council; Catherine Knight, Winchester City Council; Mike Hughes, South Downs National Park; Jon Holmes, East Hants District Council; Lewis Oliver, Havant Borough Council; Ian Maguire; Edward Chetwynd-Stapylton; Juliet Gill; Megan Barnard; Vernon Nash; Steven Flynn; Peter Hayward; Celina Colquhoun.

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Date: 19 January 2021

Dear Martyn,

1. **Background**
2. This memorandum summarises Portsmouth City Council's understanding of the heads of terms sought by different local authorities for s.106 planning obligations. It may be of assistance to the Examining Authority at Deadline 7.
3. We understand from discussions with officers at other authorities that your firm is preparing s.106 planning obligations agreements for some of the local planning authorities, with the intention to secure individual, bilateral agreements with relevant authorities.

4. With that in mind, Portsmouth City Council would appreciate your firm's preparation of a draft agreement giving effect to the planning obligations relevant to Portsmouth City Council detailed below.

5. **Community Fund**

6. *Portsmouth City Council* seeks a Community Fund for the benefit and compensation of users of Portsmouth City Council facilities at Farlington Playing Fields and land east of Eastern Road including Milton Baffins Rovers FC, and Bransbury Park and Fort Cumberland and other open space affected by the Order.

7. **Reasons:** A fund would protect sports clubs as a long-term prospect at the affected playing areas from the loss of revenue that would be caused by disruption to the playing season on the basis that prolonged suspension of club fixtures makes membership of a club an unattractive prospect, driving members away or out of the sport entirely. Aquind has accepted that it is not possible for the lost capacity to be absorbed elsewhere, so the best mitigation must be to ensure that clubs are attractive and financially viable once work is completed to draw sportspeople back.

8. Amateur sports clubs tend to rely on modest membership fees, meaning they rarely have significant reserves to fall back on if their activities are interrupted. Whilst clubs' reliance on the goodwill of dedicated volunteers greatly assists with minimising costs, the fixtures are the lifeblood of a club and a fund would give reassurance that the club has the financial means to re-emerge as a functioning, competitive entity after works are completed so as to preserve as much goodwill as possible.

9. A fund could enable events or improvements at other open spaces in the city to mitigate the loss of open spaces during construction. Further, such a fund could provide legacy benefits at the sites once construction is completed. This would be proportionate to the scale of the project and its long operational period.

10. **Enforcement, Monitoring, Discharge of Requirements**

11. *All Local Planning Authorities* seek to secure payment for the mandatory (non-discretionary) and exceptional burdens that would be placed upon them by the terms of the DCO in giving approvals and discharging requirements over an extended period.

12. **Reasons:** Aquind's proposal to use Planning Performance Agreements ("PPAs") to secure payment for local authority costs incurred in relation to the enforcement, monitoring and discharge of requirements and approvals is mistaken in law and practical reality. To date local planning authorities have not received a draft copy of the proposed PPA that would fulfil this post-consent function.
13. Legally, a PPA is governed only by the common law rules of contract law, constrained to some extent in this case by principles of public law by virtue of a local planning authority being a party. The PPAs that Aquind has promulgated to date (which for the avoidance of doubt pertain to matters before the grant of any DCO) contain termination clauses that permit a party to give notice and bring the agreement to an end. If this approach were replicated in post-consent PPAs they would not offer any long-term security for the obligations they contain.
14. Local Planning Authorities are also concerned that multiple PPAs could be sought between different local planning authorities on different terms. A single, common s.106 agreement could be sought between the parties to would prevent duplication of work, provide uniformity and improve transparency of obligations. S.106 agreements are public documents that are registered on the local land charges register. PPA documents can theoretically be made subject to confidentiality requirements, and indeed early drafts of PPAs circulated pre-examination were expressed to be private and confidential. Bluntly, placing the necessary obligations into a s.106 format puts them before the decision-maker and the public in one place, providing greater public confidence in the process.
15. Further, PPAs are private agreements that are personal to Aquind, so they are of no assistance in the event that the benefit of the DCO is assigned. Or, to put it a subtly different way, there would be no guarantee that Aquind actually transfers the burden of any PPA to a successor (or that the successor would accept it). Section 106 agreements exist in large part to avoid this particular pitfall.
16. If this were a planning application under the TCPA 1990 then, in accordance with regulation 122 of the Community Infrastructure Levy Regulations 2010, it is submitted that these obligations would be necessary for the applicant to provide LPAs with these resources so that the development is properly delivered. These costs go beyond being "directly related" to the development,

in as much that they arise from the development and nothing else; no other scheme would require the bespoke intensity of resource that the DCO imposes. The scale and kind of the development, an exceptional cross-administrative boundary, transnational development, would mean that it is reasonable to require such a contribution. Support for this position is found in the judgment of Lang J in *Oxfordshire County Council v Secretary of State for Communities and Local Government and others* [2015] EWHC 186 (Admin) at paras [27] and [47].

