From: [redacted]
To: Aquind Interconnector
Cc: [redacted]
Subject: AQUIND (EN020022) – Mr. Geoffrey Carpenter and Mr. Peter Carpenter (ID: 20025030) [BMG-Legal.FID44973420]
Date: 12 August 2021 23:21:40
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Dear Sirs

Application by AQUIND Limited for an Order granting Development Consent for the AQUIND Interconnector Project (PINS reference: EN020022)

Mr. Geoffrey Carpenter and Mr. Peter Carpenter (Registration Identification Number: 20025030)

We act for Mr Geoffrey Carpenter and Mr Peter Carpenter (our "**Clients**") who are the freehold interest owners of Little Denmead Farm (and are Interested Parties).

We note that the Secretary of State received responses from the Applicant and other Interested Parties to his letter of 13 July 2021 requesting further information and that he is reviewing these responses.

We refer to the invitation from the Secretary of State for the Department for Business, Energy & Industrial Strategy dated 28 July 2021 (published on the PINS website), for comments to be submitted by Interested Parties on the Applicant's responses to his consultation of 13 July 2021. We also note the Secretary of State requires those comments to be submitted by today (12 August).

Accordingly, we enclose our Clients' Response.

We should be grateful if PINS could confirm safe receipt to all persons copied to this email.

Kind regards.
David

David Kianizadeh
Solicitor
For and on behalf of Blake Morgan LLP

Date: 12 August 2021

Application by Aquind Limited for a Development Consent Order for the 'Aquind Interconnector' electricity line between Great Britain and France (PINS reference: EN020022)

Submissions with respect to the Applicant's additional information sent to the Secretary of State on 28 July 2021

For the Secretary of State

On behalf of

Mr. Geoffrey Carpenter & Mr. Peter Carpenter

Registration Identification Number: 20025030

Submitted in relation to the Secretary of State's request for comments dated 28 July 2021

Blake Morgan LLP

6 New Street Square

London EC4A 3DJ

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Ref: 584927-6

INTRODUCTION

1. We act for Mr Geoffrey Carpenter and Mr Peter Carpenter (the "Affected Parties").

2. The Affected Parties jointly own the freehold interest in land known as Little Denmead Farm, [redacted] [redacted].

3. The Applicant desires to compulsory acquire the majority of the private land of the Affected Parties for the temporary construction works for the erection of a Convertor Station, a below ground electricity cables, and landscaping works, and for the permanent situation of that Station on the considerably smaller area of the Affected Parties' land at its Northern end, the permanent below ground situation of the cables, and permanent maintenance of landscaping and accesses.

4. The cables would have fibre optic cables related to the electricity bearing cables by dint of their terminating in the Convertor Station and conveying data (via light) for intra-Station communications and data derived from the monitoring of the adjacent electricity bearing cables. The cables are also currently proposed to contain fiber optic cables that have surplus capacity to be used for commercial telecommunication purposes.

5. The Application is wholly in outline and contains no details at all, instead relying on notional parameter volumes inside of which the Station would be constructed and the electricity cables run. The outline nature of the Application means that there is no detailed evidence before the Secretary of State beyond aspirations or merely illustrative material.

6. The area covered by plot numbers 1-32, 1-31(a) (being Stoneacre Copse), 1-38, 1-51, 1-57, 1-69, 1-70, 1-71, and 1-72 falls within the Affected Parties' freehold interest. The Affected Parties also benefit from a right of way over plot numbers 1-60, 1-63 and 1-65 (also covered by Footpath 4 and Footpath 16).

7. A key dispute developed during the Examination Period was about the scope and extent of the development sought to be authorised, and the scope and extent of the compulsory purchase powers sought.

8. Because the Application seeks compulsory acquisition powers, the Secretary of State's Planning Act 2008 Guidance on Compulsory Purchase (September 2013) ("CPO Guidance") applies, and so do the common law protections for the Affected Parties (all of them). Paragraph 15 of that CPO Guidance recognises an overlap between the development and the acquisition powers and that is the position here. Paragraph 16 of the CPO Guidance recognises that whereas a DCO may be granted, circumstances can reasonably justify not including any acquisition powers as the land is not "necessary" "for" the "purposes of the Scheme". Or, that the Scheme may be modified – for example in a way that "modifies" the requirement for land otherwise subject to acquisition, or that some or all acquisition powers are removed.

9. The heart of the dispute lies in two elements:

    a) the inclusion in *the development* of the commercial telecommunications "use" (and on the Affected Parties' land, also 'operational development') – that is use "for" data transmission not related to nor "for" the purposes of a project in the energy field (but envisaged to be

privately leased to third parties such as Google, Facebook, Netflix, or finance data users for exclusively private gain); and

b) the permanent acquisition of land only needed for the *temporary* construction works (including landscaping and access works), which, once complete, the Affected Parties submit that that extent of land be returned to it's in a post-construction restored state for its original agricultural use, meaning that the *permanent* land take would therefore shrink to the footprint of the Convertor Station (and below ground linear volume containing electricity cables). Maintenance and emergency access is afforded

THE SECRETARY OF STATES LETTER OF 13 JULY 2021

10. We refer to Secretary of State's letter dated 13 July 2021 requesting the Applicant to provide further information in connection with various matters. One of the matters covered by this letter related to surplus fibre optic capacity. Section 6 of this letter stated:

"*Fibre-optic surplus capacity*

6. The Secretary of State notes that during the examination objections were raised as to the inclusion in the development consent order of the telecommunications buildings, the commercial use of the surplus capacity in the fibre optic cable and part of the optical regeneration station for commercial telecommunications. Without prejudice to the Secretary of State's decision on the proposed development, the Applicant is asked to provide a revised draft Development Consent Order excluding those elements which relate to commercial telecommunications including as they may affect the compulsory purchase provisions."

11. On 22 July 2021, we submitted a response to the Secretary of State's letter of 13 July 2021, a copy of the draft DCO that we had previously submitted at Deadline 8 of the Examination that excluded those elements which relate to commercial telecommunications, including as they may affect the compulsory acquisition provisions. A copy of our letter and the draft DCO we forwarded to the Secretary of State is attached at **Schedule 1** to this Response.

12. On 28 July 2021, Aquind (the "**Applicant**") submitted various documents in response to the Secretary of State's letter of 13 July 2021.

13. On 28 July 2021, a message was posted on the National Infrastructure Planning website pages for this DCO application, stating: *" The Secretary of State has received responses from the Applicant and other Interested Parties to his letter of 13 July 2021 requesting further information and is reviewing these responses. The Secretary of State invites comments from Interested Parties on the responses to his consultation by 12 August 2021"*

14. This Response is submitted on behalf of the Affected Parties in response to the Secretary of State's request for comments by 12 August 2021.

15. This Response is divided into the following Sections:

SECTION A – EXECUTIVE SUMMARY

SECTION B – SECTIONS 6-7 OF THE REQUEST, AND SCHEME MODIFICATIONS BY ALTERNATIVES

SECTION C – THE AFFECTED PARTIES' PARTICULAR RESPONSE TO THE EXCLUSION OF COMMERCIAL TELECOMMUNICATION APPARATUS AND USE

SECTION D – NEW MATERIAL AND THE LAW RELATING TO THE EXAMINATION PERIOD AND EIA UPDATE

SECTION E - THE EXCISING OF USE OF LAND FOR COMMERCIAL TELECOMMUNICATIONS

SECTION F - MICRO-SITING OF THE CONVERTER STATION

SECTION G – PROGRESS ON AGREEING PROTECTIVE PROVISIONS

SECTION H - ALTERNATIVES - PROTECTIVE PROVISIONS, RELATED UNILATERAL UNDERTAKING, AND PROPOSED AMENDMENTS TO THE DRAFT DCO SUBMITTED BY THE AFFECTED PARTIES

SECTION A - EXECUTIVE SUMMARY

16. The Affected Parties have submitted detailed Written Representations to the Secretary of State through his Examination Period of his determination of the Application for an outline DCO with related CPO powers. The outline nature of the DCO results in it being inherently vague and inchoate and so an Affected Party cannot improve on that position proposed by the Applicant. That is, any criticism by the Applicant of third parties' alternatives operates in reverse to reduce any compelling case for acquisition.

17. In that context, the Affected Parties' Deadline 8 Submission of a revised draft DCO (document reference [REP8-105]) at **Schedule 1** hereto reflects the Affected Parties' position in law and fact in relation to that outline DCO at the end of the Examination period.

18. The Secretary of State has requested on the 28 July 2021 Responses to the Further Information and Representations by the Applicant submitted after the event of the close of the statutory period of Examination of the Application under section 98(1) of the Planning Act 2008 ("PA 2008").

19. We recognise that section 103 of the PA 2008 attributes to the Secretary of State the function of determining the Application. Section 104(3) requires him to decide the Application in accordance with any relevant NPS (except to the extent that (4)-(8) applies). Here, EN-1 is said to apply. Section 114 PA 2008 also allows the Secretary of State to make an order granting development consent on terms materially different from those proposed in the application, as also clarified by Bob Neil MP who was the Secretary of State on 28 November 2011 in his letter to Sir Michael Pitt on the scope of section 114 PA 2008 in the context of the Brig y Cwm DCO application.

20. The Secretary of State's requests in his letter of 13 July 2021, in essence, covers matters that can be characterised as "alternatives" to the Application scheme, because they result to modify the development, and the CPO provisions, so as to ensure minimal permanent acquisition of the Affected Parties' land, only temporary use for construction of a key part of the development: a Converter Station, and ensure a DCO that is not ultra vires but that aligns with the relevant law, the NPS, and the Secretary of State's CPO Guidance.

21. The recent case of *R (oao SAVE Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2021] EWHC 2161 (Admin) (30 July 2021) has highlighted the enhanced role of Officials providing the Secretary of State with relevant information, a precis, and also the correct approach to "alternatives". See **Schedule 2,** to this Response, which contains a copy of the Stonehenge case. The Applicant has previously misdirected the ExA to rely on bullet point 8 of paragraph 4.4.3 of EN-1 (and that misdirection resulted to reverse "the onus" required in law by the *Prest* case to be attributed to the Applicant and Secretary of State to evaluate alternatives). Since the Court quashed the Stonehenge DCO for a legally erroneous approach to "alternatives", and since the Court highlighted the importance of Official's precis as the main document on which the Secretary of State might rely on himself to decide an application, we have provided in this Response a precis to assist the Officials (and in turn the Secretary of State) in reaching a lawful decision for the reasons set out below. The precis is a summary of detailed Representations previously made on behalf of the Affected Parties to the ExA but viewed in light of the *Stonehenge* case. This is important because it may be that the ExA has (pre-*Stonehenge c*ase) erred in

its evaluation **of all of the CPO objections** (including the Affected Parties) in reliance on the Applicant's misdirection as to the correct test relating to the evaluation of alternatives, and, in so doing, the ExA has undertaken a totally meaningless evaluation of all CPO objections such that the Secretary of State cannot lawfully rely on that prior evaluation. Given the *Stonehenge* case, the Secretary of State has now an opportunity before his decision to lawfully evaluate alternatives in line with that case, and the resulting following options:

- **Option 1 –** the Secretary of State refuses the Application (DCO and CPO as they overlap) because the Applicant has led the ExA into error in its evaluation of all CPO related matters throughout the Application area and so rendered the Examination Hearing process meaningless in the consideration of Objections to any CPO.
- **Option 2 -** disregard the sections of the Examining Authority's report relating to compulsory acquisition powers affecting the Affected Parties' interests (which includes Little Denmead Farm and Stoneacre Copse), and grants the DCO without those CPO powers in line with paragraph 16 of the Planning Act 2008: Guidance on CPO (September 2013); or
- **Option 3 -** the Secretary of State disregards the sections of the Examining Authority's report relating to compulsory acquisition of the Affected Parties' interests, and the Secretary of State *himself* evaluates all the alternatives proposed by the Affected Parties (which will include those relating to commercial telecommunications) (in line with the approach of the Stonehenge case law but that was not done in that case but might be done in this case) by examining all the relevant documents and source material in the Examination Library himself, applying the *Prest* Test and the *Sainsburys* case, and reaching his own findings and conclusions, having resolved any doubts in favour of the Affected Parties and against the Applicant. We would however question whether there would be enough time available within the statutory period for the Secretary of State to himself (as required by section 103 of the PA 2008 and the *Stonehenge* case (even if helped by Officials); or
- **Option 4** – the Secretary of State accepts it is not able to evaluate whether the use of compulsory acquisition powers in relation to the Affected Parties' interests is indeed a measure of last resort (as required by the CPO Guidance), and decides that the only way for the Secretary of State to be able to grant the DCO with CPO powers is for the Secretary of State to modify the scheme with respect to the Affected Parties' interests, and adopt the Affected Parties' Proposed Protective Provisions supplied at Deadline 8 and not criticized by the Applicant, adopt the signed DCO obligation and related amendments to the draft DCO excising the commercial telecommunications and related operational development, all of which are interconnected and were submitted at Deadline 8.

22. To assist the Secretary of State, we have addressed the Response by reference to his section headings in his letter.

SECTION B – SECTIONS 6-7 OF THE REQUEST, AND SCHEME MODIFICATIONS BY ALTERNATIVES

23. Section 6 of the Secretary of State's letter dated 13 July 2021 requests further information from the Applicant in relation to commercial telecommunications. It states:

    "***Fibre-optic surplus capacity***

    6. The Secretary of State notes that during the examination objections were raised as to the inclusion in the development consent order of the telecommunications buildings, the commercial use of the surplus capacity in the fibre optic cable and part of the optical regeneration station for commercial telecommunications. Without prejudice to the Secretary of State's decision on the proposed development, the Applicant is asked to provide a revised draft Development Consent Order excluding those elements which relate to commercial telecommunications including as they may affect the compulsory purchase provisions."

24. Section 7 addresses "micro-siting", i.e. ambivalence of which of two parameter volumes is necessary.

25. Further, Section 8 requests an update on consideration of the Protective Provisions.

26. The Affected Parties made detailed representations on these and their basis to the ExA during the Examination period and a precis and update follows here.

27. As paragraph 15 of the Secretary of States' Planning Act 2008: Guidance on CPO (September 2013)) recognises, in a CPO situation, the scheme may overlap with CPO provisions and here that is the case. Paragraph 15 states:

    "*In practice, there is likely to be some overlap between the factors that the Secretary of State must have regard to when considering whether to grant development consent, and the factors that must be taken into account when considering whether to authorise any proposed compulsory acquisition of land.*"

28. In essence, the Affected Parties' Deadline 8 Protective Provisions (document reference [REP8-108]), (and related development consent planning obligation (document reference [REP095])) were a form of "alternative" in that they would enable the DCO to contain CPO provisions enabling the project (as refined by the Affected Parties' DCO draft refinements submitted at Deadline 8 in document reference REP8-105, including to exclude – because it is ultra vires the Planning Act 2008 - private commercial use of fibre optic cables otherwise then "for" a project in the field of energy, whilst simultaneously ensuring the reduction of the permanent land take from the Affected Parties, after the temporary construction processes desired to be exercised on their private land, had concluded. .

29. Regrettably, the Applicant has pointedly chosen to not engage with the Affected Parties and "explore" (as required of the Applicant by paragraph 8 of the Secretary of States' Planning Act 2008: Guidance on CPO (September 2013)) "all reasonable alternatives" and also to only seek CPO powers as a last resort and not as a first resort. Instead, the Applicant has adopted a somewhat "silo" mentality of making un-evidenced and un-scrutinised assertions, seeking to deliberately mis-describe the Affected Parties' case, and seeking to misdirect the ExA that the *Applicant* has no obligation to itself prove its case (including the use of CPO as a last resort) by demonstrating that all reasonable alternatives have been explored . For

example, the Applicant wrongly asserts y (in its submissions to the Secretary of State on 28 July 2021) and has not submitted any explanation of or evidence of the following:

a) the drainage for its *temporary* haul road that is proposed to run across the Affected Parties' land justifies *permanent* compulsory land acquisition (but that is an evidential *non-sequitur*;

b) the proposed alternative use of a perimeter access track running along the eastern boundary of Little Denmead Farm (offered as an alternative by the Affected Parties in a signed DCO Obligation (document reference [REP8-095])) by envisaged maintenance vans is somehow "unsafe" for the type of vehicles used during the temporary construction period; and

c) the Affected Parties envisage use of the perimeter road by very large vehicles (when they do not and such vehicle access is provided for under the Affected Parties' Deadline 8 Protective Provisions [REP8-108]).

30. As paragraph 16 of the Secretary of States' Planning Act 2008: Guidance on CPO (September 2013)) recognises, elements of the scheme are ultra vires, on the Applicant's own evidence, when they are merely desirable (and so cannot be necessary), or otherwise not necessary or compellingly so.

The Correct Approach to Alternatives and Aquind's Misdirection to the ExA

31. The recent case of *R(oao SAVE Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2021] EWHC 2161 (Admin) has thrown into stark relief the real potential for a fundamental flaw in the entire evaluation by the ExA of the Objections to the CPO provisions (and, by overlap) to the related elements of the DCO. This is because of what the Applicant represented to the Secretary of State (and ExA) in paragraphs 3.5 and 3.6 of the document entitled "*Applicant's Response to Deadline 7 and 7a Submissions – Appendix B Applicant's Response to the Submissions on Behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter at Deadline 7*", (document reference REP7c-013 - 7.9.39.2). That document sets out the Applicant's own approach to assessing alternatives put forward by third parties during examination. In essence, the Applicant asserted that the wrong legal test be applied to consideration of the Affected Parties' representations and their Protective Provisions. The Applicant asserted that the relevant test comprised the eight bullet points in paragraph 4.4.3 of EN-1 whereas that attributes under bullet 8 "the onus" onto third parties in relation to alternatives. For the reasons set out below, if the ExA has also adopted that test, then it has fundamentally erred in its evaluation of the Affected Parties' Objections and position throughout the Examination, including as to its "alternatives" manifested as the draft DCO refinements (as set out in document reference [REP8-105]) and its Protective Provisions (document reference [REP8-108]) which also must be read in conjunction with the Affected Parties' signed DCO Obligation submitted at Deadline 8 (document reference [REP8-095]).

32. The High Court in that case quashed the DCO for a new road past Stonehenge for want of lawful evaluation (and conclusions) *by the Secretary of State* himself of "alternatives" resulting from a misdirection to, and followed by, the ExA from the applicant Highways England (and the adherence to that misdirection by the Secretary of State). That case also highlighted the enhanced role of Officials in the DCO decision making process, and their "precis" given the law relating to what the Secretary of State actually knows and does not actually know.

33. Consequently, this Response to the submissions made by the Applicant on 28 July 2021 is also a precis to assist Officials and the Secretary of State to seek to reach a lawful decision (whatever that decision may be) rather than an unlawful decision that would be likely to be quashed as a result of the misdirection detailed below.

34. Since the Secretary of State issued his letter of the 13th July 2021, the High Court has quashed (on 30 July 2021) the outline DCO authorising the construction of the A303 near to Stonehenge in *R(oao SAVE Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2021] EWHC 2161 (Admin). We attach that Judgment in **Schedule 2** of this Response.

35. The Court quashed the outline DCO for the proposed Stonehenge scheme because the Secretary of State in that case erred in his consideration of *alternatives* because it was incomplete and unconcluded and he acted irrationally. That case supports the submissions of the Affected Parties and pays close attention because, in our view, it shows the position of the instant Secretary of State but in advance of his determination where he has the opportunity to himself lawfully evaluate the Applicant's case, alternatives, and the Affected Parties' proposals in their actual context of an outline DCO devoid of detailed information and that relies on the terms of the DCO and parameter volumes alone.

36. The Court in the Stonehenge case also highlighted the particular position of the Secretary of State in his own determination of the Application and his reliance on the "precis" of Civil Servants to him of the *evidence* and of his *own* consideration of source documents and the environmental statement. The Court noted that the "opportunity" to access the Examination Library was insufficient in law to entitle the conclusion to be drawn that the Secretary of State *himself* knew of the facts relevant to his determination, and that he was highly reliant on the Civil Servant summaries and documents actually in front of him. That is pertinent here.

37. For example:

    a) At [34], by Regulation 5(5) of 2017/572:

        The Secretary of State or relevant authority, as the case may be, must ensure that they have, or have access as necessary to, sufficient expertise to examine the environmental statement or updated environmental statement, as appropriate."

