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**Subject:** dDCO Comments ahead of ISH4  
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**Attachments:** [210211 dDCO ISH4 Article Review v4 KL - CLEAN.docx](#)

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Dear Martyn,

As discussed, please find attached Portsmouth City Council's review of the dDCO ahead of ISH4 next week. We trust that this will assist you and the Examining Authority with your preparations. I will share this with the other local authorities in the morning so that they can refer to it, too.

Kind regards,

Kieran

**Kieran Laven**

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## Article-by-article commentary on the draft DCO for the Aquind Interconnector by Portsmouth City Council

The comments provided in this document are without prejudice to Portsmouth City Council's ("PCC") position that no Development Consent Order should be granted.

### Part 1 - General provisions

#### **Art 1 - Citation and commencement**

Acceptable.

#### **Art 2 - Interpretation**

Art 2(1) - It is not intended that every definition will be addressed, rather only those where comment may assist.

"address" - Acceptable in light of "electronic transmission" definition and Art 44 comments.

"apparatus" - as defined by NRSWA 1991, which is barely more than a dictionary definition. Acceptable.

"authorised development" - PCC objects to the words "and any other development authorised by this Order". Given the applicant's inconsistency as to whether the Fibre Optic Cables are part of the electricity cable project, associated development to the electricity cable project or a legitimately separate project (all of which PCC reject as unlawful propositions), it appears that this provision is intended to hedge its bets in the latter case. This is impermissible, asking the ExA and the Secretary of State to consent something it is not empowered to. PCC submits that the definition of "authorised development" used in the made Southampton-London Esso Pipeline DCO should be used as this omits the offending wording. At the very least, the applicant should be required to explain why the Southampton-London Esso Pipeline DCO definition would not be acceptable.

"book of reference" - Acceptable.

"commence" - In relation to limb (b) of the definition, it replicates s.155(1) and makes use of s.155(2) to prescribe that "onshore site preparation works" shall not trigger "commencement". Subject to particular comments on the scope of "onshore site preparation works" below, this is acceptable.

"electronic transmission" - acceptable subject to comments on Art 44.

"horizontal directional drilling" and "HDD"

"horizontal directional drilling compound" and "HDD compound"

"joint bay" - Acceptable.

"land" - Acceptable.

"maintain" - Having had regard to the Southampton-London Esso Pipeline DCO, PCC would prefer the following words to be added between the words "environmental statement" and "and maintenance...": "and for the avoidance of doubt must not include the renewal, re-laying, reconstruction or replacement of the entirety of Work No. 4, save where this can be done without excavating a trench". See also the Thames Tideway Tunnel Order's wording "so that it is fit for the purpose for which it was originally constructed"

"onshore HVAC cables" - Acceptable as reference to the fibre optic cables as being included within this definition is solely in respect of their role monitoring and protecting the electricity cables.

"onshore HVDC cables" - PCC objects to the inclusion of fibre optic data transmission cables "for commercial telecommunications" as part of this definition beyond their role noted above. PCC have made their position clear that the telecoms use of the 'spare' FOCS is neither part of the development nor a legitimate form of associated development. This should be deleted from the definition.

"onshore site preparation works" - It is acknowledged that the scope of activities under this definition has been reduced. It is acknowledged that Requirement 15 stipulates that a Construction Environment Management Plan must have been approved in order for each and every phase of "onshore site preparation works" to be undertaken.

(a)-(d) - provided that the relevant CEMP for a phase addresses the ground conditions concerns associated with disturbing soils by these operations, these operations are acceptable.

(e) - acceptable.

(f) - acceptable.

(g) - acceptable.

(h) - insert "site" before "advertisements" to ensure that advertisements are strictly related to the development and are not for other purposes.

(i) - acceptable.

"onshore works" - Acceptable.

"Order land" - Acceptable.

"Order limits" - Acceptable.

"operational period" - PCC does not understand why, if this is one linear electricity interconnector project, there is reference to "the relevant part of the authorised development" as either the whole of the authorised development or no part of it can operate (indeed, the whole of the authorised development is dependent on the French half of the project). It would be nonsense to speak to of any smaller "part" of the development being operational, unless the applicant is referring to the ability to bring the Fibre Optic Cables ("FOC") online for commercial telecoms related

purposes before the electricity cable "part" of the development. PCC objects to this provision to the extent that it endorses the use of FOC for commercial purposes, especially where drafting would allow it to be brought online in priority of the electricity interconnector.

"optical regeneration station" - PCC objects to the inclusion of the optical regeneration station because the applicant has not demonstrated why one is necessary at all, and further conceded that the great majority of the ORS (i.e. two-thirds) is required solely for the commercial telecoms related application of the FOC and is not required in respect of the role monitoring and protecting of the electricity cables. It is noted that Aquind still has not explained why in this instance an ORS is required for that role alone where other interconnectors of equal or greater length need no ORS.

"owner" - the s.7 Acquisition of Land Act 1981 definition is noted where ownership of land is concerned. Acceptable.

"permanent limits" - Land shaded pink, and additionally at Deadline 7 version 'blue, purple and green'.

"the permit schemes" - Acceptable.

"plot 10-14" - Acceptable.

"provisional advance authorisation" this ought to refer directly to the Permit Schemes description. In addition, the Traffic Management Permit Scheme Regulations 2007 definition alone is too generic and this is why PAA is referred to i.e. relates to the Permit Schemes which are brought about through secondary legislation.

"statutory undertaker" - s.127(8) Planning Act 2008 defines statutory undertakers by reference to s.8 Acquisition of Land Act 1981.

However, PCC queries the inclusion of the reference to a public communications provider under s.151(1) Communications Act 2003 in light of its objections to the commercial use of fibre optic cables. The inference may be drawn that this is included to extend the normal limits of the ALA 1981 so that the applicant can use powers of acquisition vis-à-vis communications providers where it would not ordinarily be able to. Given there is no simultaneous extension to other typical undertakers with land and physical infrastructure, the question arises to what extent this is included for commercial advantage rather than necessity of the development.

It is noted that water, gas, electricity and sewerage are included expressly under Sch 13, Pt 1, para (2)'s definition of "statutory undertaker" for the purposes of that Schedule. Sch 13, Pt 2 relates to electronic communications providers subjected to the use of powers under Art 33.

"street" - this definition is unobjectionable. It is not considered that the verge of a street between two carriageways would be considered otherwise than "highway" under s.48 NRSWA 1991.