17. Decommissioning Bond

18. *All local authorities* seek a bond to cover the eventuality that Aquind becomes insolvent and it is necessary to undertake decommissioning works to return land to a useable condition.

19. **Reasons:** there are serious concerns regarding the funding of the development and the commercial viability of the proposed interconnector. Should the undertaker fail financially, it is reasonable that its equipment should be removed in order to return the land to a usable condition for future development at the undertaker's prior expense.

20. CAVAT Tree Compensation Payments

21. *Hampshire County Council and Portsmouth City Council* seek security of the CAVAT method for the assessment of compensation for any loss or damage to trees in their ownership.

22. **Reasons:** The amenity value of trees to the local area must be recognised. Where the only option is to remove or damage trees, Aquind must compensate the local authority so that it can adequately replace them.

23. Section 278 Highways Act 1980 Agreements, including payment of design check and inspection fees

24. *Hampshire County Council and Portsmouth City Council* seek to secure that works accesses requiring alterations to the highway will be managed pursuant to a section 278 agreement for each respective access.

25. **Reasons:** to control design and construction and to secure an appropriate surety for any works.

26. Bus mitigation

27. *Hampshire County Council* seeks mitigation payments to reduce the detrimental impact that the works are likely to have on bus routes. Portsmouth City Council officers are aware of a meeting on 21 January 2021 for Aquind to discuss this with Hampshire County Council and may wish to replicate this obligation.

28. **Reasons:** Overall, the works are expected to have a negative impact on bus journey reliability and times. Whilst the applicant has stated that works will not overlap to mitigate some of this impact, the cumulative effect of extensive road works in the areas is likely to have a negative on journey reliability and times. Typically, when major roadworks are undertaken, the developer picks up the costs of these impacts on the local bus network. The proposed works will be carried out along key transport corridors in Hampshire which currently offer high performing commercial bus services (D1/D2 aside). It is vital that provision is made so that if the cumulative impact of the works carried out is negative, appropriate support is in place to mitigate this impact to enable these services to continue to grow and encourage modal shift. Without the measure of a fund being put in place, the long term viability of the impacted bus services is at risk. This risk is unacceptable to the County Council and directly conflicts with the authority's priority on combating climate change. HCC maintains the position that the works could undermine the TCF project which is focused on achieving modal shift. There is a risk that public perception of the bus network in the area could deteriorate due to the overall impact of the works thus discouraging the desired, and necessary modal shift.

29. Travel Plan Checking/Monitoring

30. *Hampshire County Council* seeks Travel Plan Checking/Monitoring obligations.

31. **Reasons:** to cover the costs of approving and monitoring the performance of the travel plan to ensure its meeting its required objectives with regards reducing vehicular traffic movements to the site as set out as a requirement for developments within HCC's Travel Plan Policy

32. Employment & Skills Plan

33. *All local planning authorities* seek an Employment and Skills Plan to maximise local employment opportunities by securing the development workforce from the local authority areas as much as possible.
34. **Reasons:** To secure some degree of local economic benefit to a nationally significant infrastructure project.
35. **Mitigation of landscape harm**
36. *South Downs National Park Authority* seek a Section 106 legal agreement to cover mitigation of the development proposal's adverse impacts on the landscape character and setting of the National Park. This could be in the form of defined, offsite mitigation works or via a financial contribution in lieu to be administered by the South Downs National Park Authority for landscape mitigation projects within the National Park and the local area.
37. **Reasons:** The fact that the development as it stands will cause harm to the National Park is incontrovertible, the applicant's Planning Statement for example accepts there will be significant adverse landscape and visual amenity effects. The SDNPA's position on this matter is supported by paragraph 5.9.9 of the Overarching National Policy Statement for Energy which states that National Parks have the highest status of protection in relation to landscape and scenic beauty. Paragraph 5.9.12 states that the duty to have regard to the statutory purposes of National Parks also applies to projects outside the boundaries of National Parks where they may have impacts within the National Park. The aim, it goes on to note, should be to avoid compromising the purposes of a protected landscape's designation and projects should be designed sensitively given the various siting, operational and other relevant constraints. A suitably worded planning obligation is needed to achieve this.