    This provision acknowledges that a Minister or relevant authority may not themselves have "sufficient expertise" to examine the ES, particularly as such a document may cover a wide range of specialist topics. It is sufficient that the decision-maker has "access" to sufficient expertise for that purpose. That expertise will include the officials within the Minister's department and also the Panel of Inspectors reporting on its assessment of the environmental information and of the statutory examination of the application for a DCO.

    b) At [62]: (Emphasis added)

    On the issue of whether as a matter of fact a Minister did take into account a particular factor, it is well-established that a Minister only has regard to matters of which he knows or which are drawn to his attention, for example in briefing material or by a precis.

c) At [64]: (Emphasis added)

> *"Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department. No complaint could be made if the departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law. "*
>
> *…*
>
> *"The Department does not have to draw the Minister's attention to every communication it receives and to every fact its officers know. Part of a Department's function is to undertake an analysis, evaluation and precis of material to which the Minister is bound to have regard or to which the Minister may wish to have regard in making decisions. The press of ministerial business necessitates efficient performance of that departmental function. The consequence of supplying a departmental analysis, evaluation and precis is, of course, that the Minister's appreciation of a case depends to a great extent upon the appreciation made by his Department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function. A Minister may retain his power to make a decision while relying on his Department to draw his attention to the salient facts. But if his Department fails to do so, and the validity of the Minister's decision depends upon his having had regard to the salient facts, his ignorance of the facts does not protect the decision. The Parliament can be taken to intend that the Minister will retain control of the process of decision-making while being assisted to make the decision by departmental analysis, evaluation and precis of the material relevant to that decision."*

d) At [65]: (Emphasis added)

> *"It is plain from these authorities that in considering the legal adequacy of the briefing provided to a Minister, it is necessary to have regard to the nature, scope and purpose of the legislation in question, including any matters expressly required to be taken into account, and the nature and extent of any matter which has not been addressed. It is also lawful for a ministerial decision to be reached following evaluation and analysis by experienced officials in the department and a briefing which provides a precis of material which the Minister is "bound to have regard to." To some extent, the preparation of a ministerial briefing involves judgment on the part of officials about the material to be included. In this respect, there is a broad analogy to be drawn with the approach taken by the courts to challenges to an officer's report prepared to brief the members of a local authority's committee on a planning application. "*

e) At [66]: (Emphasis added)

"Regulation 5(5) of the EIA Regulations 2017 does not impinge upon the legal principles above on the extent of the matters which a Minister may be taken to have known about when he reaches a decision. The adequacy of the expertise of Inspectors or officials is not to be confused with the legal adequacy of the briefing materials made available to a Minister to inform him of all the matters which he is legally obliged to take into account."

f) At [177]: (Emphasis added)

"Notwithstanding regulation 21(1) of the EIA Regulations 2017 and the contents of DL11, the defendant's legal team informed the court that the ES and HIA were not before Ministers when they were considering the Panel's report and the determination of the application for development consent. It is said that "the ES and HIA were considered by officials in providing their advice and the ES and HIA formed part of the examination library accessible from the examination website". However, as is clear from the case law cited in [62] to [65] above, what was within the knowledge of officials is not to be treated on that account as having been within the Minister's knowledge, unless it was drawn to his attention in a briefing or precis."

g) At [178]: (Emphasis added)

"That same case law suggests that in the real world a Minister cannot be expected to read every line of an environmental statement and all the environmental information generated during an examination or inquiry process. But nevertheless, an adequate precis and briefing is required. Depending on the circumstances, that requirement may be met, wholly or in part, by the report of a Panel or an Inspector (for example, where the Secretary of State agrees with the relevant parts of that report). It may also be provided in the draft decision letter which is submitted to the decision-maker for his consideration or in any additional briefing. That would be necessary in a typical case where only one or a small number of heritage assets are impacted. The requirement to take into account the impact on the significance of each relevant asset still applies in an atypical case, such as the present one, where a very large number of heritage assets is involved. It will be noted, however, that although regulation 21(1) requires the decision-maker to take into account the environmental information in a case, it does not require him to give his own separate assessment in relation to each effect or asset."

h) At [179]: (Emphasis added)

"Here, the SST did receive a precis of the ES and HIA in so far as the Panel addressed those documents in its report. But the SST did not receive a precis of, or any briefing on, the parts of those documents relating to impacts on heritage assets which the Panel accepted but did not summarise in its reports. This gap is not filled by relying upon the views of IP2 in the Examination because, understandably, they did not see it as being necessary for them to provide a precis of the work on heritage impacts in the ES and in the HIA. Mr Wolfe QC is therefore right to say that the SST did not take into account the appraisal in the ES and HIA of those additional assets, and therefore did not form any conclusion upon the impacts upon their significance, whether in agreement or disagreement."

i) At [180]:

> *"In my judgment this involved a material error of law.… We have no evidence as to what officials thought about those assessments. More pertinently, the decision letter drafted by officials (which was not materially different from the final document – see [67] above) was completely silent about those assessments. The draft decision letter did not say that they had been considered and were accepted, or otherwise. The court was not shown anything in the decision letter, or the briefing, which could be said to summarise such matters. In these circumstances, the SST was not given legally sufficient material to be able lawfully to carry out the "heritage" balancing exercise required by paragraph 5.134 of the NPSNN and the overall balancing exercise required by s.104 of the PA 2008. In those balancing exercises the SST was obliged to take into account the impacts on the significance of all designated heritage assets affected so that they were weighed, without, of course, having to give reasons which went through all of them one by one."*

38. In essence, the case highlights that the *function* of determining whether to grant a DCO, on what terms, and on what <u>evidence</u>, remains exclusively with the Secretary of State *himself*. See also section 103(1): *"The Secretary of State has the function of deciding an application for an order granting development consent".* And that notwithstanding the prior Examination of the Application and Report, that a disconnect may arise between the ExA Report and its *own* evaluation and also of the underlying source evidence base and the Officials provision to the Minister of all relevant evidence on which he actually relies to make his own decision. He can only rely, in law, on the *evidence actually provided to him* by his officials. If there are gaps in the evidence provided by officials to him, or officials have not undertaken evaluations or conclusions required to be drawn, then, if the Secretary of State himself also does not himself lawfully evaluate and draw relevant conclusions on the relevant evidence, then the decision will be quashed for legal error. That happened in the above case about an outline DCO for a road scheme where alternatives were in issue during the Examination Period.

39. The Court also held that the Secretary of State erred in his (incomplete) consideration of <u>alternatives</u>. See paragraphs 242 et seq. We address that in more detail below. The complaint, at [242] was that: (Emphasis added)

> *"The focus of the claimant's oral submissions was that the defendant <u>failed to consider the relative merits of two alternative schemes for addressing the harm resulting</u> from the western cutting and portal, firstly, to cover approximately 800m of the cutting and secondly, to extend the bored tunnel so that the two portals are located outside the western boundary of the WHS."*

40. In essence, the ExA itself erred in that DCO evaluation by confining itself to the consideration and evaluation of "alternatives" under NPSNN, paragraphs 4.26 and 4.27, to <u>exclusive</u> reliance on the "options appraisal" in paragraph 4.27 and so did not *itself* undertake the *different* evaluation of "alternatives" as required by paragraph 4.26: "Applicants should comply with *all legal requirements and any policy requirements* set out in this NPS on the assessment of alternatives". See [244], [246], [258], [288] and [290]. The Court held (at [288]), that case law engendered relevant principles about alternatives and was not displaced by the NPSNN. The genesis of the legal error lay in the Representations of Highways

England to the ExA during the Examination Period that then were relied on by the ExA (and Secretary of State) to misdirect themselves in law.

41. The same type of misdirection legal error appears to the Affected Party in the instant Application to be emerging in the consideration and evaluation of this outline DCO. In that outline DCO, the result of that error was – after the event and when reviewed by the Court - that the balance was not struck lawfully. Importantly, at [284], the Court held that the "planning balance was not struck lawfully" as a result of the *misdirection* of law by the ExA (and the Secretary of State in reliance of the ExA) as a result of the submissions of Highways England during the Examination Period. At [245] – [246], [259], [285] – [289], the Court held that: (Emphasis added)

> *"245. IP1's case, applying paragraph 4.26 to 4.27 of the NPSNN, was that the <u>only</u> consideration of alternatives relevant to the Examination were:*
>
> *i) "to be satisfied that an options appraisal has taken place,"*
>
> *ii) compliance with the EIA Regulations 2017 in relation to the main alternatives studied by the applicant and the main reasons for the applicant's decision to choose the scheme, and*
>
> *iii) alternatives to the compulsory acquisition of land (PR 5.4.3 and 5.4.60).*
>
> *246. At PR 5.4.56 the Panel stated that IP1 had correctly identified all legal and policy requirements relating to the assessment of alternatives…However the Panel did not consider any policy requirements relating to cultural heritage impacts which might make it appropriate or even necessary to reach a conclusion on the relative merits of IP1's scheme and alternatives to it….*
>
> *259. It is necessary to return to the NPSNN. Paragraph 4.26 begins by stating a general principle, that an applicant should comply with "all legal requirements" and "any policy requirements set out in this NPS" on the assessment of alternatives. The NPSNN goes on to set out requirements which should be considered "in particular," namely the EIA Directive and the Water Framework Directive and "policy requirements in the NPS for the consideration of alternatives." But those instances are not exhaustive. "Legal requirements" include any arising from judicial principles set out in case law as well as the Habitats Regulations 2017. Similarly, the references in paragraph 4.26 to developments in National Parks, the Norfolk Broads and AONBs and flood risk assessment are given only as examples of policy requirements for the assessment of alternatives….*
>
> *285. … it has been accepted in this case that alternatives should be considered in accordance with paragraphs 4.26 and 4.27 of the NPSNN. But the Panel and the SST misdirected themselves in concluding that the carrying out of the options appraisal for the purposes of the RIS made it unnecessary for them to consider the merits of alternatives for themselves…*
>
> *287. … it is no answer for the defendant to say that DL 11 records that the SST has had regard to the "environmental information" as defined in regulation 3(1) of the EIA Regulations 2017. Compliance with a requirement to take information into account does not address the specific obligation in the circumstances of this case to compare the relative merits of the alternative tunnel options.*
>
> *288. … it is no answer for the defendant to say that in DL 85 the SST found that the proposed scheme was in accordance with the NPSNN and so s.104(7) of the PA 2008 may not be used as a "back door" for challenging the policy in <u>paragraph 4.27 of the NPSNN</u>. I have previously explained*

why paragraph 4.27 does not override paragraph 4.26 of the NPSNN, and _does not disapply the common law principles_ *on when alternatives are an obviously material consideration."*

42. Thus, properly interpreted, NPSNN, paragraph 4.26, to require "*all legal requirements and any policy requirements"* to be satisfied also, and those requirements included criteria established under case law (for example, the *Trust House Forte* case, that also applied to national infrastructure projects). The failure by the ExA (and in turn, under section 103), the Secretary of State (in reliance on the ExA), to itself and himself evaluate alternatives under other policy and other legal requirements was an error of law vitiating the determination under section 114 of the PA 2008 and resulting in the quashing of that DCO.

43. _The similarity of the issues in the *Stonehenge* case and the instant Application are striking: because the instant case also concerns a misdirection promulgated by the Applicant Aquind in its Representations to the ExA (just as Highways England did to the ExA in that *Stonehenge* case) and, it is anticipated, that misdirection may be also relied on by the ExA (as in Stonehenge). Unlike Stonehenge, in this Application there appears to be an opportunity for the Secretary of State to properly direct himself in law (and follow the Affected Parties' approach that is correct in law), but that may result in differences between him and the ExA that, in turn, require the Minister himself under section 103 to evaluate the source evidence of the Examination Library if the ExA Report does show that it misdirected itself in its own *evaluation* of the *evidence* before it and heard by it._

44. With that in mind, the Affected Parties' have also sought to identify (subject to finance matters previously raised in detailed submissions during the Examination) a legally permissible route to granting the DCO (as modified) with CPO provisions (as modified) and that permissible route requires the Secretary of State to grant a DCO as modified by the Affected Parties' tracked changed DCO (previously submitted during Deadline 8 of the Examination Period (document reference [REP8-105]), and re-attached for convenience at **Schedule 1** to this Response) together with the Protective Provisions provided by the Affected Parties at Deadline 8 of the Examination (document reference [REP108]) (a copy of which is at **Schedule 3** to this Response also), and a signed DCO Obligation also submitted at Deadline 8 (document reference [REP8-095]) (a copy of which is at **Schedule 4** to this Response). This is because, in answer to the key issues identified in the Introduction above, the modified DCO (as proposed by the Affected Parties at Deadline 8 in document reference [REP8-105]) ensures the CPO is not ultra vires under the PA 2008, and the Affected Parties' Deadline 8 Protective Provisions (document reference [REP8-108]) and Deadline 8 DCO Obligation (document reference [REP8-095]) ensure that (notwithstanding the breaches by the Applicant of guidance and legal requirements), those documents supply a rational alternative in the context of an outline (and so necessarily inherently inchoate and vague) DCO in relation to which necessarily parasitic and thus also vague CPO provisions are sought. As a result, this will enable CPO provisions (with those Protective Provisions) to be lawfully included by the Secretary of State in this matter *because* – as in paragraph 15 of the CPO Guidance – the DCO and CPO matters *overlap*. Conversely, applying *Stonehenge* case, the Affected Parties will consider inviting the Secretary of State to consent to judgement (as he did in the RAF Manston DCO) for misdirecting himself in law in *his* consideration of alternatives if that lawful approach set out below is not adopted here by the Secretary of State .

45. What then is the anticipated misdirection of law that may have occurred here and as may be confirmed in the (as yet unseen) ExA Report? It is this. The NPS EN-1 does not itself provide policy on compulsory purchase. Paragraph 1.4.4 recognises that a DCO may include CPO “provisions” and that EN-1 “will be the primary basis for IPC decision making on such matters”. Section 4.4 and paragraphs 4.4.1 – 4.4.3 provide for “Alternatives” and 4.4.3 provides 8 bullet points of which the last speak to the “onus” and the rationale for attributing that to a third party. That is, the eight bullet points set out a test or criteria by which to evaluate alternatives in specified circumstances (“the Bullets’ Test”). Embedded in that Bullets' Test is the attribution of the “onus” to a third party and not “to” the Applicant. In the non-CPO situation covered by that Test, such onus and the approach of that Test may be understandable. **But that is not this Application case.**

46. The genesis of the misdirection appears to be as follows. The Applicant's approach to assessing alternatives put forward by third parties during Examination is set out in paragraphs 3.5 and 3.6 of document reference REP7c-013 (document reference - 7.9.39.2). That document is entitled "*Applicant's Response to Deadline 7 and 7a Submissions – Appendix B Applicant’s Response to the Submissions on Behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter at Deadline 7*".

47. Paragraphs 3.5 and 3.6 of document reference REP7c-013 / 7.9.39.2). state:

> "*3.5 Furthermore, where an alternative is first put forward by a third party after an application has been made, and the Applicant notes this alternative proposal was not advanced until December 2020 being a year after the Application was made, the ExA may place the onus on the person proposing the alternative to provide the evidence for its suitability. It is clear from the submissions made on behalf of the Affected Party that the alternative access position advanced is not a suitable alternative, because it would not allow for the safe operation of the Proposed Development.*
>
> *3.6 For these reasons, and in accordance with paragraph 4.4.3 of NPS EN-1, the alternative access position advanced on behalf of the Affected Party is not a reasonable alternative, and it is therefore not important or relevant to the Secretary of State’s decision and should be given no weight in the decision making process.*"

48. That Representation expressly (mis)directs the ExA (and potentially the Secretary of State, if he were to follow it) to apply, and exclusively so, the Bullets' Test (and its intrinsic attribution of “the onus” onto a third party and not onto the Applicant). Whilst the Representation concerns “access”, the thesis of reliance by the ExA upon the Bullets Test covers all types of “alternatives” advanced by the Applicant or any other party (including the Applicant) or otherwise.

49. Why is that a misdirection? It is a misdirection in this particular case because paragraph 4.4.3 also says this as the logically prior part of the paragraph (in the same way in Stonehenge that NPSNN, paragraph 4.4.6 contained a logically separate and discrete requirement for the evaluation of alternatives):

> *4.4.3. Where there is a policy or legal requirement to consider alternatives the applicant should describe the alternatives considered in compliance with these requirements. Given the level and urgency of need for new energy infrastructure, the IPC should, subject to any relevant legal*

requirements (e.g. under the Habitats Directive) which indicate otherwise, be guided by the following principles when deciding what weight should be given to alternatives [the Bullet Test is then set out].

50. Three points arise:

    a) The "Where" in paragraph 4.4.3 is here satisfied by the proposed provisions for compulsory purchase, and, thereby, engages the requirements of the Planning Act 2008, Guidance on CPO (September 2013);

    b) "Where" is also satisfied by the proposed provisions for compulsory purchase, and, thereby, engages the "legal requirements" of the common law protections – legal requirements - against the acquisition of private land.

   As in the *Stonehenge* case at [259]: "those instances are not exhaustive. "Legal requirements" include any arising from judicial principles set out in case law..." The legal requirements include those set out in *Sainsburys*' and *Prest* cases provided to the Secretary of State by the Affected Parties, as early as Deadline 5 of the Examination.

    c) The Bullets Test terms in paragraph 4.4.3 are expressly preceded by the phrase: (Emphasis added)

    > *… <u>subject to</u> any relevant legal requirements (e.g. under the Habitats Directive) which indicate otherwise …*

    As in the *Stonehenge* case at [259]: "those instances are not exhaustive. "Legal requirements" include any arising from judicial principles set out in case law as well as the Habitats Regulations 2017."

51. Consequently, the phrase "*e.g. under the Habitats Directive"* does not confine the phrase "*any relevant legal requirements"* to the Habitats Regulations. Rather, as in the *Stonehenge* case, [259] and [288], the scope of "any relevant legal requirements" "is not exhaustive under the NPS EN-1, paragraph 4.4.3.

52. Relevant legal requirements encompass the requirements of *Sainsbury's* and of *Prest* cases.

53. As regards *Sainsbury's* [2011] 1 AC 437, the relevant legal requirements includes an interpretative obligation that applies to the guidance designated under the PA 2008 (as well as to the statutory provisions themselves. As was affirmed by the House of Lords:

    9. … Compulsory acquisition by public authorities for public purposes has always been in this country entirely a creature of statute: <u>Rugby Joint Water Board v Shaw-Fox [1973] AC 202</u> , 214. The courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose…

    11. …

    > *"40. Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretative approaches where statutes are said to affect such rights."*

42. The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights …

43. The terminology of 'presumption' is linked to that of 'legislative intention'. As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights."

54. As regards *Prest v Secretary of State for Wales* (1982) 81 LGR 193, CA *("Prest")*, affirmed in *Sainsbury's* at [10], the summary provides: "Quashing the order, that (1) the onus of showing that the order should be confirmed lay on the authority who sought the order; (2) the Secretary of State should not limit his attention to the material put before the inspector and the matters canvassed at a public enquiry, but should take into account all matters which seemed to him to be relevant; (3) on the facts of the case, the Secretary of State had failed to consider the question of the land acquisition cost, which was a material factor". Rather, "When considering a compulsory purchase order the Secretary of State must consider all relevant information and should not limit himself to those matters alone which have been dealt with by the inspector: the onus of showing that a compulsory purchase order has been properly made is on the authority seeking it."

55. In particular, the Court of Appeal held:

To what extent is the Secretary of State entitled to use compulsory powers to acquire the land of a private individual? It is clear that no Minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, therefore, where the scales are evenly balanced — for or against compulsory acquisition w the decision — by whomsoever it is made — should come down against compulsory acquisition. I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands: and then only on the condition that proper compensation is paid, see Attorney-General v. De Keyser's Royal Hotel Ltd. (1920) A.C. 508 . If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen. This principle was well applied by Mr. Justice Forbes in Brown v. Secretary of State for the Environment (1978) P. & C.R. 285 , where there were alternative sites available to the local authority, including one owned by them…

… [I]f there was a glaring lacuna in the evidence and the considerations required to properly found a decision which is capable of being clarified without delaying the decision, the Secretary of State may be "Wednesbury" unreasonable if he does not make enquiries. In other words, he must be shown to have acted perversely.

In the sphere of compulsory land acquisition, the onus of showing that a CPO has been properly confirmed rests squarely on the acquiring authority ands if he seeks to support his own decision, on the Secretary of State. The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most

carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought.

56. The legal requirement of Prest ("the Prest Test") is as follows:

    a) "the onus of showing that a CPO has been properly confirmed rests squarely on the acquiring authority and, if he seeks to support his own decision, on the Secretary of State";

    b) There must be ", adequate evidence and proper consideration of the factor";

    c) Factors include "possible" alternatives;

    d) The decision maker (and the ExA) must "most carefully scrutinize" the evidence of the Applicant on whom the one lies;

    e) *"If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen";*

    f) (e) requires the logically prior evaluation of the evidence and resulting conclusions of fact so that any reasonable doubt can be resolved against the Applicant and in favour of the landowner.

    g) Use of statutes to destroy private land rights must not be used unless it is *clear* that the Secretary of State has allowed those rights to be violated by a decision *based upon* the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought.

57. On its face, paragraph 4.4.3 expressly ensures by use of the phrase "subject to" that the legal requirements of *Sainsbury's* and of the *Prest* Test must take precedence over the Bullet Test. Further, as in the *Stonehenge* case, the NPS cannot override the common law principles.

58. By contrast, the effect of the Aquind Representation above would be to delete the phrase: "subject to any relevant legal requirements (e.g. under the Habitats Directive) which indicate otherwise".

59. In the event that the ExA has followed the Representation of the Applicant to adhere to the Bullet Test and not evaluated both the Application, the draft DCOs, and the Protective Provisions in accordance with the Prest Test, then it logically follows that, as in the Stonehenge case, the totality of the ExA evaluation of the Application so far as it relates to the land of the Affected Parties' here would be fundamentally flawed in law and in fact. This is because, as in the Stonehenge case where the ExA overlooked the paragraph 4.26 tests of policy and law, so too in this case, the ExA will have overlooked the Prest Test and instead applied the Bullets Test that must be "subject to" the Prest Test.

60. The key parts of the Prest Tests are: the requirement for scrutiny not of the evidence of the Affected Party but of the Applicant Aquind; the attribution of "the onus" exclusively and at all times upon the Applicant Aquind; and the threshold of whether an alternative is "possible" and not whether it is "suitable".

61. It will be a matter for the Secretary of State and his Officials to ascertain from the ExA Report whether the ExA has erred in its evaluation of the Application by application of the Prest Test so far as the Application relates to the land interests of the Affected Party; and lawfully excluded the application of the Bullet Test (which contains the attribution of the onus" to the third party).

62. In line with the Affected Parties' submissions, section 104(3) of the PA 2008 requires the decision to be made in line with the relevant NPS. NPS EN-1, paragraph 1.4.4 makes EN-1 the "primary" basis for a determination. That EN-1 includes paragraphs 4.4.1-3. Paragraph 4.4.4 ensures that "any legal requirements" are elevated above the Bullet Test. It follows that a failure to apply the Prest Test would result in a failure to adhere to paragraph 4.4.3.