"telecommunications building" - PCC objects to the inclusion of telecommunications buildings as this is neither part of the development of an electricity interconnector nor associated development.

"traffic management strategy" - Acceptable.

"transitional joint bay" - Acceptable.

"trenchless installation techniques" - Typo, should be "two points". Otherwise acceptable.

"trenchless installation technique compound" - this definition doesn't appear to have actually been used anywhere in the DCO.

"undertaking" - PCC objects to the words "and provision of telecommunications services" as this is a separate undertaking to the electricity undertaking, being the only legitimate undertaking on a proper reading of the Secretary of State's section 35 direction. Please refer to PCC's response to the question posed as part of ExQ2 on this matter.

Art 2(2) - In light of plot 10-14 in particular, the words "Except where the terms of this Order and the book of reference stipulate expressly to the contrary" must be inserted before the opening words "References in this Order..."

Art 2(3) - typo, omission of "development" after "authorised".

Art 2(4) - Acceptable.

Art 2(5) - Acceptable.

Art 2(6) - Apparent typo: "constructed" should perhaps be "construed" as in Art 2(8).

Art 2(7) - Acceptable.

Art 2(8) - Acceptable.

## Part - 2 Principal powers

### **Art 3 - Development consent etc. granted by Order**

Art 3(1) - Without prejudice to PCC's views regarding commercial use of Fibre Optic Cables, the Southampton-London ESSO Pipeline DCO wording is preferable in as far as it reads "Subject to the provisions of this Order, including the requirements, the undertaker...". The word "including" under Art 2(8) is taken to connote no limitation, whereas the words "this Order and Schedule 2" in the current dDCO could be read as operating to exclude, for example, Schedule 1.

Art 3(2) - Acceptable.

### **Art 4 - Authorisation of use**

Art 4(1) - PCC refers to its objection to the definition of "authorised development" in Art 2(2) above.

Art 4(2) - Acceptable.

**Art 5 - Power to construct and maintain authorised development**

Art 5(1) - "at any time" limited by Req 2. Acceptable.

Art 5(2) - Acceptable.

**Art 6 - Benefit of the Order**

Art 6(1) - subject to comments on Art 7, acceptable.

**Art 7 - Consent to transfer the benefit of Order**

Art 7(1) - PCC suggests that the DCO should be prescriptive of matters for the Secretary of State's consideration of consent to the same extent as the Thames Tideway Tunnel DCO in its Art 9.

Art 7(2) - No comments.

Art 7(3) - No comments.

Art 7(4) - ExA's deletion noted.

Art 7(5) - No comments.

Art 7(6) - This paragraph sets out the circumstances in which the undertaker may unilaterally assign the rights it holds under the DCO without oversight from the Secretary of State or any other party.

Art 7(6)(a) - Where the transferee is the holder of an interconnector licence under s.6(1)(e) the Electricity Act 1989. Aquind Limited holds such a licence, yet there are significant concerns about its ability to finance the project and in particular the liability for compensation vis. compulsory acquisition. It follows that it is unacceptable for the benefit to be assigned to another interconnector licence holder without scrutiny by the Secretary of State.

Art 7(6)(b) - Acceptable.

Art 7(6)(c) - PCC objects to the inclusion of this sub-paragraph in light of its in-principle objection to the inclusion of fibre optic cables for commercial telecommunications purposes as part of this application for development consent. Further, the same point arises in this sub-paragraph as with Art 7(6)(a); the possession of a regulatory licence does not obviate the need for financial scrutiny over the extent of the benefit, particularly given that liabilities associated with severable pieces of infrastructure in the form of the ORS building and telecommunications building would pass to the transferee under Art 7(6)(c).

Art 7(6)(d) - Acceptable.

Art 7(6)(e) - The issue as we have indicated earlier is that this enables the transfer to a body whose financial position has not been assessed (albeit if compensation has not elapsed etc the Secretary of State under Art (6)(e) must approve the transfer). To avoid a 'gap' we ask that the Secretary of State in such circumstances must assess

the financial circumstances of the proposed transferee. This was how the concern was overcome in Thames Tideway Tunnel (see article 9(5) of that Order).

Art 7(7) - Acceptable subject to comments on Art 7(8).

Art 7(8) -

Art 7(8)(a)(i)-(iv) - Acceptable.

Art 7(8)(a)(v) - In line with earlier comments on this article, any notice needs to give evidence of the transferee's necessary financial and other resources to undertake the authorised development.

Art 7(8)(b)(i)-(ii) - Acceptable.

Art 7(9) - Acceptable.

Art 7(10) - Acceptable.

Art 7(11) - No comment from PCC.

### **Art 8 - Application, exclusion and modification of legislative provisions**

Art 8(1) - Regulation 6(e) provides that the removal of hedgerows is permitted where done for the "carrying out of development for which planning permission has been granted...". The insertion of a (k) as a permitted reason for removal for the purposes of this DCO only is acceptable.

Art 8(2) - The numbered articles listed in this paragraph do not appear to correlate to the titles that follow them. 'Temporary use of land for carrying out the authorised development' is Art 30, not Art 29, while 'Temporary use of land for maintaining the authorised development' is Art 32, not Art 31. It is assumed for a common-sense review that the titles are the more accurate reference, although with a made Order the numbers could be held as the authoritative point of reference so this must be rectified.

Art 8(2) excludes the provisions of the Neighbourhood Planning Act 2017 in as far as they relate to the 2 intended DCO articles concerning temporary possession. It is noted that significant parts of that Act are not yet in force, most notably sections 18-25. Art 8(2) means that they will never apply to this DCO if they are eventually brought into force.

Art 8(3) - This paragraph excludes, within the Order limits, the power of a "border department" to exercise certain development powers around ports in light of Brexit. Otherwise, these powers apply throughout Portsmouth City Council and Hampshire County Council's administrative area, subject to the listed exceptions in Sch 1, para 2.

Art 8(4) - PCC reserves its position to comment on this at ISH4. PCC notes Art 60 of the Thames Tideway Tunnel DCO that provides: " The authorised development shall not commence unless and until the undertaker enters into the Unilateral undertaking

for securing offsite mitigation and compensation policy and resources for local planning authorities (in accordance with document reference APP209.03)."