63. Further, as in the Stonehenge case, paragraphs 4.4.1 and 4.4.3 also contains a discrete test in the first line:

    4.4.1 From a policy perspective this NPS does not contain any general requirement to consider alternatives or to establish whether the proposed project represents the best option…

    4.4.3 Where there is a policy or legal requirement to consider alternatives the applicant should describe the alternatives considered in compliance with these requirements…

64. It is clear that EN-1 does not contain a requirement to consider alternatives or the best option because it says so. Paragraph 4.4.3 also requires the Applicant (not a third party) to describe "alternatives" in line with the requirements of policy.

65. Because of the CPO of land here, the Secretary of State's Guidance on CPO (September 2013) is made relevant and also includes "requirements". Those requirements do not lie on the Affected Parties but are placed exclusively on the Applicant Aquind:

    7. Applicants must therefore be prepared to justify their proposals for the compulsory acquisition of any land to the satisfaction of the Secretary of State. They will also need to be ready to defend such proposals throughout the examination of the application. Paragraphs 8-19 below set out some of the factors which the Secretary of State will have regard to in deciding whether or not to include a provision authorising the compulsory acquisition of land in a development consent order.

    8. The applicant should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored. The applicant will also need to demonstrate that the proposed interference with the rights of those with an interest in the land is for a legitimate purpose, and that it is necessary and proportionate.

    9. The applicant must have a clear idea of how they intend to use the land which it is proposed to acquire. …

66. Paragraphs 7, 8 and 9 of the CPO Guidance place requirements on the Applicant that paragraph 4.4.3 of EN-1 also requires the Applicant to demonstrate. Contrary to the Representation of the Applicant that Bullet 8 of 4.4.3 of EN-1 should require the ExA (and the Secretary of State) to place "the onus" onto the

Affected Parties, **paragraph 4.4.3 of EN-1 requires the opposite in the context of this particular Application where CPO is engaged:**

a) *Applicants must therefore be prepared to justify their proposals for the compulsory acquisition of any land to the satisfaction of the Secretary of State;*

b) *The applicant should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored; and*

c) *The applicant must have a clear idea of how they intend to use the land which it is proposed to acquire.*

67. Further, as was expressed to the ExA in detail previously, the Prest Test applies to the above.

68. The evidence of the Representation by the Applicant in paragraphs 3.5 and 3.6 of of document reference REP7c-013 / 7.9.39.2) asserting that "the onus" be attributed to the Affected Parties' proposals for a draft DCO and the Protective Provisions (and their DCO Obligation) itself evidences that the Applicant has failed itself to address or grapple with the "policy requirements" of 4.4.3 (of EN-1) and of paragraphs 7-9 (of the CPO Guidance). Consequently, it remains difficult to see how the Secretary of State can himself be in a position to rationally conclude whether he can be satisfied under paragraphs 7-9 of the CPO Guidance that the ***Applicant*** has discharged its own obligations to "to *demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored*" and, in turn, it is impossible for the Secretary of State to be in a position to conclude that the "*proposed interference with the rights of those with an interest in the land is for a legitimate purpose, and that it is necessary and proportionate*." See also paragraph 10 of the CPO Guidance, which states that "*The Secretary of State must ultimately be persuaded that the purposes for which an order authorises the compulsory acquisition of land are legitimate and are sufficient to justify interfering with the human rights of those with an interest in the land affected. In particular, regard must be given to the provisions of Article 1 of the First Protocol to the European Convention on Human Rights and, in the case of acquisition of a dwelling, Article 8 of the Convention*." In turn, this (again) shows that paragraph 16 of the CPO Guidance is satisfied on the *evidence* of Aquind itself so that it would be evidentially rational for the Minister to consider granting the DCO (as refined by the Affected Party) "but decide against including in an order the provisions authorising the compulsory acquisition of the land."

69. In conclusion in respect of the misdirection engendered by the Applicant that, if followed by the ExA will inform the whole of its evaluation of CPO matters (and for all Objectors *mutatis mutandis*), in the event that the Secretary of State sees the ExA Report as evidencing to him that the Bullet Test has been applied and the Prest Test has not, then the *Prest*, *Sainsbury's* and *Stonehenge* cases would entitle the Secretary of State to refuse the Application (DCO and CPO as they overlap) because the *Applicant* has led the ExA into error in its evaluation of all CPO related matters throughout the Application area and so rendered the Examination Hearing process *meaningless* in the consideration of Objections to any CPO. As in paragraph 16 of his Guidance on CPO, the Secretary of State would be entitled to also not confirm

any CPO provisions in this particular case as a result of the Applicant's misdirection to consideration of Objections to CPO.

70. Further, were the Secretary of State to grant the DCO with CPO provisions as applied for, then the Prest and Stonehenge cases would require the quashing of a grant of a DCO here, due to a fundamental failure by the Secretary of State *himself* to lawfully evaluate alternatives *unless* he himself evaluated alternatives or he ignored the ExA evaluation (if erroneous as sought to be by Aquind as above) and adopted the draft DCO and Protective Provisions submitted by the Affected Parties *because* these modifications supply the relevant 'alternative', in the context of an outline DCO with inherently vague CPO provisions, to entitle the Secretary of State to lawfully grant the DCO on *their* terms. We have previously addressed in detail the rationale for these modifications and summarise them below also by way of precis in line with the Stonehenge case approach to Ministerial determinations.

SECTION C – THE AFFECTED PARTIES' PARTICULAR RESPONSE TO THE EXCLUSION OF COMMERCIAL TELECOMMUNICATION APPARATUS AND USE

71. As has been referred to above, Section 6 of the Secretary of State's letter dated 13 July 2021 requests further information from the Applicant in relation to commercial telecommunications. It states:

    "*Fibre-optic surplus capacity*

    6. The Secretary of State notes that during the examination objections were raised as to the inclusion in the development consent order of the telecommunications buildings, the commercial use of the surplus capacity in the fibre optic cable and part of the optical regeneration station for commercial telecommunications. Without prejudice to the Secretary of State's decision on the proposed development, the Applicant is asked to provide a revised draft Development Consent Order excluding those elements which relate to commercial telecommunications including as they may affect the compulsory purchase provisions."

72. The Affected Parties consistently submitted throughout the Examination that the inclusion of use and related operational development not related to the field of energy was ultra vires the PA 2008 and, faced with an irrational refusal by the Applicant to remove that element from the draft DCO (and despite it not then nor to date been subject to an EIA evaluation notwithstanding the requirements of Regulation 4(2) and Regulation 5(2) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI2017/572) ("EIA Regulations"), and paragraph 5(f) of Schedule 4 to the EIA Regulations, the Regulation 4 bar to a grant of a DCO without having evaluated that use for EIA purposes, and in the face of the Applicant's own evidence in its Needs and Benefits Report of (asserted) "significant" benefits" (that would have triggered an EIA (in relation to "population" and "Technology" effects), the Affected Parties' themselves submitted, at Deadline 8 of the Examination, their own proposed version of the draft DCO that strips out those ultra vires elements relating to commercial telecommunications affecting their interests – see document reference REP8-105 (a copy of which is attached at Schedule 1 to this Response) . We sent a copy of this previously submitted Deadline 8 draft DCO (document reference REP8-105) direct to the Secretary of State on 22 July 2021 and that incorporates the Affected Parties'

Deadline 8 Protective Provisions (submitted also as a separate document at Deadline 8 – REP8-108]) to the ensure a lawful grant of CPO powers can otherwise be made (if the Secretary of State is persuaded they are otherwise justified in law and fact).

73. **Schedule 5** to this Response sets out (in chronological order) all the documents (and hyperlinks so that the Secretary of State can himself review the Submissions made – press "control C" and then the hyper-link) from the Examination Library that contain submissions made on behalf of the Affected Parties relating to commercial telecommunications, and (where one was made), comments or responses made by the Applicant. The Applicant's responses were limited and their limited and generalized and assertive (unevidenced) nature is evidence of the Applicant applying the wrong test and misdirecting itself to not comply with its obligations under Prest case and under paragraphs 7-10 of the Secretary of State's Guidance on CPO (September 2013).

74. In summary, the Affected Parties' submissions relating to commercial telecommunications are that the purpose of the powers in the DCO sought can only encompass development "for" a purpose "in the field of energy" under sections 14(6)(a) and 35(2)(a)(i) of the PA 2008 and cannot, in law, include or encompass a non-statutory purpose such as "commercial telecommunications" (nor related operational development such as the Telecommunications Building and operational development of a fibre optic spur cable linking to that Building, on the Affected Parties' land) and so the purpose of compulsory acquisition would be tainted by a collateral unlawful purpose in the event of inclusion of any isolated purpose "for" "commercial telecommunications"; See the *Prest* case. Thus, the Affected Parties have sought throughout to facilitate an *intra vires* project *for* a lawful purpose so as to ensure a legitimate taking of its land (of lesser permanent extent), whereas the Applicant has stubbornly refused to ensure the same.

SECTION D – NEW MATERIAL AND THE LAW RELATING TO THE EXAMINATION PERIOD AND EIA UPDATE

75. Section 98 Planning Act 2008 states that the Examining Authority **must complete the examination** of the application within 6 months of the start date, the start date being the day after the preliminary meeting.

76. Paragraph 7 of the Secretary of State's CPO Guidance (September 2013) also requires the Applicant to demonstrate its case **during the Examination Period**. Paragraph 7 states: "*Applicants must therefore be prepared to justify their proposals for the compulsory acquisition of any land to the satisfaction of the Secretary of State. They will also need to be ready to defend such proposals throughout the examination of the application.*"

77. We consider that the Secretary of State is therefore not entitled to consider new evidence of fact not previously submitted during the examination period.

78. Should the Applicant introduce new material after the end of the statutory examination period, that new material should not be admissible or considered by the Secretary of State.

79. We have considered the (so-called) EIA Validity Review and agree that it supports that Affected Parties case that, for EIA purposes alone, the excising of the "use" of fibre optic cables "for" non-energy field related purposes (i.e. "for" "commercial data telecommunications") and related operational development

on the Affected Parties' land, would not require a new assessment for EIA purposes because no significant effect arises from that excision. In particular, there was no EIA evaluation of the fibre optic cables for commercial telecommunications under Regulation 5(2)(a) (population) and paragraph 5(g) of Schedule 4 of 2017/572 (despite the assertion of the "significance" of their effect in the Needs and Benefits Report), and the Socio- Economics Chapter of the environmental statement (document reference APP-140 (6.1.25)) was silent on any relevant effect for EIA purposes. Conversely, Regulation 4 also bars their inclusion at this time and the Affected Parties' (at least) submit that the Minister avoid the Applicant's invitation to breach Regulation 4 (as a result of including commercial telecommunications sue and operational development on the Affected Parties' land).

80. In more detailed precis, we submit as follows. The exclusion of commercial telecommunications uses and related structures from the scheme will be consistent with the fact that the Applicant's Environmental Statement does not contain an assessment of the effects of including commercial telecommunication uses.

81. It is a requirement of Regulation 5(2)(a) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("**EIA Regulations**") that:

    "(2) The EIA must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on the following factors—
    (a) population and human health;"

82. Paragraph 5(g) of Schedule 4 to the EIA Regulations also requires that in relation to the information that needs to be included within the EIA, that: "*A description of the likely significant effects of the development on the environment resulting from, inter alia—…(g) the technologies and the substances used*."

83. Paragraph 5(g) Schedule 4 of the EIA Regulations also states that: "*The description of the likely significant effects on the factors specified in regulation 5(2) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the development….*"

84. The Applicant's ES does not contain any assessment of the effects of the inclusion of commercial telecommunications uses on the population (as required by Regulation 5(2) EIA Regulations), and it does not contain any assessment of the direct and indirect significant effects resulting from the commercial telecommunication technologies proposed (as required by paragraph 5(g) Schedule 4 to the EIA Regulations). This is despite the significant effects the Applicant has argued commercial telecommunications uses will create for the local population in its Needs and Benefits Report. The Needs and Benefits Report is not part of the Environmental Statement.

85. The Applicant has therefore failed to comply with Regulation 5(2) and paragraph 5(g) Schedule 4 to the EIA Regulations.

86. Therefore, it is only right that the Secretary of State excludes commercial telecommunication uses from the scheme. In this way, there will be no bar pursuant to Regulation 4 EIA Regulations (Regulation 4 prohibits the grant of a DCO without an EIA) for the Secretary of State to grant the DCO. To keep those elements relating to commercial telecommunication uses in the DCO would be in breach of Regulation 4 EIA Regulations, as those uses have not been assessed as part of the Applicant's EIA.

87. We note that the written opinion of Simon Bird QC submitted by the Applicant on 28 July 2012 states that the amendments relating to commercial telecommunications would not lead to different significant effects to those which have been environmentally assessed. This 'opinion' is a mere unreasoned assertion, whereas the Affected Parties' representations above provide a reasoned explanation of breaches of EIA Regulations but how they may be navigated lawfully (contrary to Simon Bird QC's assertion that the EIA is watertight across the board for the scheme).

SECTION E – THE EXCISING OF USE OF LAND FOR COMMERCIAL TELECOMMUNICATIONS

88. We refer to Secretary of State's letter dated 13 July 2021 requesting the Applicant to provide further information in connection with various matters. One of the matters covered by this letter related to surplus fibre optic capacity. Section 6 of this letter stated:

    "*Fibre-optic surplus capacity*

    6. The Secretary of State notes that during the examination objections were raised as to the inclusion in the development consent order of the telecommunications buildings, the commercial use of the surplus capacity in the fibre optic cable and part of the optical regeneration station for commercial telecommunications. Without prejudice to the Secretary of State's decision on the proposed development, the Applicant is asked to provide a revised draft Development Consent Order excluding those elements which relate to commercial telecommunications including as they may affect the compulsory purchase provisions."

89. We have already summarised in our Deadline 8 Representations the position in law and fact relating to this ultra vires element.

90. By section 103(1) of the PA 2008, the Secretary of State has the function of deciding an application for an order granting development consent". By section 114, the function of determining whether or not to make a development consent order ("DCO") or to refuse consent lies exclusively on the relevant Secretary of State.

91. The DCO application is for an outline DCO (devoid of any *binding or certain* detail) and includes an application for a provision containing wide ranging compulsory purchase powers of private land that include that of the Affected Parties.

92. The Affected Parties have made detailed representations about the correct approach in law to the interpretation of statutory provisions where they relate to the compulsory acquisition of private land. In essence, "The courts have been astute to impose a strict construction on statutes expropriating private

property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose", "it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands …"; " The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights …"; and "The terminology of 'presumption' is linked to that of 'legislative intention'. As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights." (see *R (aoa Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2011] 1 AC 437 at [9]-[11]). That case cited *Prest* and that case included: (Emphasis added)

> *The first is fundamental. To what extent is the Secretary of State entitled to use compulsory powers to acquire the land of a private individual? It is clear that no Minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest…I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands: and then only on the condition that proper compensation is paid… If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen …*

93. By section 35 of the PA 2008:

1) *The Secretary of State may give a direction for development to be treated as development for which development consent is required. This is subject to the following provisions of this section …*
2) *The Secretary of State may give a direction under subsection (1) only if —*
    a) *the development is or forms part of –*
        i) *a project (or proposed project) in the field of energy, transport, water, waste water or waste, or*
        ii) *a business or commercial project (or proposed project) of a prescribed description,*
    b) *the development will (when completed) be wholly in one or more of the areas specified in subsection (3), and*
    c) *the Secretary of State thinks the project (or proposed project) is of national significance, either by itself or when considered with —*
        i) *in a case within paragraph (a)(i), one or more other projects (or proposed projects) in the same field;*
        ii) *in a case within paragraph (a)(ii), one or more other business or commercial projects (or proposed projects) of a description prescribed under paragraph (a)(ii).*
3) *The areas are —*
    a) *England or waters adjacent to England up to the seaward limits of the territorial sea;*

b) *<u>in the case of a project for the carrying out of works in the field of energy</u>, a Renewable Energy Zone*

4) …

94. Section 32 defines “development” to include “use”. Aquind has applied for authorisation for the “use” of fibre optic cable for a “use” other than in relation to the field of energy. The Affected Parties have previously submitted in detail the reasons why the *use* of the fibre optic cables “for” a proposed project in the field of energy is intra vires section 35(2) whereas the use of any fibre optic cable in the proposed project in the field of energy for a use otherwise than for energy (i.e. a non-energy use) is ultra vires sections 35(2), 14(1)(a) and no order under section 14(3) has been made to “add a new type or project” under section 14(1) so as to enable lawful inclusion of a hybrid “energy/commercial fibre optic infrastructure” project within section 14(1). The Secretary of State has made no “prescribed description” under section 35(2)(a)(ii) that otherwise provides for “commercial” projects such as the use of fibre optic cable resulting from the Applicant’s choice to *over specify* the extent of fibre optic cable itself relating to and “for” a project in the field of energy and so as to provide *more cable* extent and capacity than is actually necessary “for” the energy project. The scope of section 32 cannot encompass the desired use of fibre optic cable for commercial non-energy use (for example, a commercial use enabling conveyance of Google, Facebook, Netflix or other types of internet information traffic through light within the fibre optic cable) but does encompass use of fibre optic cable that would actually link two convertor stations to enable their intra-communications “for” the energy field project. Nor can section 14(1)(a).

95. Based on mere rhetoric and not on legal reasoning, applicable principles, the Applicant disagrees and hopes that its arm-waving, and distortion of the Section 35 Direction set out in detail in previous Representations as well as viewing it in isolation from its genesis in section 35(2), in some way will be sufficient to persuade the Secretary of State that inclusion of the use of fibre optic cables for non-field of energy use would be intra vires *because* it asserts that should be so.

96. The Applicant's rhetoric continues because it then seeks to lean on section 115 to assert that the scope of section 115(2) somehow encompasses “associated development” which is “associated with” the energy field project. At heart, the Applicant’s approach derives from its advisor(s) promotion of a cross-country gas pipeline at Thorpe Marsh that included telecommunications cables as “associated development”. But careful scrutiny of the authorised development showed that such cables were expressly “for” communications actually between elements of the authorised development (and not “for” disparate use unrelated to the field of energy and that had no actual use or function related to the field of energy). So in that DCO, that telecommunications cabling properly fell lawfully within the scope of “associated development”. Therefore, Thorpe DCO supports the Affected Parties’ Objection: that use of fibre optic cables otherwise than “for” energy-field related use cannot be intra vires the scope of section 115(2)(a).

97. Nor can “use” of fibre optic cables for a use otherwise than within the field of energy fall within the scope of 120 because: the Applicant’s case has been that that use is “associated development”; reliance on section 120 assumes failure to encompass as intra vires a non-energy field use within section 14(1)(a), section 35(2)(a) and section 115(2); and the lawful scope of section 120 could not supply the vires

98. The “use” of fibre optic cables for a use otherwise than within the field of energy is not actually connected with the energy-field development and the cables used for that unrelated use would also terminate in the “Telecommunications building” on the Affected Parties’ private land and not terminate in the electricity related Convertor Station; the “use” of fibres for communications unrelated to the convertor stations or the electricity bearing cables does not bear on or relate to those stations or those cables; ANCILLARY?? ; and the Applicant’s evidence to the ExA is that the “use” for non-energy field related use would use “spare capacity” such that there can be no “need” for that use as it is premised on desirable but unnecessary and chosen over specified infrastructure.

99. Further, as a matter of statutory construction, the “provisions” to which section 120(3) refer include the provision for compulsory acquisition powers provided for in section 122(1). Section 122(2) empowers the Secretary of State to include that provision “only if” subsections (2) and (3) are met. (2) introduces a threshold test of “is required”. The Applicant’s own evidence remains that the “use” of fibre optic cables for non-energy field related use is a “desire”, understandably (still) strongly expressed as “significant”, but nevertheless a desire and not a need or a requirement. Therefore, on the Applicant’s *own* application evidence, it cannot lawfully justify inclusion in any provision under section 120 of any part of the DCO sought to be granted under section 114 any “use” of fibre optic cables for non-energy field related use.

100. Recognising this from the outset of the Examination Period, the Affected Parties proposed the *excising* of that use unrelated to the field of energy from the proposed draft DCO together with operational development exclusively relating to that un-related use, in particular the “telecommunications building” desired by the Applicant to be situated on the Affected Parties’ private land against their will.

101. Recognising that the Secretary of State had previously been faced with energy-field development that included *ultra vires* development (that outside of section 115(2) and also was not necessary for nor related to energy) had been addressed both lawfully and pragmatically in the Swansea Bay Tidal Lagoon DCO, the Affected Parties have provided that example to the ExA and to the Secretary of State to show how cables could be physically provided but without their authorisation in the DCO for their use otherwise than “for” energy-related use. That approach aligns to the Secretary of State’s approach to this kind of energy-related development where (as here) the application development is partly inside and partly outside of the scope of the PA 2008. As in that other DCO, this does not prevent a planning application being made under the Town and Country Planning Act 1990 in future for a change of “use” of fibre optic cables from a use “for” energy-field development to a use “for” commercial telecommunications data use (to enable conveyance through the cables by light of data by, for example, Google, Facebook, or Netflix, or finance-related companies, under such private leases of the light capacity that the Applicant may grant for a premium to such third parties). No doubt the Applicant may also desire planning permission for operational development (such as manhole accesses and Telecommunications Building(s)) and could then also apply for that at that future date. Consequently, a grant of a DCO would not in practical terms preclude future theoretical potential permitting of existing physical cables for an additional “use” otherwise than related to the field of energy. But that would be a matter of local, not national, interest and the PA 2008 is exclusively concerned with projects in the *national* interest. See sections 14(1) and 37.

102. The result of the following is to engender an *alternative* to the development proposed to be authorised and the Affected Parties have provided at Deadline 8 a version of the draft DCO that excises from the draft Order that "use" unrelated to the field of energy (document reference [REP8-105]). A copy of that draft DCO is at **Schedule 1** to this Response

103. The excision of the unrelated "use" has consequences that include unnecessary operational development (such as the Telecommunications Building) on the Affected Parties' private land. The Affected Parties' draft DCO submitted at Deadline 8 (document reference [REP8-105]) irons out those consequences from the draft DCO so that any such use unrelated to the energy field (and that relates instead to commercial telecommunications) is excised.

104. Consequently, the Affected Parties' are quite concerned that the Secretary of State has recently (on 13th July 2021) requested from the Applicant a copy of the draft DCO *without* the unrelated commercial telecommunications use (and consequential excisions). This was provided by the Affected Parties Affected Parties at Deadline 8 and is recorded in the Examination Library at reference REP8-105. . The approach of the Affected Parties to the draft DCO terms has been to limit their scope so as to ensure they are intra vires the PA 2008 (for example, by limiting the purpose of development to being "for" energy-related development) and previous detailed submissions have been made to that effect.

105. Disappointingly, the updated draft DCO submitted by the Applicant to the Secretary of State on 28 July 2021 does not take on board the amendments to the draft DCO in this respect made by the Affected Parties at Deadline 8. Please see **Schedule 6** to this Response which sets out which of the Affected Parties' amendments have not been incorporated by the Applicant. At Deadline 9 of the Examination, the Applicant provided a response at REP9-019 (document reference 7.9.51). Paragraph 1.3 of REP9-019 suggested that the Applicant responded to the Affected Parties' amended version of the Draft DCO submitted at Deadline 8 of the Examination (REP8-105) in the schedule of changes requested to the draft DCO [REP9-008]. That is not the case. The Applicant's only response in the schedule of changes requested to the draft DCO [REP9-008] submitted at Deadline 9 was as follows:

Ref.	DCO Ref	Consultee/Stakeholder	Comments from stakeholder/rationale for change	Change made	DCO Version
DEADLINE 9					
399.	Schedule 2, Requirement 6	Historic England	Requested correction of error in relation to consultation requirement in respect of the design of the ORS	Reference to the statutory historic body has been moved from requirement 6(7) to requirement 6(6), to address an error.	

Therefore, whilst the Applicant and Examination Authority had a full opportunity during the Examination Period and subsequently to explore and address all the Affected Parties' proposed amendments to the draft DCO relating to commercial telecommunications submitted at Deadline 8 in REP8-105 (a copy of which is at **Schedule 1** to this Response), the Applicant declined to do so at Deadline 9 of the

Examination or later on 28 July 2021. On this basis, we would urge the Secretary of State to pay special consideration to this in line with the *Prest* Test.

SECTION F - MICRO-SITING OF THE CONVERTER STATION

106. Section 6 of the Secretary of State's letter dated 13 July 2021 requests further information from the Applicant in relation to the (so-called) "micro-siting".

107. The siting of the Convertor Station (as at 30 July 2021) continues to be uncertain and its actual location is ambiguous, and not "clear" as *Prest* requires. As in *Prest*, it is *"a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands".*

108. The absence of evidence still of an unfixed location for the *key part* of the development - the Station parameter box *itself* - evidences that final terms await to be concluded with National Grid (else the locational ambiguity would have been resolved), and that that evidence indecisiveness does not yet accord with the requirement in Prest for *decisiveness* and a current lack of clarity about particular land use. It cannot be said to not matter because the difference in Station location is whether or not the land of National Grid is compulsorily acquired (or not), the Eastern siting of the Station being envisaged to be on land sold by the Affected Parties to National Grid previously whereas the Western siting would be exclusively on the Affected Parties' land. Consequently, section 122(3) appears to remain unable to be yet satisfied because (whilst framed as "micro-siting") the choice of location of the parameter box results in an area of land being taken or not taken *at all* (that of National Grid). If the Station were to be situated partly on the National Grid land, then that would negate the requirements on that land boundary to landscape its Western edge for permitted EIA development (as that edge would be subsumed into the Station).

109. In relation to that choice of parameter box sitings, Regulation 5(2), and Schedule 4, paragraph 5 and 5(e), of 2017572 require the cumulative effect "with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources" to be included in the environmental statement. As the Affected Parties' previously detailed, one of the choices of location for the Station parameter volume would result to trigger paragraph 5(e) evaluation of cumulative effects with the permitted EIA development of the National Grid extension on the same land envisaged for that parameter volume option, that was permitted subject to a landscaping condition (no doubt because of its environmental sensitivity) on the land that would be subsumed into the Station volume if the parameter box were to be authorised on the National Grid land; whereas if it were sited exclusively on the Affected Parties' land then 5(e) would not be triggered. The environmental statement before the Secretary of State has not actually considered or assessed that cumulative effect and, because of the effect of Regulation 4, the law requires that the 'option' of locating the parameter volume on the National Grid land not be able to be authorised except in breach of R4. Consequently, given the evidence remains that the Applicant remains indecisive in its choice of location, the EIA Regulations make that choice for him and entitle (in that part) authorisation of the Station parameter volume on the Affected Parties' land but he would breach Regulation 4 if he included authorisation for an alternative parameter box location on the National Grid land *because* there is no evidence of the necessary cumulative effect assessment. The Affected Parties' note that that the Court

has recently quashed a wind farm DCO in *Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 326 (Admin) (submitted with our Deadline 8 Submissions) for want of consideration of cumulative effects.

110. In other outline DCOs, a single outline parameter box has been sought to exclusively contain all of the detailed development but the Applicant here has not adopted that orthodox approach in this DCO and (inexplicably) has sought instead consent for *two* freestanding boxes. The consequences of 2017/572 now compel him to adopt the orthodox approach. There was *no evidence* before the ExA (nor now before the Secretary of State) that the choice of location makes *any* practical difference to the construction or operation of the Applicant's energy field *project*. That would also remove an ambiguity engendered by the choice of parameter volume locations referred to above in relation to *Prest* and its requirement for "decisiveness" (whilst "decisiveness" would remain unsatisfied were the draft DCO without the Affected Parties' excisions, consequential refinements, and their Protective Provisions being authorised).

UPDATED PLANS

111. The (so-called) "Updated Plans" show that the practical and legal effect, of the excise of the "use" of the fibre optic cables for use otherwise than related to the project in the field of energy, is to reduce the extent of permanent acquisition of the Affected Parties' private land by removal of the Telecommunications Building in which the "use" and operational development of the fibre optic cables for private commercial telecommunications and data transmission would otherwise have terminated at. The car park area related to that Building has also been removed. This also reduces the extent of envisaged land for permanent acquisition. The Protective Provisions provided during the Examination Period, and which the Applicant has had a number of months of opportunity to comment on in that Period, and a further opportunity recently, assumes that (subject to the recent encompassing of the woodland) the extent of the red line envisaged for *temporary* construction works would be as shown in the Updated Plans before then shrinking down to encompass alone the Convertor Station footprint (and the immediate abutting landscaping) shown on the Plans referred to by the Affected Parties.

112. The Updated Plans show the red line as different to that of the red line identified in the Application accepted by the Secretary of State in 2020. This is because the Applicant belatedly sought to both change the extent of the *application* area and to also change and increase the extent of the area it desired to acquire compulsorily. The Affected Parties' have made some detailed Representations under the Infrastructure Planning (Compulsory Acquisition) Regulations 2010/104 about that change but await the opportunity required to be have been given to them under the Regulations.

113. The Deadline 8 Submissions of the Affected Parties show that there is an alternative to the acquisition of the Copse Land (where the ashes of their deceased father are spread). The Protective Provisions and planning obligation ensure that there is no need for the permanent acquisition of this area of the Affected Parties' land.

114. There is no question of need for access for clearances for large vehicles *because* such vehicles are only required for construction of the Convertor Station and not for its ongoing maintenance.

SECTION G – PROGRESS ON AGREEING PROTECTIVE PROVISIONS

115. Section 8 of the Secretary of State's letter dated 13 July 2021 requests further information from the Applicant in relation to Protective Provisions and an update.

116. The Applicant's response to this on 28 July 2021 did not contain any update on its progress in relation to the Affected Parties' proposed protective provisions.

117. To date, the Applicant has never approached the Affected Parties to discuss their proposed protective provisions.

118. The Affected Parties' *alternative* draft DCO submitted at Deadline 8 (document reference [REP8-105]) includes as part and parcel of that alternative DCO a set of Protective Provisions (also submitted at Deadline 8 at document reference [REP8-108]) which needs to be read together with the Affected Parties' signed unilateral DCO Obligation submitted at Deadline 8 (document reference [REP8-095]). Those protective provisions are discussed in more detail later on in this Response The approach of the Affected Parties' Deadline 8 Protective Provisions has been to facilitate *temporary* use of their private land to construct the Convertor Station and lay energy-field related cables to and from it under their land, and to enable permanent acquisition of the footprint of the Station and its immediate surrounds for necessary landscape profiling and acquisition of an underground linear volume to contain electricity and related fibre optic cables, followed by restoration of their land to agricultural land so that they may continue to farm their land.

119. The Affected Parties' protective provisions [REP8-108] also include provision for permanent maintenance access to ensure ongoing operation of the Station and such access as (theoretically) might become necessary if the technological design of the Station elements becomes problematic. However, this can be no more than theoretical because of: the evidence of the Applicant (submitted by the Affected Parties) of the infinitesimally small (i.e. so as to be not a credible risk) risk of Station element failure; the requirement of Regulation 5(4) of the EIA Regulations to identify, describe and asses under Regulation 5 (2) "where relevant" disasters, and the Schedule 4, paragraph 2 (technology) and paragraph 5(g) (technology used) that an environmental statement evaluate technology used and the statement includes no evidence at all of the risk, description, or assessment of such a risk credibly requiring to be considered or evaluated. We have previously submitted in detail that the result of this means that there is no credible risk of Converter Station failure and this asserted "risk", therefore, remains an irrelevant consideration.

120. Consequently, the Affected Parties do not envisage any real (as in credible) risk of Station element failure but have nevertheless in their Deadline 8 Protective Provisions [REP8-108] provided for that eventuality and, therefore, for temporary emergency access to the Station over their intervening land (and where access cannot otherwise immediately be obtained) and an additional access route along the eastern boundary of Little Denmead Farm (as offered by the Affected Parties' signed DCO Obligation [REP8-095]).

121. It further follows that there is no relevant "safety" consideration and that, on proper scrutiny, the most recent assertions about "safety" are mere unsubstantiated rhetoric by the Applicant.

122. Thus, the excision of the unrelated, non-energy field "use" (and related operational development), coupled with the Affected Parties' Deadline 8 Protective Provisions [REP8-108], signed DCO obligation [REP8-095], and the Affected Parties Deadline 8 submitted amends to the draft DCO (REP8-105) supplies an evidence-based and rational *alternative* to the original application draft DCO. Applying the *Sainsbury's* case obligation (as that case requires, where there is a choice of interpretation, the interpretation against land taking "will" be chosen) to the power in section 122(1) ("may … only if") results to lawfully empower the Secretary of State to include compulsory purchase provision that would apply to the Affected Parties' private land on the basis of *that* alternative. Otherwise, the Affected Parties' continue to maintain (for the reasons given in detail during the statutory Examination Period and their precis above) that the application draft DCO (as a whole) would remain ultra vires the PA 2008 by its inclusion of ultra vires use and development for fibre optic cables for a collateral purpose commercial telecommunications.

123. Further, recognising that section 122(1) must be exercised rationally, and that this application is for an *outline* DCO and not for a detailed DCO, the absence of evidence about the content of the DCO outside of the notional parameters box precludes in law the authorisation of a DCO envelope greater than the volumes stated of the parameters (in particular of the Convertor Station). In essence, section 122(2) can only be satisfied on evidence and the absence of evidence that results from mere thin air or no information means that it cannot be rationally said (i.e. there is no *evidence* of a 'requirement', as opposed to mere desire) that section 122(2) is actually satisfied here. Consequently, the Affected Parties' draft DCO refinements submitted in REP8-105 at Deadline 8 ensure that the draft Order can be intra vires the PA 2008 section 122(2) requirement by tying the authorised volume of the Station elements to the overall parameter 'box' for which authorisation is actually sought, as opposed to a bigger box (on the Affected Parties' private land) than has been applied for.

124. Furthermore, *Sainsbury's* [2011] 1 AC 437 reminds the Secretary of State at [10] that section 122(1) requires *both* 122(2) and (3) to be satisfied and here 122(3) requires a "compelling case in the public interest" for acquisition of private land. As in *Prest* (referred to in [10]), part of the required "compelling" nature of the case is that the "public interest *decisively* so demands". Here, the Applicant's own evidence to the Secretary of State remains that: the Applicant strongly "*desires"* the use of non-energy field use of fibre optic cables for private commercial gain but that cannot lawfully amount to a compelling case "in the *public* interest" for acquisition of private land; the siting of the Convertor Station (as at July 2021) continues to be uncertain and its actual location is ambiguous.

SECTION H - ALTERNATIVES - PROTECTIVE PROVISIONS, RELATED UNILATERAL UNDERTAKING, AND PROPOSED AMENDMENTS TO THE DRAFT DCO SUBMITTED BY THE AFFECTED PARTIES

125. As has been referred to above, the Secretary of State's "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)" (**CPO Guidance**) that states:

> "*8. The applicant should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored. The applicant will also need to demonstrate that the proposed interference with the rights of those with an interest in the land is for a legitimate purpose, and that it is necessary and proportionate…*

26. Applicants should seek to acquire land by negotiation wherever practicable. As a general rule, authority to acquire land compulsorily should only be sought as part of an order granting development consent if attempts to acquire by agreement fail …"

126. *Because* of the failure by the Applicant itself to explore “all reasonable alternatives” to compulsory acquisition of private land and so as to be itself in apposition to show that it was advancing such acquisition as a remedy of last resort (and not of first resort), the Affected Parties had no choice in their own Objection to the taking of their land against their will but to submit their own proposed protective provisions, unilateral undertaking, and consequential amendments to the draft DCO (which incorporate amendments relating to the excision of commercial telecommunications) to protect their private land interests in Little Denmead Farm during the Examination.

127. These were submitted as rational alternatives to the Applicant's proposals for an outline DCO (without any fixed details), in light of the amount of the Affected Parties' land the Applicant is seeking compulsory acquisition powers over. The Affected Parties also did this due to the lack of engagement by the Applicant to resolve issues via private agreement negotiations. As at 12 August 2021, substantive negotiations have still not started.

128. During the Examination, the Affected Parties produced three comprehensive drafts of Protective Provisions and related draft unilateral undertakings covering reasonable and workable alternatives (in the context of an outline DCO devoid of detail and that ensure appropriate flexibility) for their property and land rights. These were submitted in the following order and provided an opportunity for the Applicant to “explore” them and to the ExA to scrutinize (in line with the Prest Test) any resistance by the Applicant :

a) Deadline 5 – draft protective provisions and draft unilateral undertaking - document reference REP5-109. The Applicant did not respond to this document.

b) Deadline 7 – revised draft protective provisions and revised draft unilateral undertaking document reference REP7-119. The Applicant did not respond to this document or evaluate any of the alternatives proposed by them, other than make high level minimal cursory assertions that were not supported by any explanation or evidence in relation to only 2 of the numerous alternatives proposed;

c) Deadline 8 – final version draft protective provisions (document reference [REP8-108]), together with a signed unilateral undertaking (document reference [REP8-095]). The Applicant did not provide any response to these two documents at Deadline 9 of the Examination or thereafter directly to the Secretary of State on 28 July 2021 in response to the Secretary of State's request for further information on 13 July 2021 regarding protective provisions.

129. Copies of the latest draft of the Affected Parties' Protective Provisions submitted at Deadline 8 (document reference [REP8-108]) and the Affected Parties' signed unilateral undertaking (document reference [REP8-095]) are at **Schedules 3 and 4** to this Response. We refer the Secretary of State in particular to the detailed explanation provided in the Affected Parties' protective provisions submitted at Deadline 8 of all the alternatives being proposed by the Affected Parties. In summary, those alternatives are:

a) the exclusion of the installation of commercial telecommunication buildings, equipment, cables, and any other connected apparatus and use of surplus fiber optic cables for commercial telecommunication purposes from Little Denmead Farm (unless with the prior agreement of the Affected Parties), though the prior agreement element can now be deleted if the Secretary of State is minded to exclude use for commercial telecoms purposes;

b) alternatives to enable the Affected Parties' continued access to Little Denmead Farm during the construction period, but at the same time allowing the Applicant to temporarily possess any necessary part of Little Denmead Farm it needs during the construction period for the converter station. This would override powers being sought to extinguish private rights of way and temporarily stop up access routes which would (without the protective provisions) affect the Affected Parties' access. As at 12 August 2021 the Applicant has failed to engage at all directly with the Affected Parties in relation to these protective provisions;

c) alternatives to enable the Applicant to access the converter station during its operation (both using an access way through Little Denmead Farm and a new access proposed along the eastern boundary of the Farm), This in turn relates to the signed unilateral undertaking under s106 Town and Country Planning Act 1990 that creates a new alternative access for the Applicant to use during the operation of the converter station, and place obligations on the Affected Parties to manage any ash die-back within Stoneacre Copse (which is also owned by the Affected Parties. Ash die-back was the reason given by the Applicant as to why it needed to increase the red-line to include Stoneacre Copse and subject that Copse to compulsory acquisition powers). The Affected Parties through their submitted Deadline 8 protective provisions and signed unilateral undertaking, offer to manage the ash-die back at Stoneacre Copse, which thus removes any need for the Applicant to be granted compulsory acquisition powers over that Copse;

d) Granting the Applicant a right of way over a second perimeter access along the eastern boundary of Little Denmead Farm for the Applicant to also use during the operation of the converter station (in addition to granting rights to the Applicant to lay an emergency temporary access over Little Denmead Farm during the operation of the converter station, in order to deal with any emergencies that require access by larger vehicles that cannot use the second perimeter access track along the eastern boundary);

e) Granting the Applicant rights to maintain landscaping around the converter station, avoiding any need for the Applicant to compulsorily acquire the freehold interest of a large part of Little Denmead Farm;

f) Granting the Applicant rights to inspect and maintain access and egress to/from the converter station, and the electricity cables under Little Denmead Farm; and

g) As a consequence of all the above, significantly reducing the extent of land that realistically and can justifiably be subject to compulsory acquisition powers. The submitted protective provisions at deadline 8 incorporate a plan which shows the reduced land belonging to the Affected Parties that could be subject to permanent compulsory acquisition powers; and

h) Provisions relating to the decommissioning of the converter station and the restoration of Little Denmead Farm.

130. The Affected Parties also submitted corresponding amendments (including amendments relating to the removal of the use of fiber optic cables for commercial telecommunication purposes) to the draft DCO at Deadline 8 (document reference [REP8-105]), a copy of which is at **Schedule 1** to this Response.

131. All references in this Response to alternatives proposed by the Affected Parties incorporate their proposed draft protective provisions (submitted at Deadline 8 under reference REP8-108), signed DCO unilateral undertaking obligation (submitted at Deadline 8 under reference REP8-095), and amendments to the draft DCO submitted at Deadline 8 (document reference [REP8-105]).

132. The consideration of the commercial telecoms provisions in these protective provisions is relevant to the Secretary of State's request to the Applicant to produce a revised draft DCO stripping out the relevant provisions relating to commercial telecoms (because that version had already been provided by the Affected Parties at Deadline 8).

133. To assist the Secretary of State remind himself as to why we have proposed excising the use of fibre optic cables for commercial telecoms purposes in relation to the Affected Parties' land, but also all physical cables, buildings and equipment related to commercial telecoms, the reasoning is as follows:

a) The cross channel electricity cables will connect to two converter stations, one at each end.

b) The cross channel cables will have fibre optic cables adjacent to them "for" monitoring the electricity cables that would actually connect to the Converter Stations at each end;

c) The Applicant envisages choosing to over specify the fibre optic cable diameter so that the cable would contain more fibre optic cables than would be necessary "for" the Converter Station intra-communications or "for" monitoring of the electricity bearing cables. Those surplus fibre optic cables will not connect to the Converter Station but would instead branch out under the Affected Parties' land to connect to a Telecommunications Building on that land;

d) It is for this reason that the Affected Parties have consistently submitted that both the physical fibre optic cables (to be used for commercial telecommunications) on their land and the use of cables on their land "for" commercial telecoms need to be excluded from the DCO and CPO powers <u>with respect to their land.</u> They have also in additional consistently submitted that the proposed commercial telecoms building on their land needs to be excluded from the DCO and CPO powers.

e) It is for these reasons too that we submitted at Deadline 8 a version of the draft DCO (document reference [REP8-105]) (a copy of which is attached at **Schedule 1** to this Response) that strips out the above elements relating to the commercial telecommunications.

134. The consideration of other alternative element contained in the Affected Parties' proposed protective provisions and signed unilateral DCO obligation, is relevant also to the matters covered in the Applicant's latest submissions to the Secretary of State on 28 July 2021.

135. The first draft of the Affected Parties' Protective Provisions was submitted at Deadline 5 (see document REP5-109). Having had full opportunity to review that draft, the Applicant did not provide *any* response on the detail of these provisions, nor did it seek to address the issues privately with the Affected Parties. Instead, the Applicant responded to the Affected Parties' at Deadline 6 of the Examination, in document REP6-069 /reference 7.9.25 (at table 3.1 on pages 3-67 and 3-68) by stating:

> "*The Applicant disagrees that the extent of the permanent land take is unjustified for the reasons explained in the response provided for Question 4.3 of the Applicant's Transcript of Oral Submissions for CAH1 (REP5-034). Further information in relation to Plot 1-32 is included within the Applicant's Post Hearing Notes submitted at Deadline 6. Taking the above into account, the proposed protective provisions in relation to the Carpenter's land are wholly inappropriate*"

136. This is mere rhetorical arm waving by the Applicant, provided no exploration of the alternative (in breach of paragraphs 7-10 of the Guidance on CPOs (September 2013), and evidences the Applicant's adherence to its misdirection under paragraph 4.4.3 of EN-1, in particular, bullet 8, instead of discharging its obligations under the Prest Test.