### **Art 9 - Defence to proceedings in respect of statutory nuisance**

Art 9(1) - s.82(1) Environmental Protection Act 1990 ("EPA 1990") empowers "any person... aggrieved" to make a complaint of statutory nuisance to the Magistrates' Court. While Art 9(1) does not bar a complaint from being brought and found proven, it prevents the court from issuing an order or imposing a fine where any one of the circumstances (a)-(d) is demonstrated vis-à-vis the 2 cited forms of statutory noise nuisance.

Art 9(1)(a), firstly takes the options for defending a s.82 complaint beyond those usually available. The s.60 Control of Pollution Act 1974 ("CPA 1974") position is that the recipient of a notice under s.60 CPA 1974 must comply with its requirements or else it commits an offence (provided there is no reasonable excuse for breaching the requirements). Art 9(1)(a) pulls in the opposite direction to the provisions of s.60 by rewarding compliance with the requirements of the notice, rather than simply penalising non-compliance. In other words, this wording of Art 9(1)(a) awards the undertaker an advantage that it would not ordinarily enjoy by expanding the grounds on which it can prevent the Magistrates' Court from taking action under s.82 EPA 1990.

Secondly, Art 9(1)(a) (and Art 9(4)) contradicts the position made clear by s.61(9) CPA 1974 that a consent *per se* is not a defence to a s.82 EPA 1990 complaint. The phraseology of s.61(9) CPA 1974 is important: it is to put the recipient of a consent on notice of the fact that actions and environmental outcomes will be assessed under a s.82 EPA 1990 complaint, not the possession of consents. In other words, compliance with the consent *may* mean that no statutory nuisance is found under s.82, but simply *having* the consent is not enough. If the Magistrates' Court were to conclude that the s.60 consent would not be sufficient to prevent a statutory nuisance, it should be open to the Magistrates' Court to issue its own order or impose a fine. Art 9(1)(a) is drafted to stop the Magistrates' Court from doing this.

Art 9(1)(b) provides that the Magistrates' Court shall be prohibited from issuing an order or fine under s.82 EPA 1990 where activities are being conducted in accordance with the construction and environmental management plan ("CEMP"). As with 9(1)(b), the effect of this provision is to oust the meaningful jurisdiction of the Magistrates' Court to hold and take appropriate action if the CEMP is not working sufficiently to prevent a statutory noise nuisance from occurring.

Art 9(1)(c) seeks to prevent an order or fine being imposed under s.82 EPA 1990 during the operation of the development provided that the nuisance is within the limits approved by a noise management plan under Requirement 20. Again, this is perverse and circular drafting. The inescapable conclusion is that if a noise nuisance is occurring but no element of the noise management plan is contravened, then the noise management plan was not fit for purpose in the first place. Thus the Magistrates' Court must be permitted to both find a statutory noise nuisance *and remedy it in substance*, notwithstanding any other consents.



Further, Art 9(1)(c) is objectionable in principle because there is no good reason why the development during its operational life should be supposed to produce a statutory nuisance if constructed competently, let alone to be forever excused from any statutory noise nuisance that might occur.

Art 9(1)(d) seeks to give the undertaker a final opportunity to avoid an order or fine from the Magistrates' Court where the construction or maintenance activity "cannot be reasonably avoided". This is unnecessary in light of s.82(9) EPA 1990's provision for a 'Best Practicable Means' defence, although it is acknowledged that s.82(10) curtails the availability of this defence in certain circumstances. The undertaker cannot justify seeking such a loosely defined defence to itself, being one that is not permitted under the primary legislation.

Art 9(2) seeks to entrench the problematic argument that an inadequate construction environmental management plan would oust the jurisdiction of the court where a statutory noise nuisance exists.

Art 9(3) seeks to supplement the factors that the local authority must have regard to in relation to ss. 60(4) & 61(4) CPA 1974. This is unobjectionable.

Art 9(4) is unacceptable for the reasons outlined above under Art 9(1)(a), and as drafted would only relieve the mandatory requirement for the s.61(9) cautionary statement to be given in the consent. However, it appears that the intention of the drafting is to furnish the undertaker with a defence in form where a court would demand a defence in substance.

Art 9(5) is not objectionable.

Taking all of these threads together, there are 2 conclusions: firstly, that there is no justification for Article 9 to have any place in the DCO and pardon any occurring statutory noise nuisance inflicted upon an aggrieved person. There is a strong public interest in allowing private citizens to protect themselves against statutory nuisance. PCC cannot acquiesce in an argument that stripping the public of their right to a remedy is justified by the fact that PCC could take up the complaint and issue an abatement notice under s.80 EPA 1990. It follows that PCC asks the ExA to strike out Article 9 if it is minded to grant the DCO.

The second conclusion is that PCC objects especially to the attempt to secure effective immunity to s.82 EPA 1990 statutory noise nuisance complaints during the operational lifetime of the development. There is no justification for such an exceptional provision and a responsible undertaker would have nothing to fear from being subject to s.82 EPA 1990. If the ExA could not be persuaded to strike out the whole of Article 9, then PCC asks that any references to the operation of the authorised development are struck out. This would go some way to reflecting Art 7(3) of the Thames Tideway Tunnel DCO that provided "The defence in this article shall not have effect after completion of construction."

## Part 3 - Streets

### Art 9A - Permit Scheme

**Art 9A(1)** - The permit scheme applies to permissions sought under Part 3 of the DCO.

**Art 9A(2)(a)-(b)** - Primacy of FTMS and other approvals (including relevant approved traffic management strategy for a given phase under Requirement 25) *during construction*. Without examples of conditions that might 'conflict' or a clear rationale for what might be considered 'conflict' as opposed to 'control', it seems that problems may not be realised until a permit is issued.

**Art 9A(2)(c)** - PCC objects to the blanket exclusion of section 58 and 58A NRSWA 1991 where Aquind wishes to undertake its works. Where such moratoria apply, PCC's permit scheme, at section 10.8.1, allows an application for a permit to be made "specifying the grounds on which consent is sought" and decided accordingly.

**Art 9A(2)(d)** - This sub-clause restates the purpose of Prior Advance Authorisation and therefore would not be objectionable, but in accordance with the comments on Art 9A(7) PCC would expect the wider definition of "urgent works" contained within the Permit Scheme to be allowed.