137. The Applicant's reference to "Question 4.3" in relation to CAH1 in the above is a reference to the following question set by the Examining Authority during CAH1. Question 4.3 was as follows:

> "*Question 4.3*
>
> *The Applicant to explain whether and how the rights to be acquired, including those for Temporary Possession, are necessary and proportionate. The explanation should include an end-to-end explanation of the need for Order land widths using visual aids to assist with the appreciation of construction methods and the use of the Order land sought and be an illustration and expansion of the information in the Environmental Statement – Volume 1 - Chapter 3 Description of the Proposed Development [APP-118], paragraphs 3.6.4.57 to 5.15 and other submissions.*"

138. The reference to "necessary and proportionate" seems to precis the second sentence of paragraph 8 of the CPO Guidance and to sentence of paragraph 9- but was not directed to exploration by the Applicant of "all reasonable alternatives" explored by it. Thus, as in the Stonehenge case, there appears to be an evaluative gap in relation to sentence 1 of paragraph 9 (and that gap evidences the misdirection by the ExA of erroneous reliance on paragraph 4.4.3 of EN-1, bullet points, whilst failing to have regard to the paragraph 4.4.3 requirement "subject to any legal requirements", being here, the application of the *Prest* Test (and Sainsbury's). Indeed, the absence of any questions from the ExA about paragraph 8, first sentence, is consistent with it misdirecting itself in law (as it did in the Stonehenge case) and confining itself to the bullet point criteria of 4.4.3 instead of *in addition* applying the paragraph 8 first sentence test as required (separately) by the first sentence of 4.4.3 and paragraph 8 itself.

139. Question 4.3 is not a question about the Affected Parties' proposed draft protective provisions, therefore any response provided by the Applicant would not have had the alternatives proposed by those protective provisions in mind.

140. The Applicant's response to Question 4.3 is contained in the Applicant's Transcript of Oral Submissions for CAH1 (see paragraphs 4.21 to 4.24 on pages 9 to 11 of document reference REP5-034

(7.9.18)). That response contains no reference to or assessment by it of any of the alternatives nor those proposed by the Affected Parties in their first draft protective provisions and unilateral undertaking.

141. As the Examination progressed (without any further effort by the Applicant to progress matters relating to the protective provisions privately), a second updated and revised draft Protective Provisions (and related updated related unilateral undertaking) was submitted by the Affected Parties at Deadline 7 (see document REP7-119). Those revised drafts also covered the same alternatives as listed in paragraph 44 of this Response.

142. Having had full opportunity to review that draft, the Applicant responded to the Affected Parties' second draft protective provisions (and related updated unilateral undertaking) as follows at Deadline 7c in paragraphs 3.1 to 3.4 of document reference REP7c-013 (document reference - 7.9.39.2). That document is entitled "*Applicant's Response to Deadline 7 and 7a Submissions – Appendix B Applicant's Response to the Submissions on Behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter at Deadline 7*". Paragraphs 3.1 to 3.4 state: (Emphasis added)

"*3.1 Statement 2 is focused on the need for the Access Road to the Converter Station to be present on the Affected Party's land (specifically Plot 1-32) during the Operational Period, with representatives on behalf of the Affected Party setting out a position that this is not necessary and the reasons why.*

3.2 The content of Statement 2 is in the main repetitive of the position put forward on behalf of the Affected Party in the Post Hearing Note on the Scope of the Authorised Development (REP6-135). The Applicant responded to this at Deadline 7 at Appendix A to the Applicant's Responses to Deadline 6 Submission – Hearings (REP7-075), and more particularly paragraph 2 of that document which provided the Applicant's response to comments made regarding the provision of additional spare transformers and a disassembled crane at the Converter Station.

3.3 Noting the repetition within the Affected Party's submission and that the Applicant has already clearly explained that the proposals are not in any way a technically feasible or an appropriate suggestion and evidence a continuing lack of understanding of the infrastructure which is to be provided, the Applicant does not seek to re-address the matters raised. The Applicant does however consider it helpful to provide a few clarifications in response to Statement 2, which are as follows:

3.3.1 the laying of an emergency temporary access road for in the event of an emergency situation is not a feasible or safe solution in connection with the operation of Nationally Significant High Voltage Electricity Infrastructure to which a permanent means of access is required;

3.3.2 the Applicant has very clearly evidenced why the alternative perimeter access road suggested is not suitable for the installation and replacement of transformers which by necessity requires large vehicles, and it has clearly evidenced why the Access Road is required on Plot 1-32 for that purpose both in connection with the construction of the Converter Station and throughout its Operational lifetime;

3.3.3 it is entirely rationale to contend that a failed transformer cannot (in some way) be unwired and the wires re-wired to a close by spare (operational) transformer whilst leaving the then redundant transformer in situ. Safe industry practice in connection with high voltage electricity infrastructure

does not involve the simple re-wiring and the leaving in situ of a faulty transformer, as suggested on behalf of the AP; and

3.3.4 there is no space for a disassembled crane at the Converter Station Area, and even if there were this does not assist the Affected Party because any failed transformer would need to be removed from the Converter Station Area, with an Access Road of suitable width and construction being available to do so.

3.4 The alternative position advanced on behalf of the Affected Party in relation to access requirements during the operational period would prevent the safe operation of the Converter Station, and in consequence the Proposed Development could not proceed."

143. In fact, the Application remains for an *outline* DCO and not for a *detailed* DCO. The Applicant had not in fact (or at all) explained why it could not "explore" "all reasonable alternatives".

144. It is clear from the Applicant's Responses that it misunderstood the Protective Provisions because no perimeter access was proposed for large vehicles (they being able to access the erected Converter Station (if needs be) over a temporary haul road.

145. The Responses contain otherwise numerous detailed assertions that are misplaced in light of the outline nature of the DCO sought, and were also not scrutinised by the ExA as Prest requires. As has been set out above, the EIA Regulations 2017 require consideration of "technologies … used" as part of the minimum information required by paragraph 5 of Schedule 4 in an environmental statement, and also provide a lower threshold test for major accidents and disasters. The environmental statement did include ongoing safety of the project as a relevant consideration nor identify any likely significant effect, nor include any disaster or emergency recovery plan. This absence of evidence shows that there is reasonable doubt that "safety" is a credible consideration and *Prest* requires that doubt be resolved in favour of the landowner here.

146. The remaining responses indicate that, as in Prest, there were opportunities remaining to be explored and scrutinised by the ExA (properly directing itself in law), because the considerations raised were merely inconvenient and not 'industry practice', and a desire, as opposed to a need.

147. In light of the above therefore, the Applicant did not provide any "exploration" or evaluation assessment itself nor of alternatives proposed by the Affected Parties (including those alternatives proposed in relation to commercial telecommunications), save for limited and unsubstantiated assertions relating to:

a) the proposed alternative temporary emergency access road across Little Denmead Farm. The Applicant asserts this as not being a feasible or safe solution, but the Applicant does not explain *how or why* it is not feasible or safe, nor does the Applicant provide any supporting evidence whereas the Affected Parties provided evidence of how to construct such a temporary road (and as is being used in other DCOs); and

b) the alternative perimeter access road, but the Applicant has (again) misdirected the Examining Authority in its response to this alternative element. The Applicant has mistakenly

categorised and assessed this alternative as being proposed to be used by larger vehicles during the operation of the converter station, when in fact it has consistently been made clear by the Affected Parties in Issue Specific Hearings and in Representations that the perimeter access road (running along the eastern boundary of Little Denmead Farm) was being proposed (in line with the Applicant' own Design and Access Statement evidence) to be used by smaller maintenance vehicles during the operation of the converter station in conjunction with the proposed temporary emergency access track to run across Little Denmead Farm to be used by larger vehicles (it is temporary because by the Applicant's own environmental assessment and evidence, there is a very low risk of there being a catastrophic event at the converter station, and the converter station will only need to be inspected/maintained between 3 to 4 times a year).

148. During ISH4, the Applicant also submitted that it would be relying upon the Riverside DCO as an example of its own approach. In light of this, the Affected Parties *also* followed the Applicant's helpful lead in submitted a revised final version draft Protective Provisions that adopts the very same Riverside DCO (where an existing landowner was similarly protected by Protective Provisions) at Deadline 8 (document reference [REP8-108]), together with a signed unilateral DCO Obligation (document reference [REP8-095]), and corresponding revisions to the draft DCO which reflected its revised proposed alternatives (which included stripping out commercial telecoms from their land) which the Affected Parties (document reference [REP8-105]), also submitted at Deadline 8. Indeed, the Affected Parties' proposed Protective Provisions submitted at Deadline 8 align with Riverside DCO Protective Provisions (which show what might have been achievable by private negotiation).

149. It seems to the Affected Party that if the Applicant can rely on the Riverside DCO terms as a model for acceptable provisions and their phraseology, then so too can the Affected Party. And it has.

150. Also, the Affected Parties' protective provisions submitted at Deadline 8 envisage a situation where the Secretary of State determines that he will grant the DCO and that he is entitled to authorise compulsory acquisition powers pursuant to section 122 Planning Act 2008, including to extend the Order Limits to include Stoneacre Copse for such purposes. In only such a case, the Affected Parties' Deadline 8 protective provisions would then become a relevant consideration for the Secretary of State when determining the appropriate extent of compulsory acquisition powers and other powers should be authorised in relation to Little Denmead Farm. Those Deadline 8 Protective Provisions reflect what the Affected Parties submit is appropriate in relation to Little Denmead Farm in such a scenario.

151. At Deadline 9 of the Examination, the Applicant submitted responses to submissions made on behalf of the Affected Parties at Deadline 8 in a document entitled: "*Response to Submissions made on behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter*" (document reference [REP9-019] / 7.9.51). However, we note that at para 1.3 of REP9-019 the Applicant asserts that it responded to our amended version of the Draft DCO (REP8-105) in the schedule of changes requested to the draft DCO [REP9-008]. That is <u>not</u> the case.

152. In fact, the Applicant did not, in (document reference [REP9-019] / 7.9.51), include <u>any</u> comment on, or evaluation of, the Affected Parties' Deadline 8 revised <u>final</u> version draft Protective Provisions

(document reference [REP8-108]), signed unilateral DCO Obligation (document reference [REP8-095]), or corresponding revisions to the draft DCO which reflected the Affected Parties' proposed alternatives (which included stripping out commercial telecoms from their land) (document reference [REP8-105]). We also note that in its submissions to the Secretary of State on 28 July 2021, the Applicant does not comment on or evaluate these particular documents either.

153. We infer from that full opportunity that the Applicant had to evaluate the final Deadline 8 Protective Provisions that it was content (finally) with their terms. This aligns with their not engaging again with them subsequently.

154. The Applicant has never evaluated before or during Examination its own "reasonable alternative" to permanent acquisition of the Affected Parties' land to be able to demonstrate its proposals for CPO are a remedy of last (not first) resort. As at 12 August 2021, it has not commented on/evaluated directly to the Secretary of State, or approached the Affected Party privately, about the Applicant's proposed protective provisions, signed DCO obligation, and proposed corresponding changes to the draft DCO beyond the very limited assertions referred to above.

155. Nowhere in the Examining Authority's evaluation of the Affected Parties' proposals on alternatives during Examination is there evidence of the Examining Authority itself (as the Prest Test requires) scrutinising the <u>Applicant's minimal and limited assertions and asking the Applicant **why**</u> the Affected Parties' alternatives are not able to be incorporated within the project and CPO provisions. For example, there has been no scrutiny by the Examining Authority as to the reasonable basis for the Applicant to assert the proposed alternative (evidenced) temporary emergency access route across Little Denmead Farm was not a safe or feasible solution - the ExA did not ask any follow up questions asking the Applicant to explain its statements in relation to this or provide evidence. The absence of scrutiny by the ExA of the Applicant's compliance with paragraphs 7-8 of the Guidance on CPO (September 2013) evidences that the ExA applied the wrong test, limiting itself to the bullets of paragraph 4.4.3 of EN-1 and not going beyond (as paragraph 4.4.3 and *Sainsbury's* and *Prest* required that it do).

156. The reason for this appears to be because the Applicant has misdirected both itself in its own breach of paragraphs 7-8 and also misdirected the Examining Authority (as did Highways England in the Stonehenge case) in terms of the scope and extent and type of evaluation of alternatives in the CPO context where a different legal requirement applies. As has been referred to above, the Applicant has contended that "the onus" rests on the third party proposing the alternative. Paragraphs 3.5 and 3.6 of document reference REP7c-013 (document reference - 7.9.39.2) entitled "Applicant's Response to Deadline 7 and 7a Submissions – Appendix B Applicant's Response to the Submissions on Behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter at Deadline 7" set out the Applicant's position and state:

> "*3.5 Furthermore, where an alternative is first put forward by a third party after an application has been made, and the Applicant notes this alternative proposal was not advanced until December 2020 being a year after the Application was made, the ExA may place the onus on the person proposing the alternative to provide the evidence for its suitability. It is clear from the submissions made on behalf of the Affected Party that the alternative access position advanced is not a suitable alternative, because it would not allow for the safe operation of the Proposed Development.*

3.6 For these reasons, and in accordance with paragraph 4.4.3 of NPS EN-1, the alternative access position advanced on behalf of the Affected Party is not a reasonable alternative, and it is therefore not important or relevant to the Secretary of State's decision and should be given no weight in the decision making process."

157. In light of the principles established by the *Prest* and *Stonehenge* cases as set out above, the Applicant has clearly mis-directed itself and the Examining Authority by asserting that it is up to the landowner (i.e. the Affected Parties) and not the Applicant or the Examining Authority to evaluate the alternatives proposed during Examination by a landowner. As a result of this error, the Applicant has failed to justify and explain why the alternatives proposed by the Affected Parties are not suitable. There was also no scrutiny by the Examining Authority of the alternatives proposed by the Affected Parties as per their draft protective provisions and unilateral undertaking.

158. As referred to above, on analysis of the ExA Examination Period evidence, as in the *Stonehenge* case, it appears that the Examining Authority relied on the advice of the Applicant in this regard and it too misdirected itself by failing to scrutinize the Affected Parties' proposed alternatives and by failing the scrutinize the Applicant's assessment of those alternatives. If so, any report produced by the Examining Authority to the Secretary of State cannot be relied on in relation to the ExA's analysis and conclusions on the evaluation of alternatives proposed by the Affected Parties objecting to the compulsory acquisition of their land, and hence in relation to compulsory acquisition powers being sought in relation to Little Denmead Farm (and the plot numbers the Affected Parties have an interest in or right over). The Applicant and the Examining Authority had numerous opportunities to evaluate "all reasonable alternatives", (including those elements comprising alternatives proposed by the Affected Parties in order to ensure the minimum permanent land take from their working farm) in line with the *Prest* Test, but appear to have erroneously chose not to do so.

159. The effect of the court's decision in the *Stonehenge* case to was fix the Highways Agency and Examining Authority for misleading the Secretary of State with respect to the unlawfully confined consideration of alternatives. The Court held that in the context of CPO, the consideration of national policy requirements on alternatives requires they be "subject to any legal requirements". The relevant legal requirements in this case are the consideration of common law principles, which cannot be overridden by policy requirements. The relevant common law principles are set out in the Prest case, which places, and maintains, "the onus" <u>on the Applicant</u> (and never upon the landowner) to evaluate alternatives on the basis that CPO should only ever be used as a measure of last resort.

160. What the Applicant has tried to do in this case is re-write common law and CPO Guidance and paragraph 4.4.3 f EN-1 to make those bullet point criteria override the common law protections against the constitutional principle of protection for the private landowner. See *Sainsbury's* case.

161. That would explain why there has been no evaluation by either the Applicant or the Examining Authority of the alternatives proposed by the Affected Parties. That makes the approach adopted by the Examining Authority illegal as it has required the wrong party to evaluate alternatives with respect to the interests owned by the Affected Parties. The Examining Authority did not itself scrutinize the Applicant's statements and lack of reasons and evidence that the Affected Parties' alternatives were unsuitable.

162. In light of the above, the Secretary of State now has the following options:

- **Option 1 –** disregard the sections of the Examining Authority's report relating to compulsory acquisition powers affecting the Affected Parties' interests (which includes Little Denmead Farm and Stoneacre Copse), and grants the DCO without those CPO powers in line with paragraph 16 of the Planning Act 2008: Guidance on CPO (September 2013). This would be on the evidenced and rational basis that the Applicant has failed to show the use of CPO is a remedy of last resort for want of consideration by *the Applicant* (before or during the Examination Period) of "all reasonable alternatives") and its failure to demonstrate the same by it. It has breached national CPO Guidance (and EN-1 paragraph 4.4.3, first sentence) by failing itself to demonstrate and explore all reasonable alternatives. It would also in effect remove the land required for the converter station from the scope of the CPO powers. As no private agreement has been negotiated *yet* but the Affected Parties have every confidence that appropriate terms can be reached forthwith-; or
- **Option 2 -** the Secretary of State disregards the sections of the Examining Authority's report relating to compulsory acquisition of the Affected Parties' interests, and the Secretary of State *himself* evaluates all the alternatives proposed by the Affected Parties (which will include those relating to commercial telecommunications) (in line with the approach of the Stonehenge case law but that was not done in that case but might be done in this case) by examining all the relevant documents and source material in the Examination Library himself, applying the *Prest* Test and the *Sainsburys* case, and reaching his own findings and conclusions, having resolved any doubts in favour of the Affected Parties and against the Applicant. We would however question whether there would be enough time available within the statutory period for the Secretary of State to himself (as required by section 103 of the PA 2008 and the *Stonehenge* case (even if helped by Officials); or
- **Option 3** – the Secretary of State agrees with the Affected Parties that: (a) the Applicant has failed to discharge its obligation under relevant CPO guidance that requires the consideration of all reasonable alternatives by the Applicant and their scrutiny by the decision maker, so as to be able to demonstrate proposals for the use of compulsory acquisition powers only as a measure of last (not first) resort; (b) the Examining Authority failed to scrutinize the Applicant so as to test whether a CPO (including as modified) was a remedy of last resort), and; (c) that the Applicant and Examining Authority misdirected themselves by confining their approach to paragraph 4.4.3 of EN-1 without regard to the prior phrase "subject to any legal requirements" with the result that they applied the wrong test in the circumstances of this Application and CPO matters, and did not go beyond (as also happened in error in the Stonehenge case) to logically prior apply the *Prest* Test and *Sainsbury's* case, and, in legal error, erroneously attributed "the onus" of alternatives (and so scheme modifications) to the land owner whereas the law requires that it remain on the acquiring party and that that acquiring party be so scrutinized.
    - In this case, if the Secretary of State accepts it is not able to evaluate whether the use of compulsory acquisition powers in relation to the Affected Parties' interests is indeed a

measure of last resort (as required by the CPO Guidance), then the only way therefore for the Secretary of State to be able to grant the DCO with CPO powers is for the Secretary of State to modify the scheme with respect to the Affected Parties' interests, and adopt the Affected Parties' Proposed Protective Provisions supplied at Deadline 8 and not criticized by the Applicant, adopt the signed DCO obligation and related amendments to the draft DCO excising the commercial telecommunications and related operational development, all of which are interconnected and were submitted at Deadline 8.

- If the Secretary of State does not do this, he would act unlawfully. See the Stonehenge case.
- Instead, the inclusion of the Affected Party's revised proposed Protective Provisions and other Deadline 8 proposed amendments to the draft DCO (along with the signed DCO obligation) would (subject to lawful consideration of the financial aspects of the project detailed in previous Representations) enable the Secretary of State to lawfully and rationally conclude that the requirements of his CPO Guidance; and paragraphs 8 (sentence 1) and 26 could be said to be lawfully satisfied by the terms of those Provisions as evidence of a reasonable modification to the scope of the DCO project in the field of energy and scope of the CPO provisions. Without the inclusion of the Affected Parties' protective provisions in the event of Part V of the draft DCO being authorised, the Secretary of State would be acting unlawfully and in breach of section 104(3) of the PA 20-08, EN-1, paragraph 4.4.3, first sentence and “subject to any legal requirements”, *Prest* and *Sainsbury’s* cases and paragraphs 8 and 26 of his own CPO Guidance.

SCHEDULE 1

COPY OF REVISED DRAFT DCO SUBMITTED BY AFFECTED PARTIES AT DEADLINE 8 OF THE EXAMINATION (DOCUMENT REFERENCE REP8-105)

AQUIND Limited

AQUIND INTERCONNECTOR

Updated Draft DCO – Clean

The Planning Act 2008

Infrastructure Planning (Applications: Prescr bed Forms and Procedure) Regulations 2009
Regulation 5(2)(h)

Document Ref: 3.1

PINS Ref.: EN020022

AQUIND Limited

AQUIND INTERCONNECTOR

Updated Draft DCO – Clean

PINS REF.: EN020022

DOCUMENT: 3.1

DATE: 1 March~~25 JANUARY~~ 2021

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DOCUMENT

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STATUTORY INSTRUMENTS

202X No. 0000

INFRASTRUCTURE PLANNING

The AQUIND Interconnector Order 202[ ]

Made - - - -	***
Coming into force - -	***

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Commented [CZ1]: See BM Deadline 8 Document: "Development Consent Protective Provisions in relation to Little Denmead Farm" as submitted at Deadline 8

An application has been made to the Secretary of State under section 37 of the Planning Act 2008 (the "2008 Act" (**a**)) and in accordance with the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009(**b**) for an Order under sections 114, 115 and 120 of the 2008 Act.