**Art 9A(3)** - Where alternative conditions are suggested by the highway authority, the highway authority must provide the alternatives to the undertaker within 10 days of receipt of the original application. The undertaker must be given at least 5 days to consider the suggested alternatives and in that time the street authority may not issue a refusal. PCC asks that "days" are reverted to "working days" in line with the Permit Scheme's calculation of timeframes to avoid confusion.

**Art 9A(4)** - This article relates to agreement between the undertaker and the highway authority and is therefore not controversial. "working days" should be reinstated.

**Art 9A(5)** - This article refers back to and reinforces the prohibition on conditions that conflict with the Framework Traffic Management strategy, a resulting Traffic Management Strategy for a given phase, or any other approval granted under the DCO.

**Art 9A(6)** - This article defines "moratoria" within the DCO to give the effects detailed under Art 9(A)(2)(c) above.

**Art 9A(7)** - This sub-clause relating to emergency works is copied from s.52(1) NRSWA. "Emergency works" is not as broad as "urgent activities" under the Permit Scheme, which are concessions to commercial priorities such as service outage rather than preventing harm to property and people. PCC would prefer to maintain the flexibility to permit any arising "urgent activities" as well as the "emergency works" detailed.

**Art 9A(8)** - This appeal mechanism is considered acceptable as the Permit Scheme mechanisms can lead to an unsatisfactory impasse. This Article does not preclude the arbitration options provided for under NRSWA and the subordinate regulations.

### **Article 10 - Power to alter layout etc. of streets**

Art 9A is intended to essentially 'overlay' any applications made under other articles in Part 3 of the DCO such as this - an Art 10 application should be made under the Permit Scheme (section 5.1.1). The works listed in Art 10(1)(a)-(i) are broadly powers under Part V of the Highways Act 1980, which are to be treated as 'works for road purposes' under s.86(2) NRSWA, and in substance are also likely to be 'major works' under s.86(3).

Art 10(1) remains objectionable in principle for PCC because it allows works outside the Order limits subject to a bespoke approach to the Permit Scheme procedure under the DCO.

Further, the ability to exercise Art 10 rights in aid of constructing *and maintaining* outside of the Order limits appears unnecessarily broad. It seems that Art 10 powers, being grounded in the Part V powers of a local highway authority, theoretically gives the undertaker a level of power over all streets in Portsmouth and Hampshire that is properly reserved to public authorities. It is not clear or justified why for post-construction maintenance and in relation to any area outside the Order limits the undertaker should not be treated as any other party by making an application under the general terms of the Permit Scheme. That is especially the case where the undertaker has the power to make permanent changes. However, because applications would always be subject to approval (Art 10(3)), the Council is able to refuse any application that it feels is inappropriate.

Before moving on from 10(1), it should be noted that the part of (g) relating to "alteration of parking places [&] loading bays" does not appear to be grounded in Part V Highways Act 1980 (s.115, Pt VII relates to these matters for heavy goods vehicles as opposed to all other forms of vehicles). The alteration of parking places is effected by orders under the Road Traffic Regulation Act 1984.

Art 10(2) - PCC endorses the ExA's suggested amendment.

Art 10(3)-(4) - the relevant street authority must decide within *42 days* (replacing the previous 20 working days) beginning on the day on which the application was made, or else the application is deemed approved.

### **Article 11 - Street works**

Art 11(1) - PCC requires the words "without the consent of the relevant street authority" to be deleted. This is because the word "consent" is ambiguous and could be read to include an application under the Permit Scheme (contrary to the intention of Art 9A(1)). Art 11(4) is sufficient to assert that Aquind has a statutory right akin to a statutory undertaker's rights under NRSWA and does not need a separate

'consent' under NRSWA. Nonetheless, the holder of a statutory right must still comply with an adopted Permit Scheme. PCC believes that the deletion avoids any ambiguity. There is also precedent for this under the Thames Tideway Tunnel Order.

Art 11(2) - This power is ancillary to the powers in Art 11(1), to provide a right of occupation over streets near to those that are subject to works. Consent of the street authority must be sought.

Art 11(3) - the relevant **street authority** must decide within *42 days* (replacing the previous 20 working days) beginning on the day on which the application was made, or else the application is deemed approved.

### **Article 12 - Application of the 1991 Act**

Art 12(1) - This applies the para 2 NRSWA provisions (and any applicable regulations or codes) to any activities falling within Art 11 and 13, whether or not NRSWA would ordinarily regard these activities as "street works".

Art 12(2) - NRSWA Omissions (in response to PCC's submissions to the ExA in ExQ1, DCO1.5.35 & DCO1.5.40):

s.56 - power to give direction to the timing of streetworks is omitted, meaning that Art 9A(3) would be the sole means of directing that conditions securing different timings are imposed. If there were any works to which the Permit Scheme did not apply, this would be necessary in order to allow the Highway Authority to meet its Network Management Duty under s 16 of Traffic Management Act 2004 to as well as to co-ordinate works of all kinds on the highway under Section 59 of NRSWA.

ss.58&58A - omitted from the Art 12 list despite being envisaged by Art 9A. Read alongside Art 9A(2)(c) and 9A(6) to mean that so-called 'moratoria' are not effective in any way upon Art 11 street works undertaken by Aquind, either in relation to pre-Aquind works or to works undertaken by Aquind that may require subsequent disturbance by other undertakers.

s.64 - This section empowers local highway authorities to designate streets as traffic-sensitive. Consequently, it could not have any effect upon a DCO consent and can be acceptably omitted.

s.66 - This section requires an undertaker to complete works as expeditiously as possible with only necessary obstructions of the highway (paraphrased). There is a criminal offence for failing to do so. This is an important motivation for any undertaker and should not be removed purely for Aquind's convenience.

s.74 - This section empowers the street authority to charge an undertaker for overrunning works, and to issue a Fixed Penalty Notice. Again, there is no justification for excluding this option, even if it is convenient to Aquind.

s.75 - Note: the replacement for this section has not yet been enacted by ss.58(2) and 99(1) Traffic Management Act 2004. In either case, the street authority would expect to be able to recover fees against Aquind in the same way as against any other undertaker.

s.78 - There do not appear to be any of the referenced relevant regulations, so it seems for completeness this article should refer to "future relevant regulations" as in other DCOs. Many other DCOs have provisions with regard to modification of this section, rather than excluding it completely.

### **Article 13 - Temporary closure, alteration, diversion or restriction of streets, public rights of way and permissive paths**

13(1) - This power applies to those streets within the Order limits only, while constructing and maintaining for the life of the development (distinct from the limited 'maintenance period' defined in article 32).

13(5)(a) - *consultation* of the street authority where they are effectively on-notice that Aquind will at some point want to close etc. the road by virtue of Sch 8.

13(5)(b) - *consent* of the street authority required to close etc. any other street within the Order limits.

13(8) - if the relevant **street authority** that receives an application for consent under paragraph 5(b) (i.e. one that prevents all traffic, including pedestrian) fails to notify the undertaker of its decision within *42 days* (replacing the previous 20 working days). However, in the case of an order for a period of more than 18 months the Road Traffic (Temporary Restrictions) Procedure Regulations 1992 provide a time period between application and decision of 12 weeks.

13(9) - It is noted that there are several references in Sch 13 to "temporary stopping up" and the simplicity of deeming in this article rather than amending all such references is understood. It is noted that Sch 13, Part 5, para 4(1) contains a placeholder for an article that relates to "permanent stopping up", although no article of the dDCO proposes to grant such a power.

### **Article 14 - Access to works**

An application for approval to lay accesses to works (permanent or temporary) may be made to the highway authority (in consultation with the planning authority) and determined under Sch 3 i.e. *42 days* (assuming no further info required). This will not secure the same protections as a s.278 Highways Act 1980 agreement i.e. surety/registrable local land charge to complete works in event of default etc. Aquind have offered a s.106 obligation to enter into s.278 agreements with PCC for temporary works accesses. It is not clear that the Art 14 power therefore remains applicable in this respect, or with respect to permanent works accesses. Indeed, it may underscore the need for a prohibition on any permanent works accesses being undertaken in Portsmouth in the s.106 agreement.

### **Article 15 - Agreements with street authorities**

This doesn't cover s.278 highways agreements because they are made with highway authorities, not street authorities.

### **Article 16 - Traffic regulation**

16(1) - This article does not reference the Order limits so can be applied to anywhere, albeit subject to the traffic authority's consent.

16(1)(a) - "revoke" seems heavy-handed; why would anything more than suspension for a fixed time be required for this scheme? Temporary TROs can override an extant permanent TRO for up to 18 months and then be renewed if necessary.

16(1)(b)-(f) - "road" is not defined in the DCO, but "street" is.

16(2) - having received consent under 16(1), the undertaker must then consult with the police and the *highway* authority.

16(3) - Having achieved the consent of the traffic authority, the undertaker must give the police and the street authority a further 28 days' notice before exercising the consented power, AND advertised the intention to use the power.

16(7) - Where an application for consent is received under 16(1), the traffic authority has 42 days to decide.

## Part 4 - Supplemental Powers

### Art 17 - Discharge of Water

Art 17(1) - This is noted as being identical to the equivalent provision in the Southampton-London ESSO pipeline DCO. Acceptable.

Art 17(2) - This is noted as being identical to the equivalent provision in the Southampton-London ESSO pipeline DCO. Acceptable.

Art 17(3) - Identical to the equivalent provision in the Southampton-London ESSO pipeline DCO, save for the addition of "or delayed". Acceptable.

Art 17(4) - Replicates the equivalent provision in Southampton-London ESSO in substance with slightly different wording to include referral back to Art 17(1).

Art 17(5) - This is noted as being identical to the equivalent provision in Southampton-London ESSO pipeline DCO. Acceptable.

Art 17(6) - This is noted as being identical to the equivalent provision in Southampton-London ESSO pipeline DCO. Acceptable.

Art 17(7) - This article is a more restricted version of the equivalent provision in the Southampton-London ESSO pipeline DCO. Acceptable.

Art 17(8) - This article is framed differently to the Southampton-London ESSO pipeline DCO by referencing the whole of "regulations [sic] 12 of the Environmental Permitting (England and Wales) Regulations 2016", whereas the ESSO pipeline DCO refers to regulation 12(1)(b) only. The Aquind drafting impresses that the article does not confer an environmental permit of either kind. This is acceptable.

Art 17(9) - acceptable.

### **Art 18 - Protective work to buildings**

18(1) - This article is strictly limited to those buildings "lying within the Order limits". The Southampton-London ESSO pipeline DCO went further, providing also that buildings "which may be affected by the authorised development" are included. It is presumed, therefore, that Aquind would look to undertake any protective works for affected buildings outside the Order limits by private negotiation, or otherwise pay compensation for any damage caused in accordance with Art 18(9).

18(2) - This article is identical to the equivalent provision in Southampton-London ESSO pipeline DCO. Acceptable.

18(3) - This article is less expansive than the corresponding article in the Southampton-London ESSO pipeline DCO. Acceptable.

18(4) - It is worth reiterating that due to Art 18(1), this only applies to buildings "lying within the Order limits". This is reinforced at Art 18(4)(b) by the only deviation from the Southampton-London ESSO pipeline DCO, whereby the undertaker is limited to entering only those adjacent properties that are also "within the Order limits".

18(5) - This article is identical to the equivalent provision in the Southampton-London ESSO pipeline DCO. Acceptable.

18(6) - The drafting of this article to refer to "paragraph (5)" is an improvement on the drafting of the Southampton-London ESSO Pipeline DCO, which appears to have omitted reference to one of the four possible rights. However, PCC disagrees that 14 natural days is appropriate (as was held in the ESSO Pipeline DCO) in the context of this article and would suggest that 10 working days is reinstated to protect such persons against the loss of time against a relatively short deadline due to public holidays, notably during the Christmas period. This is especially important as the landowner is unlikely to be familiar with the DCO and the arbitration article. Indeed, Article 18(6) should stipulate that the option of arbitration under the relevant article is drawn to the recipient's attention along with the timeframe.

18(7) - This article is identical to the equivalent provision in the Southampton-London ESSO pipeline DCO. Acceptable.

18(8) - An article of the same wording was accepted by the ExA in the Southampton-London ESSO pipeline DCO. Acceptable.

18(9) - An article of the same wording was accepted by the ExA in the Southampton-London ESSO pipeline DCO. However, given that Aquind seeks to limit its liability under this article to land within the Order limits, it would seem that there is a greater likelihood of any adversely "affected" parties having recourse to s.152 Planning Act 2008 (compensation in a case where no right to claim nuisance).

18(10) - This article is identical to the equivalent provision in the Southampton-London ESSO pipeline DCO. Acceptable.