The application was examined by a panel of three members ("the Panel") in accordance with Chapter 4 of Part 6 of the 2008 Act and the Infrastructure Planning (Examination Procedure) Rules(**c**).

The Panel, having considered the application together with the documents that accompanied it and the representations made, in accordance with section 83 of the 2008 Act, has submitted a report to the Secretary of State setting out its findings, conclusions and recommendations in respect of the application.

The Secretary of State, having considered the report and recommendations of the Panel, has decided to make an Order granting development consent for the development described in the application [with modifications which in the opinion of the Secretary of State do not make any substantial change to the proposals comprised within the application].

The Secretary of State is also satisfied that the parcels of common, open space or fuel or field allotment land comprised within the Order limits (as identified in the Book of Reference), when burdened with rights and restrictive covenants imposed by this Order, will be no less advantageous than they were before to persons in whom they are vested, other persons, if any, entitled to rights of common or other rights and the public, and that accordingly, section 132(3) of the 2008 Act applies.

The Secretary of State in exercise of the powers conferred by section 114, 115 and 120 of the 2008 Act, makes the following Order:

PART 1

General provisions

Preliminary

Citation and commencement

1. This Order may be cited as the AQUIND Interconnector Order 202[ ] and comes into force on [ ] 202[ ].

Interpretation

2.—(1) In this Order, unless the context requires otherwise—

"the 1961 Act" means the Land Compensation Act 1961(**d**);

"the 1965 Act" means the Compulsory Purchase Act 1965(**e**);

(a) ~~2008 c 29 Parts 1 to 7 were amended by Chapter 6 of Part 6 of the Localism Act 2011 (c 20)~~
(b) S I 2009/2264, to which there are amendments not relevant to this Order
(c) S I 2010/103, amended by S I 2012/635
(d) 1961 c 33 Section 2(2) was amended by section 193 of, and paragraph 5 of Schedule 33 to, the Local Government, Planning and Land Act 1980 (c 65) There are other amendments to the 1961 Act which are not relevant to this Order
(e) 1965 c 56 Section 3 was amended by section 70 of, and paragraph 3 of Schedule 15 to, the Planning and Compensation Act 1991 (c 34) Section 4 was amended by section 3 of, and Part 1 of Schedule 1 to, the Housing (Consequential

"the 1980 Act" means the Highways Act 1980(a);

"the 1981 Act" means the Compulsory Purchase (Vesting Declarations) Act 1981(b);

"the 1984 Act" means the Road Traffic Regulations Act 1984(c);

"the 1989 Act" means the Electricity Act 1989(d);

"the 1990 Act" means the Town and Country Planning Act 1990(e);

"the 1991 Act" means the New Roads and Street Works Act 1991(f);

"the 2008 Act" means the Planning Act 2008(g);

"the 2009 Act" means the Marine and Coastal Access Act 2009(h);

"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.) for the purposes of this Order and identified in Schedule 6;

"address" includes any number or address used for the purposes of electronic transmission;

"apparatus" unless otherwise provided for, has the same meaning as in Part 3 of the 1991 Act;

"area of seaward construction activity" means the area of the sea within the Order limits seaward of MHWS shown on the work plans;

"authorised development" means the development required by the section 35 direction to be treated as such, being development within the meaning of sections 35(2)(a)(i) and 32 of the 2008 Act and associated development and ancillary development in relation thereto described in Schedule 1 (Authorised Development) ~~and any other development authorised by this Order which is development within the meaning of section 32 of the 2008 Act~~;

Commented [CZ2]: To ensure that the authorised development remains within clear constraints See *Smith* case

"book of reference" means the document certified by the Secretary of State as the book of reference under article 43 (Certification of plans, etc.) for the purposes of this Order;

"building" means a "building" as defined by section 235(1) of the 2008 Act ~~includes any structure or erection or any part of a building, structure or erection~~;

Commented [CZ3]: Aligned to the statutory definition that is incorporated within the 2008 Act by sections 32 and 235(1) thereof that defines "building" by reference to section 336(1) of the 1990 Act

Provisions) Act 1985 (c 71) Section 5 was amended by sections 67 and 80 of, and Part 2 of Schedule 18 to, the Planning and Compensation Act 1991 (c 34) Subsection (1) of section 11 and sections 3, 31 and 32 were amended by section 34(1) of, and Schedule 4 to, the Acquisition of Land Act 1981 (c 67) and by section 14 of, and paragraph 12(1) of Schedule 5 to, the Church of England (Miscellaneous Provisions) Measure 2006 (2006 No 1) Section 12 was amended by section 56(2) of, and Part 1 to Schedule 9 to, the Courts Act 1971 (c 23) Section 13 was amended by section 139 of the Tribunals, Courts and Enforcement Act 2007 (c 15) Section 20 was amended by section 70 of, and paragraph 14 of Schedule 15 to, the Planning and Compensation Act 1991 (c 34) Sections 9, 25 and 29 were amended by the Statute Law (Repeals) Act 1973 (c 39) Section 31 was also amended by section 70 of, and paragraph 19 of Schedule15 to, the Planning and Compensation Act 1991 (c 34) and by section 14 of, and paragraph 12(2) of Schedule 5 to, the Church of England (Miscellaneous Provisions) Measure 2006 (2006 No 1) There are other amendments to the 1965 Act which are not relevant to this Order

(a) 1980 c 66 Section 1(1) was amended by section 21(2) of the New Roads and Street Works Act 1991 (c 22); sections 1(2), 1(3) and 1(4) were amended by section 8 of, and paragraph (1) of Schedule 4 to, the Local Government Act 1985 (c 51); section 1(2A) was inserted, and section 1(3) was amended, by section 259 (1), (2) and (3) of the Greater London Authority Act 1999 (c 29); sections 1(3A) and 1(5) were inserted by section 22(1) of, and paragraph 1 of Schedule 7 to, the Local Government (Wales) Act 1994 (c 19) Section 36(2) was amended by section 4(1) of, and paragraphs 47(a) and (b) of Schedule 2 to, the Housing (Consequential Provisions) Act 1985 (c 71), by S I 2006/1177, by section 4 of, and paragraph 45(3) of Schedule 2 to, the Planning (Consequential Provisions) Act 1990 (c 11), by section 64(1), (2) and (3) of the Transport and Works Act (c 42) and by section 57 of, and paragraph 5 of Part 1 of Schedule 6 to, the Countryside and Rights of Way Act 2000 (c 37); section 36(3A) was inserted by section 64(4) of the Transport and Works Act 1992 and was amended by S I 2006/1177; section 36(6) was amended by section 8 of, and paragraph 7 of Schedule 4 to, the Local Government Act 1985 (c 51); and section 36(7) was inserted by section 22(1) of, and paragraph 4 of Schedule 7 to, the Local Government (Wales) Act 1994 (c 19) Section 329 was amended by section 112(4) of, and Schedule 18 to, the Electricity Act 1989 (c 29) and by section 190(3) of, and Part 1 of Schedule 27 to, the Water Act 1989 (c 15) There are other amendments to the 1980 Act which are not relevant to this Order

(b) 1981 c 66

(c) 1984 c 27

(d) 1989 c 29

(e) 1990 c 8 Section 56(4) was amended by section 32 of, and paragraph 10(2) of Schedule 7 to, the Planning and Compensation Act 1991 (c 34) Section 106 was substituted, and section 106A inserted, by section 12(1) of the Planning and Compensation Act 1991 Section 206(1) was amended by section 192(8) of, and paragraphs 7 and 11 of Schedule 8 to, the 2008 Act Sections 272 to 274 and section 279 were amended by section 406(1) of, and paragraph 103 of Schedule 17 to, the Communications Act (c 21), and section 280 was amended by section 406(1) of, and paragraph 104 of Schedule 17 to, that Act Sections 272 to 274 were also amended by S I 2011/741 and S I 2012/2590 Section 282 was amended by S I 2009/1307 There are other amendments to the 1990 Act which are not relevant to this Order

(f) 1991 c 22 Section 48(3A) was inserted by section 124 of the Local Transport Act 2008 (c 26) Part 3 of the 1991 Act was amended by Part 4 of the Traffic Management Act 2004 (c 18) Section 74 was amended, and sections 74A and 74B inserted, by sections 255 and 256 of the Transport Act 2000 (c 38) There are other amendments to the 1991 Act but they are not relevant to this Order

(g) 2008 c 29

(h) 2009 c 23

"cable circuit" means a number of electrical conductors necessary to transmit electricity between two points within the authorised development; this comprises in the case of a HVAC cable circuit, three conductors and in the case of a HVDC cable circuit, two conductors;

"cable protection" means physical measures for the protection of cables including grout bags, concrete or frond mattresses, and/or rock placement and any other physical measures for the protection of cables which are unlikely to give rise to any materially new or materially different environmental effects from those assessed in the environmental statement;

"carriageway" has the meaning given in section 329 of the 1980 Act (interpretation);

"commence" means (a) in relation to any works seaward of MHWS, the first carrying out of any licensed marine activity authorised by the deemed marine licence save for pre-construction surveys approved by the deemed marine licence and (b) in respect of any other works comprised in the authorised development beginning to carry out any material operation, as defined in section 155 of the 2008 Act (when development begins), forming part, or carried out for the purposes, of the authorised development other than operations consisting of onshore site preparation works and the words "commencement" and "commenced" are to be construed accordingly;

"construction compound" means a site used temporarily in connection with construction of the authorised development which may include central offices, welfare facilities and storage;

"converter station" means the HVDC converter station containing apparatus and equipment required for the operation and maintenance of an electric power HVDC interconnector including (but not limited to) equipment required to transmit, switch, transform and convert electricity, including backups, spares and apparatus with external landscaping and means of access and more particularly described in Schedule 1;

"deemed marine licence" means the marine licence set out at Schedule 15 and any variation properly made to that from time to time;

"design and access statement" or "DAS" means the document certified as the design and access statement by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order;

"discharging authority" means the body responsible for giving any agreement or approval required by a requirement;

"disposal" means the deposit of dredged material at disposal sites with reference WI048 and WI049 within the extent of the Order limits seaward of MHWS and "dispose" and cognate expressions are to be construed accordingly;

"electronic transmission" means a communication transmitted—

(a) by means of an electronic communications network; or

(b) by other means but while in electronic form;

"environmental statement" means the document submitted by the undertaker to support its application for development consent and certified as the environmental statement by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order;

"fibre optic data transmission cables" means fibre optic cables of the purpose for control, monitoring, and protection of the HVDC cable circuits, and of and for telecommunications relating to the converter station

"framework traffic management strategy" means the document certified as the framework traffic management strategy by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order;

"footpath" and "footway" have the same meaning as in the 1980 Act;

"hedgerow and tree preservation order plans" means the plans certified as the hedgerow and tree preservation order plans by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order

"highway" and "highway authority" have the same meaning as is provided for in the 1980 Act;

"horizontal directional drilling" and "HDD" means a trenchless technique for installing an underground duct between two points without the need to excavate vertical shafts;

Commented [CZ4]: To align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to ensure the purpose of the authorised development remains exclusively within statutory scope of "the field of energy" under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3 5, 3 5 1(A)-(d), 3 5 2(A) of the Applicant's Statement request a Section 35 Direction **[AS-040]** and **[APPP-111]**, and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008

"horizontal directional drilling compound" and "HDD compound" means a construction compound to be provided in connection with the undertaking of horizontal directional drilling;

"HVAC" means high voltage alternating current;

"HVDC" means high voltage direct current;

"intrusive activities" means activities including but not limited to anchoring of vessels, jacking up of vessels, seabed clearance and disposal;

"joint bay" means the underground transition location between sections of cable containing the cable joint and ancillary equipment and parts required to make the joint;

"land" includes land covered by water, any interest in land or right in, to or over land;

"land plans" means the plans certified as the land plans by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order and identified in Schedule 4;

"link box" means an underground metal box placed within a plastic or concrete pit where cable sections are connected and earthed;

"link pillar" means an above ground building where cable sections are connected and earthed;

"Little Denmead Farm" means the land within HM Land Registry Title

"local planning authority" has the same meaning as in the 1990 Act;

"maintain" includes inspect, upkeep, repair, adjust, alter, improve, preserve and further includes remove, reconstruct and replace any part of the authorised development, provided such works do not give rise to any materially new or materially different environmental effects to those identified in the environmental statement and "maintenance" must be construed accordingly;

"marine HVDC cables" means two 320 kilovolt HVDC cable circuits for the transmission of electricity which may be bundled as two pairs of cables or take the form of single cables, ~~together~~ with~~:~~ i) for the purpose of control, monitoring, and protection of the HVDC cable circuits, and for telecommunications relating to the converter station,~~(i)~~ fibre optic data transmission cables accompanying each HVDC cable circuit, ~~for the purpose of control, monitoring, and protection of the HVDC cable circuits and converter station, and for commercial telecommunications~~; and (ii) for such cables one or more crossing~~cables~~ ~~crossing~~;

"marine works" means Works No's 6 and 7 described in Schedule 1 and any other works seaward of MHWS in connection with those Works authorised by this Order or, as the case may require, any part of those works and "marine work" refers to any one of the marine works;

"Maritime and Coastguard Agency" means the executive agency of the Department for Transport;

"master" in relation to a vessel means any person for the time being having or taking the command, charge or management of the vessel;

"mean high water springs" or "MHWS" means the average throughout the year of two successive high waters during a 24-hour period in each month when the range of the tide is at its greatest;

"mean low water springs" or "MLWS" means the average throughout the year, of two successive low waters, during a 24-hour period in each month when the range of the tide is at its greatest;

"National Grid" means National Grid Electricity Transmission plc. (Company No. 02366977) and their successors in title, assigns and any other person exercising their powers or performing the same functions;

"onshore HVAC cables" means two 400 kilovolt HVAC cable circuits for the transmission of electricity,~~together~~ with: (i)) for the purpose of control, monitoring, and protection of the HVDC cable circuits, and for telecommunications relating to the converter station, fibre optic data transmission cable ~~for the purpose of control, monitoring and protection~~ and an earth continuity conductor with each cable circuit; and (ii) for such cables one or more ~~cable~~ crossings;

"onshore HVDC cables" means two 320 kilovolt HVDC cable circuits for the transmission of electricity ~~together~~ with: (i)~~-~~ for the purpose of control, monitoring, and protection of the HVDC cable circuits, and for telecommunications relating to the converter station, fibre optic data transmission cables accompanying each HVDC cable circuit ~~for the purpose of control, monitoring and protection of the HVDC cable circuits~~

Commented [CZ5]: To align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to constrain the purpose of the instant Application within the field of energy under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3 5, 3 5 1(A)-(d), 3 5 2(A) of the Applicant's Statement request a Section 35 Direction **[AS-040]** and **[APP-111]**, and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008; and to align with the evidence in paragraph 5 2 of **[AS-040]**

Commented [CZ6]: To align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to constrain the purpose of the instant Application within the field of energy under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3 5, 3 5 1(A)-(d), 3 5 2(A) of the Applicant's Statement request a Section 35 Direction **[AS-040]** and **[APP-111]**, and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008

and the converter station, and for commercial telecommunications; and (ii) for such cables one or more crossingcables crossing

"onshore site preparation works" means:

(a) pre-construction archaeological investigations;
(b) environmental surveys and monitoring;
(c) site clearance;
(d) removal of hedgerows, trees and shrubs;
(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; and
(j) Work No. 2 (bb) (access junction and associated gated highway link);

"onshore works" means Works No's 1 to 5 (inclusive) described in Schedule 1 and any other works landwards of MLWS in connection with those Works authorised by this Order or, as the case may require, any part of those works and "onshore work" refers to any one of the onshore works;

"Order land" means the land which is within the limits of the land to be acquired shown on and identified by plot numbers on the land plans and described in the book of reference;

"Order limits" means the limits shown on the works plans within which the authorised development may be carried out, whose grid co-ordinates seaward of MHWS are set out in paragraph 2 of Schedule 1 of this Order;

"operational period" means the period of time that the relevant part of the authorised development is in operation after construction and commissioning is complete pursuant to the relevant construction contract or contracts and "operation" and "operational" should be construed accordingly;

"optical regeneration station" means signal amplification and control equipment associated with fibre optic data transmission cables required to ensure an adequate signal strength housed within a building;

"owner", in relation to land, has the same meaning as in section 7 of the 1981 Act (interpretation);

"parameter plans" means the plans certified as the parameter plans by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order and identified in Schedule 7;

"permanent limits" means the limits of land for the purpose of article 20 (Compulsory acquisition of land) as shown shaded pink, blue, purple and green on the land plans;

"the permit schemes" means the following schemes made under part 3 of the Traffic Management Act 2004(a) as in force at the date on which this Order is made–

(a) The Traffic Management (Hampshire County Council) Permit Scheme Order; and
(b) The Portsmouth City Council Permit Scheme Order 2020.

"plot 10-14" means plot 10-14 as shown on the land plans and described in the book of reference;

"provisional advance authorisation" has the same given in regulation 2 of the Traffic Management Permit Scheme Regulations 2007(b);

(a) 2004 c 18
(b) S I 2007/3372

Commented [CZ7]: To align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to constrain the purpose of the instant Application within the field of energy under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3 5, 3 5 1(A)-(d), 3 5 2(A) of the Applicant's Statement request a Section 35 Direction **[AS-040]** and **[APPP-111]**, and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008

"relevant highway authority" means, in any given provision of this Order, the highway authority for the highway that the provision relates to i.e. Hampshire County Council or Portsmouth City Council, as the case may be;

"relevant street authority" means, in any given provision of this Order, the street authority for the street that the provision relates to i.e. Hampshire County Council or Portsmouth City Council, as the case may be;

"relevant planning authority" means, in any given provision of this Order, the local planning authority for any area of land that the provision relates to, i.e. Winchester City Council, Havant Borough Council, Portsmouth City Council or East Hampshire District Council, as the case may be, or in respect of the marine works the Marine Management Organisation;

"requirement" means a requirement set out in Schedule 2, paragraphs 2 to 29 and a reference to a numbered requirement is a reference to the requirement set out in the paragraph of the same number in that Schedule;

"section 35 direction" means the direction of the Secretary of State dated [INSERT] by which the authorised development is required to be treated as development for which development consent is required

"SSE" means SSE Electricity Limited (Company No. 04094263) and their successors in title, assigns and any other person exercising their powers or performing the same functions;

"statutory undertaker" means any person falling within section 127(8) of the 2008 Act (statutory undertakers' land) and includes a public communications provider as defined in section 151(1) of the Communications Act 2003(**a**);

"street" means a street within the meaning of section 48 of the 1991 Act, together with land on the verge of a street between two carriageways, and includes part of a street;

"street authority", in relation to a street, has the meaning given in Part 3 of the 1991 Act (the street authority and other relevant authorities);

"subsoil" means any part of the substrata which is below the surface of the ground;

~~"telecommunications building" means telecommunications apparatus and ancillary equipment related to the termination of and for the commercial use of the fibre optic data transmission cables housed within a building~~;

"telecommunications infrastructure" means, in paragraph (4) of Schedule 2, telecommunications infrastructure for the purpose of control, monitoring, and protection of the HVDC cable circuits and for telecommunications relating to the converter station

"traffic authority" has the same meaning as in the 1984 Act;

"traffic management strategy" means a strategy csontaining details of the traffic management measures to be implemented in connection with the carrying out of works on any street to be approved pursuant to requirement 25;

"traffic signs" has the meaning given in section 64(1) of the 1984 Act (General provisions as to traffic signs);

"transitional joint bay" means the underground concrete bays forming part of Work No. 5, where the marine HVDC cable in Works No. 6 and 7 is jointed to the onshore HVDC cable in Works No. 4

"tree preservation order" has the meaning given in section 198 of the 1990 Act (power to make tree preservation orders);

"trenchless installation techniques" means techniques for installing an underground duct between two point, without excavating and back-filling a trench;

"trenchless installation technique compound" means a construction compound to be provided in connection with the undertaking of trenchless installation techniques;

"tribunal" means the Upper Tribunal (Lands Chamber);

"undertaker" means AQUIND Limited (company number 06681477) or the person who has the benefit of this Order in accordance with article 6 (Benefit of Order) and 7 (Consent to transfer benefit of Order) for the purposes of the field of energy

"undertaking" mean the transmission of electricity ~~and provision of telecommunications services~~ by the undertaker as authorised from time to time

Commented [CZ8]: To align the defined term with the terms of "requirements" and because paragraph 1 of Schedule 2 is not itself a "requirement" but a series of minor definitions If this is not so aligned, Article 2(1) and the definition of "requirement" could convert paragraph 1 of Schedule 2 into an unnumbered requirement and enable unevaluated development to be inadvertently authorised

Commented [CZ9]: To align the scope of the authorised development with the terms of the Secretary of State's Section 35 Direction for a proposed Development under section 35(2)(a)(i), being a proposed project in the field of energy so as to constrain the purpose of the instant Application within the field of energy under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3 5, 3 5 1(A)-(d), 3 5 2(A) of the Applicant's Statement request a Section 35 Direction **[AS-040]** and **[APP-111]**, and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008

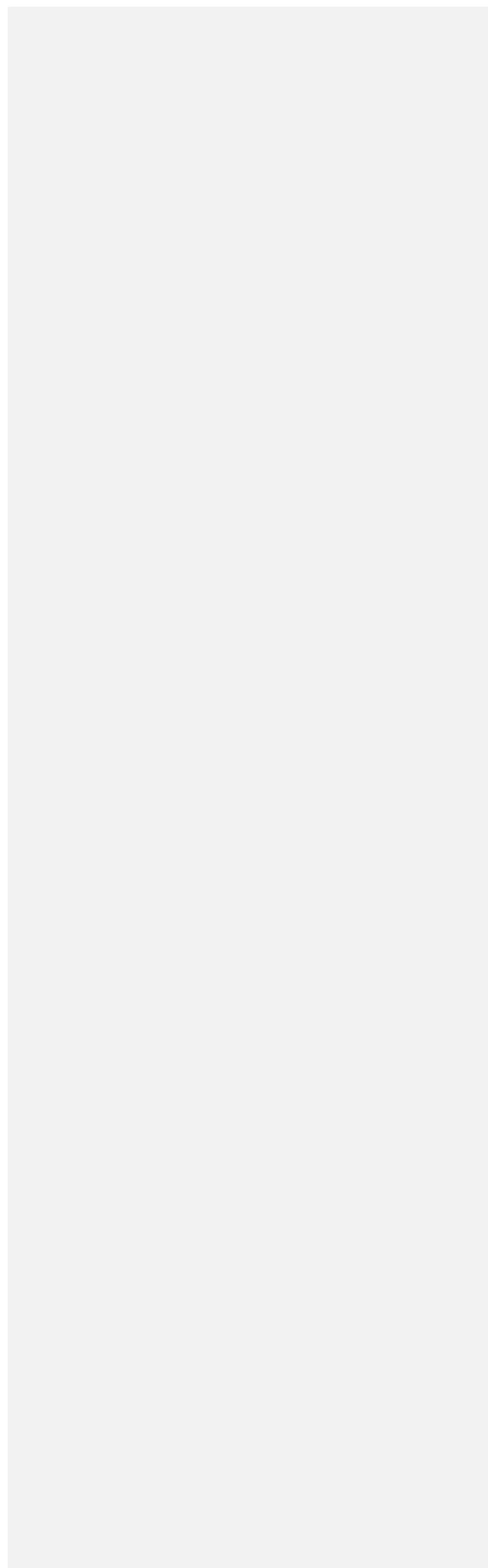
Commented [CZ10]: To align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to constrain the purpose of the instant Application within the field of energy under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3 5, 3 5 1(A)-(d), 3 5 2(A) of the Applicant's Statement request a Section 35 Direction **[AS-040]** and **[APPP-111]**, and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008; and because paragraph 5 4 of [INSERT] evidences that this building(s) is solely required for the commercial telecommunications purposes unrelated to the field of energy

Commented [CZ11]: To align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to constrain the purpose of the instant Application within the field of energy under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3 5, 3 5 1(A)-(d), 3 5 2(A) of the Applicant's Statement request a Section 35 Direction **[AS-040]** and **[APP-111]**, and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008

Commented [CZ12]: To align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to ensure that the purpose of the authorised development remains exclusively within the statutory field of energy under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3 5, 3 5 1(A)-(d), 3 5 2(A) of the Applicant's Statement request a Section 35 Direction **[AS-040]** and **[APP-111]**, and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008

Commented [CZ13]: To align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to ensure that the purpose of the authorised development remains exclusively within the field of energy under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3 5, 3 5 1(A)-(d), 3 5 2(A) of the Applicant's Statement request a Section 35 Direction **[AS-040]** and **[APP-111]**, and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008, and because the "provision of telecommunications ...