18(11) - This article is identical to the equivalent provision in the Southampton-London ESSO pipeline DCO. However, PCC prefers the drafting of Thames Tideway Tunnel Art 20 as the reliance upon s.13 CPA 1965 to enforce possession by means

of a warrant is unjustified and draconian when this should be about agreeing with the owner/occupant protective works. It is clearly not akin to CA or Temp possession either. TTT in the equivalent art 20 set out means of agreement.

18(12) - This article is identical to the equivalent provision in the Southampton-London ESSO pipeline DCO. Acceptable.

### **Art 19 - Authority to survey and investigate the land**

Art 19(1) - By stark contrast to Art 18, the undertaker is able to enter onto land outside the Order limits under this Article; there is also no liability for loss arising due to interruption arising from the survey as under Art 18(7). The equivalent article in the Southampton-London ESSO pipeline DCO, Art 19(7), secured this and therefore Aquind's approach of limiting the drafting to rights of reinstatement and compensation only if the reinstatement is defective is unacceptable.

Art 19(1)(a) - Additional drafting noted. Acceptable.

Art 19(1)(b) - Acceptable provided that the owners and occupiers of land are compensated for "loss or damage arising to them by reason of the exercise of" the rights under this article. See Art 20(7) of the Southampton-London ESSO pipeline DCO where this was achieved.

Art 19(1)(c) - Acceptable provided that the owners and occupiers of land are compensated for "loss or damage arising to them by reason of the exercise of" the rights under this article. See Art 20(7) of the Southampton-London ESSO pipeline DCO where this was achieved.

Art 19(1)(d) - Acceptable provided that the owners and occupiers of land are compensated for "loss or damage arising to them by reason of the exercise of" the rights under this article.

Art 19(2) - Although this is identical to the equivalent provision in the Southampton-London ESSO pipeline DCO, in the context of no compensation for loss or damage arising from the such survey activities, it is not acceptable. There is notably no right to arbitration under Art 19 of the Aquind DCO, so there is no opportunity for a counter-notice to be served on the basis that the survey activities are not apparently "necessary or expedient", even though the works could be equally as disruptive. PCC would prefer, regardless of the compensation position, given the disruptive and invasive nature of the power that 10 workings days' notice is given rather than 14 natural days to account for public holidays.

Art 19(3) - This deviates from the form of the equivalent Southampton-London ESSO pipeline DCO:

Art 19(3)(a) - The words "before or after" should be inserted before the word "entering" to ensure that owners and occupiers can be satisfied if they are challenged; an unduly legalistic approach that only allows an owner/occupier to challenge for authority upon entering the land is likely to lead to tensions in the community.

Art 19(3)(b) - acceptable.



Art 19(4) - This is acceptable, save that:

Art 19(4)(c)-(d) - both sub-paragraphs must be caveated that such consents are subject to the Permit Schemes under Art 9A, and any other consents under Part 3.

Art 19(5) - As alluded to in the comments to Art 19(1), this provision is in stark contrast to the position of the Southampton-London ESSO Pipeline DCO which compensates for "loss and damage" incurred by the survey activities at Art 20(7). The drafting of Aquind's Art 19(5) only allows a claim for compensation to arise in the event of defective reinstatement of the land, rather than any loss through disruption that does not involve damage to the land. This is unacceptable and commercially motivated. The language of "owners and occupiers" in the ESSO Pipeline DCO is to be preferred as the Aquind reference to "person interested in the land" may be used to bar occupiers from claiming, for example as mere licensees.

Art 19(6) - As with Art 19(4)(c)-(d), this paragraph must defer to the Permit Scheme under Art 9A and Part 3. It also needs revision to read properly following amendments.

Art 19(7) - The application of this paragraph would not be objectionable if there were a prospect of proper compensation for loss arising from investigations - it is entirely foreseeable that a person who is told that they are not entitled to compensation might refuse to give possession peaceably.

## Part 5 - Powers of acquisition

### **Art 20 - Compulsory acquisition of land**

This follows closely the model provisions.

### **Art 21 - Statutory authority to override easements and other rights**

This provision is confirming the application of s.158 – a statutory defence to nuisance as confirmed through the making of the Order. The CPA (S.10) doesn't apply to NSIPs but S.152 provides that the principles of the CPA 1965 s.10 are applicable in the assessment of compensation.

### **Art 22 - Time limit for exercise of authority to acquire land compulsorily**

This is for 5 years (reduced from 7); it is consistent with Southampton-London ESSO Pipeline DCO (and other equivalent DCOs).

### **Art 23 - Compulsory acquisition of rights and the imposition of restrictive covenants**

This ensures a proportional approach to acquisition, where rights (rather than outright acquisition) can be secured. The ability to secure rights and transfer them to a statutory undertaker is appropriate given undertakers will, ordinarily, not consent to using their own powers for realigning apparatus. Therefore, the Applicant has to seek all rights required to move existing apparatus and realign it, then pass rights to

relevant SU. The ability for the Applicant to undertake protective works to buildings is common in DCOs.

#### **Art 24 - Private Rights of Way**

The extinguishment of private rights of way (and the modification of compensation provisions) is common in DCOs and prevents the project from being stymied due to such rights. It focuses the requirement for 'diligent inquiry' to be undertaken for the referencing exercise, to ensure such rights are identified and that parties are able to engage in the Examination. However, where rights are claimed at a later date (during delivery) those rights will not prejudice the construction/operation of the project.

#### **Art 25 - Application of the Compulsory Purchase (Vesting Declarations) Act 1981**

Standard provision applying vesting process. Art 25(5)(b) - the period referred to at Art 22 should be 5 years, not 7.

#### **Art 26 - Modification of Part 1 of the Compulsory Purchase Act 1965**

This is a standard provision relating timescales for use of powers to those authorised in the DCO (a minor error – it refers to the 7 years in article 22 in 3(b) – clearly this is 5 years, but the meaning doesn't change).

#### **Art 27 - Acquisition of subsoil and airspace**

This provision limits the acquisition of rights as specified (subsoil and airspace) and also disappplies the ability for claimants to serve a counter or blight notice claiming material detriment if the acquisition is limited to airspace/subsoil – requesting acquisition of retained land. This is a standard provision.

#### **Art 28 - Acquisition of part of certain properties**

Sets out standard provision for an owner-occupier serving a counter-notice (requesting acquisition of the whole where part is proposed to be acquired) once a notice to treat is served. The CPA provision is 28 days but here (the revised provision) is 21 days. PCC suggest this should be amended to 28 days.

#### **Art 29 - Rights under or over streets**

This is a model provision but particular consideration needs to be applied given the nature of the works (laying of HVDC in the road) and the provisions being agreed pursuant to NRSWA. Also need to consider how this provision aligns with the exclusion of PCC (and other highway authority land) from the Book of Reference.

This refers to "subsoil", which is defined in Art 2 as any part of the substrata below the surface of the ground. Highways subsoil as discussed in the December hearings is subsoil below the zone of ordinary use/top two spits. That subsoil is not in all cases owned by the highway authority. This provision however obviously makes specific reference to streets so needs to avoid confusion.

Also, the same highways zone of ordinary use also applies to air space. This needs to be accounted for and clarified in order to avoid infringing on rights vested in the highway authority.

### **Art 30 - Temporary use of land for the construction of the authorised development**

This provision follows standard drafting but there is bespoke drafting in respect of Plot 10-14. This is expanded on in the ExM [REP6- 017] in paragraph 9.23. However, the intention as described in paragraph 9.23 is not evident or explicit in the dDCO. Further, the occupation of all Order land temporarily (prior to vesting) is to ensure that the acquisition is proportional – it should not be solely for the purposes of clearing bentonite breakout. The land should be occupied temporarily (for drilling) with the final rights reflecting the location of the cables.

### **Art 31 - Time Limit for Exercise of authority to temporarily use land for the construction of the authorised development**

This is a standard provision (and the 5 year period is acceptable for the project). However, 31(2) is challenged as it enables the undertaker to stay in occupation of the land 'temporarily' once powers have expired for an unspecified period of time.

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

This article appears largely redundant where New Connection Works Rights have been secured (i.e. along the length of the route). It provides very similar rights (albeit it slightly more restricted and time-limited than the rights afforded under NCWR).

### **Art 33 - Statutory undertakers**

This article is subject to Protective Provisions, so therefore will in reality not likely apply as drafted but will be subject to the terms of the Protective Provisions (as drafted or revised) on the face of the Order, or any side agreements.

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

Standard provision related to costs.

### **Art 35 - No double recovery**

Standard provision that is included in most DCOs and is a key principle of the compensation code. Now confirmed in recent case law.

### **Art 36 - Special Category Land**

Drafting follows principles of other equivalent provisions in DCOs.

## **Part 6 - Operations**

Art 37 - Deemed marine licence under the 2009 Act - no comment from PCC.

## **Part 7 - Miscellaneous and general**

### **Art 38 - Protective provisions**

This article needs to be considered in the context of Art 3. Art 3(1) singles out Sch 2 (which is in any case part of the Order). Sch 2 is no doubt emphasised because it contains the Requirements, but it should not be read that other Schedules such as Sch 13 are any less applicable or binding, but the diffuse references to Schedules of the DCO could give this impression.

### **Art 39 - Application of landlord and tenant law**

This article disapplies any common law or statutory rules relating to leases that the undertaker is party to as specified by Art 39(1)(a)-(b), meaning that any lease will be constrained to construction through its own wording only. PCC suggest that a sub-paragraph is included that obliges the Undertaker to disclose the existence of this article as a recital to any such lease to ensure that third parties are not taken advantage of by such an esoteric provision. PCC is mindful that some of its own tenants (for whom PCC is in no way responsible for negotiating on behalf of) could be affected, particularly Milton Baffins Rovers FC.

### **Art 40 - Operational land for the purposes of the 1990 Act**

This article provides that land to which the Order relates shall be termed operational land for the purposes of s.263 Town and Country Planning Act 1990.

### **Art 41 - Felling or lopping of trees and removal of hedgerows**

PCC objects to this article in principle as it believes that it is best placed to undertake the balancing exercise on whether any particular tree should be felled. PCC notes that this article has been revised to make it substantially the same as the Southampton-London ESSO Pipeline DCO. Without prejudice to that position, the following comments below are made. PCC also notes the draft s.106 agreement that seeks to replace or compensate (by CAVAT payment) highway trees that would fall under this article.

41(1) - Amendments mean that this is now sufficiently certain as to the range of the article's application, which is an improvement.

41(2) - Without prejudice to the general objection to this Article, if the article were maintained then this paragraph would be acceptable.

41(3) - Without prejudice to the general objection to this Article, this would be acceptable in light of Southampton-London ESSO Pipeline DCO.

41(4) - Ditto.

41(5) - Ditto.

41(6) - This article would need to be expressed as being "without prejudice to any alternative compensation mechanism pursuant to a development consent obligation" in recognition of the CAVAT method of compensation to be secured there.

41(7) - Acceptable.

### **Art 42 - Trees subject to tree preservation orders**

PCC objects to this article in principle as it believes that it is best placed to undertake the balancing exercise on whether any particular tree should be felled. Without prejudice to that position, it is acknowledged that this article has been revised to make it substantially the same as the Southampton-London ESSO Pipeline DCO and the following comments are made:

42(1) - Amendments mean that this is now sufficiently certain as to the range of the article's application, which is an improvement.

42(2) - Without prejudice to the general objection to this Article, if the article were maintained then this paragraph would be acceptable.

42(3) - In accordance with its in principle objection, PCC believes that TPO trees should be subject to an application to the LPA for felling as opposed to a deemed consent.

42(4) - Without prejudice to the general objection to this Article, if the article were maintained then this paragraph would be acceptable. Highway Trees covered by the s.106 development consent obligations are not anticipated to be TPO trees.

### **Art 43 - Certification of plans [and documents]<sup>1</sup>, etc.**

PCC acknowledges the formatting correction identified by the ExA in its Schedule of Proposed dDCO changes and agrees with it. PCC has no further comments on this article.

### **Art 44 - Service of notices**

This article is acceptable.

### **Art 45 - Arbitration**

PCC notes the alternative drafting supplied by the ExA and would be content with that drafting, although working days are generally preferred to prevent time lost to public holidays.

### **Art 46 - Procedure in relation to [certain approvals]<sup>2</sup>, etc.**

PCC notes the alternative drafting supplied by the ExA and would be content with that drafting, although working days are generally preferred to prevent time lost to public holidays.

### **Art 47 - Crown rights**

PCC has no comments on this article.