(**a**) 2003 c 21



"vessel" means every description of vessel, however propelled or moved, and includes a non-displacement craft, a personal watercraft, a seaplane on the surface of the water, a hydrofoil vessel, a hovercraft or any other amphibious vehicle and any other thing constructed or adapted for movement through, in, on or over water and which is at the time in, on or over water;

"watercourse" includes all rivers, streams, ditches, drains, canals, cuts, culverts, dykes, sluices, sewers and passages through which water flows except a public sewer or drain; and

"Work" means a work identified as part of the authorised development in Schedule 1 (Authorised Development);

"work plans" means the plans certified by the Secretary of State as Works Plans under article 43 (Certification of plans, etc.) for the purposes of this Order and identified in Schedule 5; and

"working day" means Monday to Friday excluding bank holidays and other public holidays.

(2) References in this Order to rights over land include references to rights to do or to place and maintain, anything in, on or under land or in the air-space above its surface and references in this Order to the imposition of restrictions are references to restrictive covenants over land which interfere with the interests or rights of another and are for the benefit of land which is acquired, or rights over which are acquired, under this Order.

(3) All distances, directions and lengths referred to in this Order are approximate and distances between points on a Work comprised in the authorised and shown on the works plans or access and rights of way plans are to be taken to be measured along that Work.

(4) All areas described in square metres in the book of reference are approximate.

(5) References to any statutory body includes that body's successor bodies from time to time that have jurisdiction over the authorised development.

(6) References in the Schedules to points identified by letters or numbers are to be constructed as references to points so lettered or numbered on the access and rights of way plans or land plans.

(7) Grid references in the Schedules are references to points on the Ordnance Survey National Grid.

(8) In this Order, the expression "includes" or "include" is to be construed without limitation.

PART 2

Principal powers

Development consent etc. granted by Order

3.—(1) Subject to the provisions of this Order and to the requirements ~~Schedule 2~~, the undertaker is granted development consent for the authorised development to be carried out within the Order limits.

(2) Subject to the requirements, Works Nos. 1 to 5 must be constructed within the Order limits landward of MHWS and Work Nos. 6 to 7 must be constructed within the Order limits seaward of MHWS.

~~**Authorisation of use**~~

~~**4.**—(1) The undertaker is authorised to operate and use the authorised development for which development consent is granted by this Order.~~

~~(2) Paragraph (1) does not relieve the undertaker of any requirement to obtain any permit, licence or other obligation under any other legislation that may be required from time to time to authorise the operation of any part of the authorised development.~~

Commented [CZ14]: To align with the terms used by Article 3 of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy; and to avoid doubt about, or any difference in the interpretation of relative relationship between "provisions" and "requirements" under section 120 of the Act in relation to the terms to which the authorised development is subject; and to ensure that Article 3(1) does not inadvertently introduced development not evaluated

Commented [CZ15]: Article 4 is superfluous See Articles 3 and 5 of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 Article 3(1) provides authorisation for and Article 5 provides a power to maintain the authorised development Particularised provision for "use" is not necessary The authorised development attracts the application of section 157(1) of the 2008 Act that ensures the use remains in the field of energy

Power to construct and maintain authorised development

5.—(1) The undertaker may at any time construct and maintain the authorised development, except to the extent that this Order or an agreement made under this Order provides otherwise.

(2) The power to maintain conferred under paragraph (1) does not relieve the undertaker of any requirement to obtain any further licence under Part 4 of the 2009 Act (marine licensing) for marine works not covered by the deemed marine licence.

Benefit of the Order

6.—(1) Subject to article 7 (Consent to transfer benefit of Order), the provisions of this Order have effect solely for the benefit of the undertaker.

Consent to transfer the benefit of Order

7.—(1) Subject to paragraph (3) the undertaker may with the written consent of the Secretary of State –

(a) transfer to another person ("the transferee") any or all of the benefit of the provisions of this Order (including the deemed marine licence, in whole or in part) and such related statutory rights as may be agreed between the undertaker and the transferee; and

(b) grant to another person ("the lessee") for a period agreed between the undertaker and the lessee any or all of the benefit of the provisions of the Order (including the deemed marine licence, in whole or in part) and such related statutory rights as may be so agreed,

except where paragraph (6) applies in which case no consent of the Secretary of State is required.

(2) Where a transfer or grant has been made in accordance with paragraphs (1) and (6) references in this Order to the undertaker, except in paragraphs (4), (5) and (7) include references to the transferee or the lessee.

(3) The Secretary of State must consult the MMO before giving consent to transfer or grant to another person the whole or part of the benefit of the provisions of the deemed marine licence.

(4) The Secretary of State must determine an application made under this article within a period of no more than 8 weeks commencing on the date the application is received by the Secretary of State, unless otherwise agreed in writing with the undertaker.

(5) Where the undertaker has transferred any benefit, or for the duration of any period during which the undertaker has granted any benefit, under paragraph (1) –

(a) the benefit transferred or granted ("the transferred benefit") must include any rights that are conferred and any obligations that are imposed, by virtue of the provisions to which the benefit relates; and

(b) the exercise by a person of any benefits or rights conferred in accordance with any transfer or grant under paragraph (1) is subject to the same restrictions, liabilities and obligations as would apply under this Order if those benefits or rights were exercised by the undertaker.

(6) This paragraph applies to any provisions of this Order and its related statutory rights where –

(a) the transferee or lessee is the holder of a licence under section 6(1)(e) of the 1989 Act;

(b) in respect of the benefit of the Order in so far as it relates to Work No. 1 the transferee is National Grid;

~~(c) in respect of the benefit of the Order in so far as it relates to the commercial telecommunications use of the fibre optic data transmission cables any person who Ofcom have directed the electronic communications code is to have effect in relation to pursuant to section 106 of the Telecommunications Act 2003~~;

~~(d)~~(c) in respect of the benefit of the Order in so far as it relates to Work No. 2 (w) the transferee is SSE; or

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Commented [CZ16]: To align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to ensure the purpose of the authorised remains exclusively within the statutory "field of energy" under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3 5, 3 5 1(A)-(d), 3 5 2(A) of the Applicant's Statement request a Section 35 Direction **[AS-040]** and **[APP-111]**, and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008, and because the purpose of "commercial telecommunications" is outside of the jurisdictional scope of that Act, see section 14(6) ("fields"), is not an expressed "field", and is extra-statutory the 2008 Act

(e) the time limits for claims for compensation in respect of the acquisition of land or effects upon land under this Order have elapsed and –

(i) no such claims have been made;

(ii) any such claim has been made and has been compromised or withdrawn;

(iii) compensation has been paid in final settlement of any such claim;

(iv) payment of compensation into court has taken place in lieu of settlement of any such claim; or

(v) it has been determined by a tribunal or court of competent jurisdiction in respect of any such claim that no compensation is repayable.

(7) Prior to any transfer or grant under this article taking effect the undertaker must give notice in writing to the Secretary of State and if such transfer or grant relates to the exercise of powers in their area to the MMO and the relevant planning authority.

(8) The notices required under paragraph (7) must –

(a) state –

(i) the name and contact details of the person to whom the benefit of the provisions will be transferred or granted;

(ii) subject to paragraph (9) the date on which the transfer will take effect;

(iii) the provisions to be transferred or granted; and

(iv) the restrictions, liabilities and obligations that in accordance with paragraphs (5)(c) will apply to the person exercising the powers transferred or granted; and

(v) where paragraph (6) does not apply confirmation of the availability and adequacy of funds for compensation associated with the compulsory acquisition of the Order Land.

(b) be accompanied by –

(i) where relevant a plan showing the works or areas to which the transfer or grant relates; and

(ii) a copy of the document effecting the transfer or grant signed by the undertaker and the person to whom the benefit of the powers will be transferred or granted.

(9) The date specified under paragraph (8)(a)(ii) must not be earlier than the expiry of five working days from the date of receipt of the notice.

(10) The notice given under paragraph (7) must be signed by the undertaker and the person to whom the benefit of the powers will be transferred or granted as specified in that notice.

(11) Section 72(7) and (8) of the 2009 Act do not apply to a transfer or grant of the whole or part of the benefit of the provisions of the deemed marine licence to another person by the undertaker pursuant to an agreement under paragraph (1).

Application, exclusion and modification of legislative provisions

8.—(1) Regulation 6 of the Hedgerows Regulations 1997 is modified so as to read for the purposes of this Order only as if there were inserted after paragraph (1)(j) the following –

(a) "or (k) for the carrying out of development which has been authorised by an order granting development consent pursuant to the Planning Act 2008.".

(2) The provisions of the Neighbourhood Planning Act 2017 insofar as they relate to temporary possession of land under articles 29 (temporary use of land for carrying out the authorised development) and 31 (temporary use of land for maintaining the authorised development) of this Order do not apply in relation to of the works carried out for the purpose of, or in connection with, the construction or maintenance of the authorised development.

(3) The Town and Country Planning (Border Facilities and Infrastructure) (EU Exit) (England) Special Development Order 2020 does not apply in relation to any land that is within the Order limits.

~~(4) For the purposes only of Section 106 (1) of the 1990 Act the undertaker shall be deemed to be a person interested in the Order land or any part of it and for the avoidance of doubt Section 106(3)(a) shall include any transferee under Article 7 of this Order.~~

Commented [CZ17]: Article 8(4) deleted because the requirements of sections 104(3) and 114 of the Planning Act 2008 cannot encompass subsequently applying provisions in relation to matters required to be taken into account at a logically prior point before the making of an order

Defence to proceedings in respect of statutory nuisance

9.—(1) Where proceedings are brought under section 82(1) of the Environmental Protection Act 1990(**a**) (summary proceedings by person aggrieved by statutory nuisance) in relation to a nuisance falling within paragraph (g) (noise emitted from premises so as to be prejudicial to health or a nuisance) and (ga) (noise that is prejudicial to health or a nuisance and is emitted or caused by a vehicle, machinery or equipment on a street) of section 79(1) of that Act no order may be made and no fine may be imposed under section 82(2) of that Act if the defendant shows that the nuisance–

(a) relates to premises, vehicles, machinery or equipment used by the undertaker for the purposes of or in connection with the construction or maintenance of the authorised development and that the nuisance is attributable to the carrying out of the authorised development in accordance with a notice served under section 60 (control of noise on construction site) or a consent given under section 61 (prior consent for work on construction site) of the Control of Pollution Act 1974(**b**); or

(b) relates to premises used by the undertaker for the purposes of or in connection with the construction or maintenance of the authorised development and that the nuisance is attributable to the carrying out of the authorised development in accordance with the controls and measures relating to noise as described in a construction environmental management plan approved pursuant to requirement 15;

(c) relates to premises used by the undertaker for the purposes of or in connection with the operation of authorised development and that the nuisance is attributable to the operation of the authorised development in accordance with the noise levels set out in a noise management plan approved pursuant to requirement 20; or

(d) is a consequence of the construction or maintenance of the authorised development and that it cannot reasonably be avoided.

(2) For the purpose of paragraph (1) above, compliance with the controls and measures relating to noise described in an approved construction environmental management plan will be sufficient, but not necessary, to show that an alleged nuisance could not reasonably be avoided.

(3) Where a relevant planning authority is acting in accordance with section 60(4) and section 61(4) of the Control of Pollution Act 1974 in relation to the construction of the authorised development then the local authority must also have regard to the controls and measures relating to noise referred to in a relevant construction environment management plan approved pursuant to requirement 15.

(4) Section 61(9) (consent for work on construction sites to include statement that it does not of itself constitute a defence to proceedings under section 82 of the Environmental Protection Act 1990) of the Control of Pollution Act 1974 does not apply where the consent relates to the use of the premises by the undertaker for purposes of or in connection with the construction or maintenance of the authorised development.

(5) In this article "premises" has the same meaning as in section 79 of the Environmental Protection Act 1990(**c**).

(a) 1990 c 43 There are amendments to this Act which are not relevant to this Order
(b) 1974 c 40 Sections 61(9) and 65(8) were amended by section 162 of, and paragraph 15 of Schedule 3 to, the Environmental Protection Act 1990, c 25 There are other amendments to the 1974 Act which are not relevant to the Order
(c) 1990 c 43

PART 3

STREETS

Application of the permit scheme

9A –

(1) The permit schemes apply to the construction and maintenance of the authorised development and will be used by the undertaker in connection with the exercise of any powers conferred by this Part.

(2) For the purposes of this Order–

(a) a permit in relation to the construction of the authorised development may not be granted subject to conditions which conflict with the framework traffic management strategy or require the authorised development to be carried out in a manner which conflicts with any approvals granted pursuant to this Order (including any relevant approved traffic management strategy) or where the undertaker would be unable to comply with those conditions through the exercise of the powers conferred by this Order;

(b) a permit in relation to the construction of the authorised development may not be refused where the proposed reason for refusal is the inability to impose a condition which will not comply with paragraph 2(a);

(c) a permit in relation to the construction of the authorised development may not be refused or granted subject to conditions which relate to the imposition of a moratoria; and

(d) where a provisional advance authorisation has been granted to the undertaker in advance of the grant of a permit in relation to the construction of the authorised development the relevant street authority may not grant a permit for any other works in the location during the time period to which that provisional advance authorisation relates save that nothing will restrict the ability of the local highway authority to grant a permit for emergency works.

(3) Irrespective of anything which is stated to the contrary within the permit schemes, where the undertaker submits an application for a permit in relation to the construction of the authorised development subject to proposed conditions and the relevant highway authority wishes for different conditions to be imposed on the permit the relevant highway authority must seek to reach agreement with the undertaker on the conditions subject to which the permit is to be granted and provide alternative permit conditions to the undertaker within 10 days following the date on which the application for the permit is made by the undertaker and must not refuse an application for a permit before the end of the period which is 5 days following the date on which the alternative permit conditions are provided to the undertaker.

(4) Where the undertaker confirms its agreement to the alternative permit conditions provided by the relevant highway authority pursuant to paragraph (3) before the expiry of 5 days following the date on which any such alternative permit conditions are provided to the undertaker, the relevant highway authority must grant the permit subject to those conditions.

(5) Any alternative permit conditions provided by a relevant highway authority in accordance with paragraph (3) must comply with paragraph 2(a).

(6) References to moratoria in paragraph (2)(c) mean restrictions imposed under section 58 (restrictions on works following substantial road works) or section 58A (restrictions on works following substantial street works) of the 1991 Act.

(7) Reference to emergency works in paragraph 2(d) means works whose execution at the time when they are executed is required in order to put an end to, or to prevent the occurrence of, circumstances then existing or imminent (or which the person responsible for the works believes on reasonable grounds to be existing or imminent) which are likely to cause danger to persons or property.

(8) Without restricting the undertaker's recourse to any alternative appeal mechanism which may be available under the permit schemes or otherwise, the undertaker may appeal any decision

to refuse to grant a permit, or to grant a permit subject to conditions, in accordance with the mechanism set out in Schedule 3 of this Order.

Power to alter layout etc. of streets

10.—(1) Subject to paragraph (3), the undertaker may for the purpose of constructing and maintaining the authorised development, permanently or temporarily alter the layout of any street (and carry out works ancillary to such alterations) whether or not within the Order limits and the layout of any street having a junction with such a street and, without limiting the scope of this paragraph, the undertaker may–

(a) increase the width of the carriageway of the street by reducing the width of any kerb, footpath, footway, cycle track, central reservation or verge within a street;

(b) alter the level or increase the width of any such street, kerb, footpath, footway, cycle track, central reservation or verge;

(c) reduce the width of the carriageway of the street;

(d) execute any works to widen or alter the alignment of pavements;

(e) make and maintain crossovers and passing places;

(f) execute any works of surfacing or resurfacing of the street;

(g) carry out works for the provision or alteration of parking places, loading bays and cycle tracks;

(h) carry out works necessary to alter or provide facilities for the management and protection of pedestrians; and

(i) execute any works to provide or improve sight lines required by the relevant street authority.

(2) The undertaker must restore to the reasonable satisfaction of the street authority any street that has been temporarily altered pursuant to this article.

(3) The powers conferred by paragraph (1) must not be exercised without the approval of the relevant street authority and such approval is not to be unreasonably withheld or delayed.

(4) If a street authority which receives an application for approval under paragraph (3) fails to notify the undertaker of its decision before the end of the period of 42 days beginning with the date on which the application was made, it is deemed to have granted consent.

Street works

11.—(1) The undertaker may, for the purpose of the authorised development, enter on so much of any of the streets as is within the Order limits and may without the consent of the relevant street authority—

(a) break up or open the street, or any sewer, drain or tunnel under it;

(b) tunnel or bore under the street or carry out works to strengthen or repair the carriageway;

(c) place or keep apparatus in, on or under the street;

(d) maintain, renew or alter apparatus in, on or under the street or change its position;

(e) execute and maintain any works to provide hard and soft landscaping;

(f) carry out re-lining and placement of road markings;

(g) remove and install temporary and permanent signage;

(h) remove, replace and relocate any street furniture; and

(i) execute any works required for or incidental to any works referred to in sub-paragraphs (a) to (i).

(2) Without limiting the scope of the powers conferred by paragraph (1) but subject to the consent of the relevant street authority, which consent must not be unreasonably withheld or delayed, the undertaker may, for the purposes of the authorised development, enter on so much of

any other street whether or not within the Order limits, for the purposes of carrying out the works set out at paragraph (1) above.

(3) If a relevant street authority that receives an application for consent under paragraph (2) fails to notify the undertaker of its decision within 42 days beginning with the date on which the application was made, that authority will be deemed to have granted consent.

(4) The authority given by paragraphs (1) and (2) is a statutory right for the purposes of sections 48(3) (streets, street works and undertakers) and 51(1) (prohibition of unauthorised street works) of the 1991 Act.

(5) In this article "apparatus" has the same meaning as in Part 3 of the 1991 Act and also expressly includes Work No. 4 and Work No. 5.

Application of the 1991 Act

12.—(1) The provisions of the 1991 Act mentioned in paragraph (2) that apply in relation to the carrying out of street works under that Act and any regulations made or code of practice issued or approved under those provisions apply (with all necessary modifications) in relation to—

(a) carrying out of works under article 11 (Street works);

(b) the temporary closure, temporary alteration or temporary diversion of a street by the undertaker under article 13 (Temporary closure of streets and public rights of way),

whether or not the carrying out of the works or the closure, alteration or diversion constitutes street works within the meaning of that Act.