### **Art 48 - Removal of human remains**

PCC has no comments on this article.

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<sup>1</sup> ExA's Schedule of proposed dDCO changes

<sup>2</sup> ExA's Schedule of proposed dDCO changes

## **Schedule 1 - Authorised development**

PCC has repeatedly objected to the inclusion of Fibre Optic Cables as part of the authorised development, most recently in response to the relevant question in ExQ2.

## **Schedule 2 - Requirements**

As a general comment, PCC requires the calculation of days for all Requirements to be by reference to working days to prevent the loss of time due to public holidays.

Definitions: "lead local flood authority" must refer to Portsmouth City Council as well as Hampshire County Council.

## **Requirement 5 - Converter station and optical regeneration station parameters**

Table WN5: PCC does not believe that these parameters have been adequately justified by the applicant. The ExA will be aware of PCC's position in this respect through its representations to date concerning the status of the Fibre Optic Cables ("FOCs") for commercial purposes and the applicant's admission that the commercial aspirations for commercial data mean the ORS is larger than it would be if the FOCs were only required to manage the interconnector.

## **Requirement 6 - Detailed design approval**

Requirement 6(3)(c) - Detailed design approval prior to Works No.4 must include details of the location of the joint bays etc., not indicative locations. This information will be, in any case, required prior to commencement of the relevant works to enable the traffic and transport approvals to be considered under Requirements 17 and 25.

Requirement 6(7) - As in the above paragraph, "indicative" details to be "carried out substantially in accordance" with other approved details is unacceptably loose.

## **Requirement 8 - Implementation and maintenance of landscaping**

Requirement 8(3) - The landscaping at the ORS therefore needs to be within the land in permanent control of the undertaker ("Order land") - or this permanent requirement needs to be delivered by s106. The ExA cannot guarantee or compel the delivery of private agreements to ensure this occurs otherwise.

## **Requirement 9 - Biodiversity management plan**

Requirement 9(4) - Biodiversity management plan must also include direct and embedded mitigation for bats and other referenced species in accordance with ES chapter 16.

## **Requirement 12 - Surface and foul water drainage**

Requirement 12(4) - After the word "notified" insert "at least 5 working days in advance".

## **Requirement 13 - Contaminated land and groundwater**

Requirement 13(1) - As the judgement as to whether works within a phase are likely to cause significant harm is vesting with the undertaker, this requirement needs an obligation similar to Requirement 12(4) that the undertaker must notify the LPA if

they believe the works in any phase will not include works which are likely to cause significant harm.

### **Requirement 18 - Construction hours**

Requirement 18(3) - This should be deleted. As a final CEMP will have been approved prior to any works, and 18(1) allows a final CEMP to depart from the standard working hours there is no need to refer back to the OOCEMP which will have been superseded by a final CEMP (albeit the final CEMPs will be in broad accordance with the OOCEMP).

Requirement 18(4)(b) - "oversized deliveries" should be defined within Schedule 2.

### **Requirement 22 - Restoration of land used temporarily for construction**

This requirement is too loosely worded and ought to be broken down into separate paragraphs to address separate elements. The phased approach to commencing development is not deployed in relation to reinstatement. Such an approach would ensure that land (much of which is open space) is returned in a reinstated form at the earliest opportunity, rather than deferring the need to consider it until the completion of the authorised development (and then allowing 12 further months for completion).

Requirement 22's expectation that land will be "reinstated to its former condition" does not sit well with Art 30(4) providing that the undertaker is not required to, for example, "replace a building removed under this article".

It is also queried whether the reference to "MLWS" should be "MHWS".

### **Requirement 26 - Guarantees in respect of the payment of compensation etc.**

The requirement for a bond is welcomed (but at this moment PCC is unable to comment on whether the sum is sufficient). However, PCC queries why a bond or security cannot be provided now

PCC is content with options (a)-(e) but is not convinced that a parent company guarantee or "a person of sufficient financial standing" would be a suitably enduring form of security and so they should be deleted.

### **Requirement 27 - Employment and skills plan**

PCC reserves its position on this Requirement and will provide comment at ISH4.  
**Schedule 3 - Procedure for approvals, consent and appeals [as suggested by the ExA]**

Para 2(1) - nine weeks is more generous, resetting the clock where further info is requested in time (within 10 business days of receipt of the application (see para 3(2))).

Para 2(4)(b) - The final words "the application is to be taken to have been refused by the discharging authority at the end of that period." need to be brought down a line and indenting formatted to recognise the 2 routes to the deemed refusal properly.

Para 3(2)&(4) - It appears problematic to deem information to be substantively complete when it is not - if at, say, day 20 it is apparent that further info is required and the discharging authority can only ask for further info (to which it will not be "entitled" (3(4)) and may therefore be ignored/declined), the discharging authority will need to refuse the application for lack of substantively complete information. It can't be *Wednesbury* reasonable to pretend that information is complete when it is not.

Para 3(3) - If it is clear from the wording of the relevant article or requirement that a statutory consultee is concerned, the undertaker should issue the documentation to both parties simultaneously.

Para 4(1)(a) - appeal against refusal, deemed refusal and particular conditions is standard.

Para 4(4) - typo: "part" → party

Para 4(11) - Will a town planner always be appropriate for, say, highways matters?

### General Concerns:

PCC submits that a *Grampian* requirement is needed to prevent commencement of development unless and until Aquind can demonstrate to the Secretary of State that it holds all requisite French consents to construct the French half of the interconnector. This is in particular due to the recent decision of Ofgem and their French counterpart, CRE, that the partial exemption request cannot proceed owing to the UK ceasing to benefit from transitional arrangements following departure from the European Union as of 1 January 2021. As such the relevant regulations do not apply. This also brings into question the ACER appeal and reconsideration of the first exemption application as again the regulations no longer apply. It is clear that Aquind cannot operate in France without an exemption. This brings into serious question the whole project.

PCC would also draw the ExA's attention to Requirement 26 of the Southampton-London ESSO Pipeline DCO with respect to the payment of fees for discharge applications.

In connection with the need for resourcing the authorities' response to the DCO, PCC would also highlight Art 60 of the Thames Tideway Tunnel and the unilateral obligations that it secured in relation to resourcing the discharge of requirements. It is due to the complexity of these provisions that PCC reserves its position in relation to the recent addition of Art 8(4) to the Aquind DCO.