(2) The provisions of the 1991 Act are –

(a) subject to paragraph (3), section 55 (notice of starting date of works);

(b) section 57 (notice of emergency works);

(c) section 59 (general duty of street authority to co-ordinate works);

(d) section 60 (general duty of undertakers to co-operate);

(e) section 65 (safety measures);

(f) section 67 (qualifications of supervisors and operatives);

(g) section 68 (facilities to be afforded to street authority);

(h) section 69 (works likely to affect other apparatus in the street);

(i) section 70 (duty of undertaker to reinstate);

(j) section 71 (materials, workmanship and standard of reinstatement);

(k) section 72 (powers of streets authority in relation to reinstatement);

(l) section 73 (reinstatement affected by subsequent works);

(m) section 76 (liability for cost of temporary traffic regulation);

(n) section 77 (liability for cost of use of alternative route);

(o) section 79 (records of location of apparatus);

(p) section 80 (duty to inform undertakers of location of apparatus);

(q) section 81 (duty to maintain apparatus);

(r) section 82 (liability for damage or loss caused);

(s) all provisions of that Act that apply for the purposes of the provisions referred to in subparagraphs (a) to (q)

(3) Section 55 of the 1991 Act has effect as if references in section 57 of that Act to emergency works included a reference to a closure, alteration or diversion (as the case may be) required in a case of emergency.

Temporary closure, alteration, diversion or restriction of streets, public rights of way and permissive paths

13.—(1) The undertaker, during and for the purpose of constructing and maintaining the authorised development, may temporarily close, alter, divert or restrict any street, public right of way or permissive path within the Order limits and may for any reasonable time—

(a) divert the traffic from the street, public right of way or permissive path; and

(b) subject to paragraph (3), prevent all persons from passing along the street, public right of way or permissive path.

(2) Without limitation on the scope of paragraph (1), the undertaker may use as a temporary working site any street, public right of way or permissive path which has been temporarily closed, altered, diverted or restricted under the powers conferred by this article.

(3) ~~The~~ The undertaker must provide reasonable access for pedestrians going to or from premises abutting a street or public right of way affected by the temporary closure, alteration, diversion or restriction under this article if there would otherwise be no reasonable access.

(4) Without limitation to the generality of paragraph (1), the undertaker may temporarily close, alter, divert or restrict the streets, public rights of way or permissive paths specified in column (1) of Schedule 8 (Streets, public rights of way and permissive paths to be temporarily closed, altered, diverted or restricted) to the extent specified, by reference to the letters and numbers shown on the access and rights of way plans and stated in column (2) of Schedule 8.

(5) The undertaker must not temporarily close, alter, divert or restrict;

(a) any street, public right of way or permissive path as mentioned in paragraph (4) without first consulting the relevant street authority; and

(b) any other street, public right of way or permissive path without the consent of the street authority which may attach reasonable conditions to any consent, but such consent may not be unreasonably withheld or delayed.

(6) Where the undertaker provides a temporary diversion under paragraph (3), the temporary alternative route is not required to be of a higher standard than the temporarily stopped up street, or public right of way.

(7) Any~~Any~~ person who suffers loss by the suspension of any private right of way under this article is entitled to compensation to be determined, in the case of dispute, under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

(8) If a relevant street authority that receives an application for consent under paragraph (5)(b) fails to notify the undertaker of its decision within 42 days of receiving the application, that relevant street authority will be deemed to have granted consent.

(9) References to temporary stopping up of any street or highway in Schedule 13 (protective provisions) are to be construed as a reference to the closure of that street or highway under this article.

Access to works

14.—(1) The undertaker may, for the purposes of the authorised development and subject to paragraph (2) with the consent of the relevant highway authority (such consent not to be unreasonably withheld or delayed) following consultation by the relevant highway authority with the relevant planning authority, form and lay out such means of access (permanent or temporary) or improve any existing means of access at such locations within the Order limits (including in the locations identified on the access and rights of way plans) as the undertaker reasonably requires for the purposes of the authorised development.

(2) The consent of the relevant highway authority under paragraph (1) is not required in relation to Work No.2 (bb).

(3) If the relevant highway authority which has received an application for consent under paragraph (1) fails to notify the undertaker of its decision before the end of the period of 42 days beginning with the date on which the application was made, it is deemed to have granted consent.

Agreements with street authorities

15.—(1) A street authority and the undertaker may enter into agreements with respect to—

(a) any closure, alteration or diversion of a street authorised by this Order; or

(b) the carrying out in the street of any of the works referred to in article 10 (power to alter layout etc. of streets) and article 11 (street works); and

(c) such other works as the parties may agree.

(2) Such an agreement may, without prejudice to the generality of paragraph (1)—

(a) make provision for the street authority to carry out any function under this Order which relates to the street in question;

(b) specify a reasonable time for the completion of the works; and

(c) contain such terms as to payment and other matters as the parties consider appropriate.

Traffic regulation

16.—(1) Subject to the provisions of this article and the consent of the relevant traffic authority in whose area the street is situated, which consent may not to be unreasonably withheld or delayed, the undertaker may, for the purposes of or in connection with the authorised development—

(a) revoke, amend or suspend in whole or in part any order made, or having effect as if made, under the 1984 Act in so far as it is inconsistent with any prohibition, restriction or other provision made by the undertaker under this article;

(b) permit, prohibit or restrict the stopping, parking, waiting, loading or unloading of vehicles on any road;

(c) authorise the use as a parking place of any road;

(d) make provision as to the direction or priority of vehicular traffic on any road; and

(e) permit or prohibit vehicular access to any road;

(f) place traffic signs on or near a street, subject to and in conformity with the directions issued by the Secretary of State pursuant to powers conferred by section 64, 65 and 85 of the 1984 Act.

either at all times or at times, on days or during such periods as may be specified by the undertaker.

(2) Before complying with the provisions of paragraph (3) the undertaker must consult the chief officer of police and the relevant highway authority in whose area the street is situated.

(3) The undertaker must not exercise the powers in paragraphs (1) unless it has—

(a) given not less than 28 days' notice in writing of its intention so to do to the chief officer of police and to the relevant traffic authority in whose area the street is situated; and

(b) advertised its intention in such manner as the relevant traffic authority may specify in writing within 7 days' of its receipt of notice of the undertaker's intention as provided for in sub-paragraph (a).

(4) Any prohibition, restriction or other provision made by the undertaker under paragraph (1) (a)

has effect as if duly made by—

(i) the relevant traffic authority in whose area the street is situated as a traffic regulation order under the 1984 Act; or

(ii) the local authority in whose area the street is situated as an order under section 32 (Power of local authorities to provide parking spaces) of the 1984 Act(**a**),

(**a**) As amended by section 102 of, and Schedule 7 to, the Local Government Act 1985 (c 51) and section 168(1) of, and paragraph 39 of Schedule 8 to, the 1991 Act

and the instrument by which it is effected may specify savings and exemptions to which the prohibition, restriction or other provision is subject; and

(b) is deemed to be a traffic order for the purposes of Schedule 7 (road traffic contraventions subject to civil enforcement) to the Traffic Management Act 2004(**a**)

(5) Any prohibition, restriction or other provision made under this article may be suspended, varied or revoked by the undertaker from time to time by subsequent exercise of the powers of paragraph (1) at any time.

(6) Expressions used in this article and in the 1984 Act have the same meaning in this article as in that Act.

(7) If the relevant traffic authority fails to notify the undertaker of its decision within 42 days of receiving an application for consent under paragraph (1) the relevant traffic authority is deemed to have granted consent.

PART 4

Supplemental powers

Discharge of water

17.—(1) Subject to paragraphs (3) and (4), the undertaker may use any watercourse or any public sewer or drain for the drainage of water in connection with the carrying out, operation or maintenance of the authorised development and for that purpose may inspect, lay down, take up and alter pipes and may, on any land within the Order limits, make openings into, and connections with, the watercourse, public sewer or drain.

(2) Any dispute arising from the making of connections to or use of a public sewer or drain by the undertaker pursuant to paragraph (1) is determined as if it were a dispute under section 106 of the Water Industry Act 1991(**b**) (right to communicate with public sewers).

(3) The undertaker must not discharge any water into any watercourse, public sewer or drain except with the consent of the person to whom it belongs; and such consent may be given subject to such terms and conditions as that person may reasonably impose, but must not be unreasonably withheld or delayed.

(4) The undertaker must not make any opening into any public sewer or drain pursuant to paragraph (1) except—

(a) in accordance with plans approved by the person to whom the sewer or drain belongs, but such approval must not be unreasonably withheld or delayed; and

(b) where that person has been given the opportunity to supervise the making of the opening.

(5) Where the person receives an application for consent under paragraphs (3) or approval under paragraph (4)(a) and fails to notify the undertaker of its decision within 28 days' of receiving an application, that person will be deemed to have granted consent or given approval, as the case may be.

(6) The undertaker must not, in carrying out or maintaining the authorised development pursuant to this article, damage or interfere with the bed or banks of any watercourse forming part of a main river.

(7) The undertaker must take such steps as are reasonably practicable to secure that any water discharged into a watercourse or public sewer or drain pursuant to this article is as free as may be practicable from gravel, soil or other solid substance, oil or matter in suspension.

(a) 2004 c 18

(b) 1991 c 56 Section 106 was amended by section 35(8)(a) of the Compensation and Service (Utilities) Act 1992 (c 43) and sections 36(2) and 99 of the water Act 2003 (c 37) There are other amendments to this section which are not relevant to this Order

(8) This article does not authorise entry into controlled waters of any matter whose entry or discharge into controlled waters is prohibited by regulations 12 of the Environmental Permitting (England and Wales) Regulations 2016(**a**)

(9) In this article—

(a) "public sewer or drain" means a sewer or drain which belongs to a sewerage undertaker, the Environment Agency, an internal drainage board or a local authority; and

(b) except as provided in article 2 (Interpretation), other expressions used both in this article and in the Environmental Permitting (England and Wales) Regulations 2016 have the same meaning as in those Regulations.

Protective work to buildings

18.—(1) Subject to the following provisions of this article, the undertaker may at its own expense carry out such protective works to any building lying within the Order limits as the undertaker considers necessary or expedient.

(2) Protective works may be carried out—

(a) at any time before or during the carrying out in the vicinity of the building of any part of the authorised development; or

(b) after the completion of that part of the authorised development in the vicinity of the building at any time up to the end of the period of five years beginning with the day on which that part of the authorised development is first brought into operational use.

(3) For the purpose of determining how the functions under this article are to be exercised the undertaker may enter and survey any building falling within paragraph (1) and any land within its curtilage.

(4) For the purpose of carrying out protective works under this article to a building the undertaker may (subject to paragraphs (5) and (6))—

(a) enter the building and any land within its curtilage; and

(b) where the works cannot be carried out reasonably conveniently without entering land which is adjacent to the building but outside its curtilage, enter the adjacent land (but not any building erected on it) within the Order limits.

(5) Before exercising—

(a) a right under paragraph (1) to carry out protective works to a building;

(b) a right under paragraph (3) to enter a building and land within its curtilage;

(c) a right under paragraph (4)(a) to enter a building and land within its curtilage; or

(d) a right under paragraph (4)(b) to enter land,

the undertaker must, except in the case of emergency, serve on the owners and occupiers of the building or land not less than 14 days' notice of its intention to exercise that right and in a case falling within sub-paragraph (a) or (c), specifying the protective works proposed to be carried out.

(6) Where a notice is served under paragraph (5) the owner or occupier of the building or land concerned may by serving a counter-notice within the period of 10 days' beginning with the day on which the notice was served require the question of whether it is necessary or expedient to carry out the protective works or to enter the building or land to be referred to arbitration under article 45 (arbitration).

(7) The undertaker must compensate the owners and occupiers of any building or land in relation to which rights under this article have been exercised for any loss or damage arising to them by reason of the exercise of those rights.

(8) Where—

(a) protective works are carried out under this article to a building; and

(**a**) S I 2016/1154

(b) within the period of five years beginning with the day on which the part of the authorised development carried out in the vicinity of the building is first opened for use it appears that the protective works are inadequate to protect the building against damage caused by the carrying out or use of that part of the authorised development,

the undertaker must compensate the owners and occupiers of the building for any loss or damage sustained by them.

(9) Without affecting article 35 (no double recovery), nothing in this article relieves the undertaker from any liability to pay compensation under section 152 (compensation in a case where no right to claim nuisance) of the 2008 Act.

(10) Any compensation payable under paragraph (7) or (8) must be determined, in case of dispute, under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

(11) Section 13 (refusal to give possession to acquiring authority) of the 1965 Act applies to the entry onto, or possession of land under this article to the same extent as it applies to the compulsory acquisition of land under this Order by virtue of section 125 (application of compulsory acquisition provisions) of the 2008 Act.

(12) In this article "protective works" in relation to a building means—

(a) underpinning, strengthening and any other works the purpose of which is to prevent damage which may be caused to the building by the carrying out, maintenance or use of the authorised development; and

(b) any works the purpose of which is to remedy any damage which has been caused to the building by the carrying out, maintenance or use of the authorised development.

Authority to survey and investigate the land

19.—(1) The undertaker may for the purposes of this Order enter on any land within the Order limits landwards of MLWS or which may be affected by the authorised development within Works Nos. 1 to 5 (inclusive) and—

(a) survey, monitor or investigate the land (including any watercourses, groundwater, static water bodies or vegetation on the land);

(b) without limitation to the generality of sub-paragraph (a), make trial holes, boreholes and excavations in such positions on the land as the undertaker thinks fit to investigate the nature of the surface layer, subsoil and groundwater and remove samples;

(c) without limitation to the generality of sub-paragraph (a), carry out ecological or archaeological investigations and monitoring on such land, including the digging of trenches; and

(d) place on, leave on and remove from the land apparatus for use in connection with the survey and investigation of land and making of trial holes, boreholes and excavations.

(2) No land may be entered or equipment placed or left on or removed from the land under paragraph (1) unless at least 14 days' notice has been served on every occupier of the land.

(3) Any person entering on any land under this article on behalf of the undertaker—

(a) must, if so required entering the land, produce written evidence of their authority to do so; and

(b) may take with them such vehicles and equipment as are necessary to carry out the survey or investigation or to make the trial holes.

(4) No trial holes, boreholes or excavations are to be made under this article—

(a) in land forming a railway without the consent of Network Rail(**a**)

(b) in land by or in right of the Crown without the consent of the Crown;

(**a**) As defined in Part 4 of Schedule 13 (For Protection of Railway Interests)

(c) in land located within the highway boundary without the consent of the relevant highway authority; or

(d) in a private street without the consent of the relevant street

authority but such consent must not be unreasonably withheld or delayed.

(5) The undertaker must make good any damage done to the land when exercising any powers conferred by this article and where any damage is caused to land which is not made good any person interested in the land may recover compensation for any loss or damage arising by reason of the exercise of the authority conferred by this article, such compensation to be determined, in case of dispute, under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

(6) If either a relevant highway authority or a relevant street authority which receives an application for consent under this article fails to notify the undertaker of its decision within 28 days' of receiving the application, that authority will be deemed to have granted consent.

(7) Section 13 (refusal to give possession to acquiring authority) of the 1965 Act applies to the entry onto, or possession of land under this article to the same extent as it applies to the compulsory acquisition of land under this Order by virtue of section 125 (application of compulsory acquisition provisions) of the 2008 Act.

~~PART 5~~

~~Powers of acquisition~~

~~Compulsory acquisition of land~~

~~**20.** (1) The undertaker may—~~

~~(a) acquire compulsorily so much of the Order land within the permanent limits and described in the book of reference and shown on the land plans as is required for the construction, operation or maintenance of the authorised development or to facilitate it, or as is incidental to it; and~~

~~(b) use any land so acquired for the purposes authorised by this Order or for any other purposes in connection with or ancillary to the undertaking.~~

~~(2) This article is subject to article 22 (Time limit for the exercise of the Order, article 23 (Compulsory acquisition of rights and the imposition of restrictive covenants), article 27 (Acquisition of subsoil and airspace only), article 29 (Rights under or over streets), article 30 (Temporary use of land for carrying out authorised development) and article 47 (Crown rights).~~

~~Statutory authority to override easements and other rights~~

~~**21.** (1) The carrying out or use of the authorised development and the doing of anything else authorised by this Order is authorised for the purpose specified in section 158(2) (nuisance: statutory authority) of the 2008 Act, notwithstanding that it involves—~~

~~(a) an interference with an interest or right to which this article applies; or~~

~~(b) a breach of a restriction as to user of land arising by virtue of contract.~~

~~(2) The undertaker must pay compensation to any person whose land is injuriously affected by—~~

~~(a) an interference with an interest or right to which this article applies; or~~

~~(a) a breach of a restriction as to user of land arising by virtue of contract,~~

~~authorised by virtue of this Order and the operation of section 158 of the 2008 Act.~~

~~(3) The interests and rights to which this article applies are any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land, including any natural right to support.~~

Commented [CZ18]: Section 120(3) and (4) provisions for a section 122 purpose cannot be included because the Applicant cannot on the law and facts it relies on during and within the period of statutory Examination required by section 98(1) of the 2008 Act, nor as submitted by the Affected Party, lawfully demonstrate satisfaction of paragraphs 7-20, and 25, of the Planning Act 2008: Guidance related to compulsory acquisition procedures; sections 122(2) and (3) cannot be satisfied because it cannot be said that there are no impediments to implementation of the authorised development because the Secretary of State is not in a position on the facts in front of the parties within the Examination period to know whether the impediments (such as lack of funding) can be overcome

(3) Subsection (2) of section 10 of the 1965 Act applies to paragraph (2) by virtue of section 152(5) of the 2008 Act (compensation in case where no right to claim in nuisance).

(3) Any rule or principle applied to the construction of section 10 of the 1965 Act is to be applied to the construction of paragraph (2) (with any necessary modifications).

Time limit for exercise of authority to acquire land compulsorily

22.—(1) After the end of the period of 5 years beginning on the day on which this Order is made—

( ) no notice to treat is to be served under Part 1 of the 1965 Act (which makes provision for compulsory acquisition under the Acquisition of Land Act 1981); and

( ) no declaration is to be executed under section 4 of the 1981 Act as applied by article 25 (Application of the Compulsory Purchase (Vesting Declarations) Act 1981)(**a**),

in respect of the acquisition by the undertaker of land for the authorised development under this Order.

Compulsory acquisition of rights and the imposition of restrictive covenants

23.—(1) Subject to the provisions of this article, the undertaker may acquire compulsorily the rights, and impose the restrictions, over so much of the Order land within the permanent limits described in the book of reference and shown on the land plans as is required for the construction, operation or maintenance of the authorised development or to facilitate it, or as is incidental to it, by creating them as well as by acquiring rights and benefits of restrictions already in existence.

(2) Subject to section 8 of the 1965 Act (provisions as to divided land), as substituted by article 28 (Acquisition of part of certain properties), where the undertaker acquires a right over land or imposes a restriction under paragraph (1), the undertaker is not to be required to acquire a greater interest in that land.

(3) Schedule 9 has effect for the purpose of modifying the enactments relating to compensation and the provisions of the 1965 Act in their application in relation to the compulsory acquisition under this article of a right over land by the creation of a new right or the imposition of a restrictive covenant.

(4) In any case where the acquisition of rights or imposition of a restrictive covenant under paragraph (1) is required for the purposes of diverting, replacing or protecting the apparatus of a statutory undertaker, the undertaker may, with the consent of the Secretary of State, transfer the power to acquire such rights or impose such restrictive covenants to the statutory undertaker in question.

(5) The exercise by a statutory undertaker of any power in accordance with a transfer under paragraph (4) is subject to the same restrictions, liabilities and obligations as would apply under this Order if that power were exercised by the undertaker.

(5) Nothing in this article authorises the acquisition of rights over, or the imposition of restrictions affecting, an interest which is for the time being held by or on behalf of the Crown.

(**a**) 1981 c. 66. Sections 2(3), 6(2) and 11(6) were amended by section 4 of, and paragraph 52 of Schedule 2 to, the Planning (Consequential Provisions) Act 1990 (c. 11). Sections 10 and 11 and Schedule 1 were amended by S.I. 2009/137. Section 15 was amended by sections 56 and 321(1) of, and Schedules 8 and 16 to, the Housing and Regeneration Act 2008 (c. 17). Paragraph 1 of Schedule 2 was amended by section 76 of, and Part 2 of Schedule 9 to, the Housing Act 1988 (c. 50); section 161(4) of, and Schedule 19 to, the Leasehold Reform, Housing and Urban Development Act 1993 (c. 28); and sections 56 and 321(1) of, and Schedule 8 to, the Housing and Regeneration Act 2008. Paragraph 3 of Schedule 2 was amended by section 76 of, and Schedule 9 to, the Housing Act 1988 and section 56 of, and Schedule 8 to, the Housing and Regeneration Act 2008. Paragraph 2 of Schedule 3 was repealed by section 277 of, and Schedule 9 to, the Inheritance Tax Act 1984 (c. 51). There are other amendments to the 1981 Act which are not relevant to this Order.

Private rights of way

24.—(1) Subject to the provisions of this article, all private rights of way over land subject to compulsory acquisition under this Order will be extinguished—

(a) as from the date of acquisition of the land by the undertaker, whether compulsorily or by agreement; or

(a) on the date of entry on to the land by the undertaker under section 11(1) of the 1965 Act (power of entry),

whichever is the earlier.

(2) Subject to the provisions of this article, all private rights of way over land owned by the undertaker which, being within the Order limits, is required for the purposes of this Order will be extinguished on the appropriation of the land by the undertaker for any of those purposes.

(3) Subject to the provisions of this article, all private rights of way over land of which the undertaker takes temporary possession under this Order will be suspended and unenforceable for as long as the undertaker remains in lawful possession of the land.

(4) Any person who suffers loss by the extinguishment or suspension of any private right under this article is entitled to compensation in accordance with the terms of section 152 (compensation in case where no right to claim nuisance) of the 2008 Act to be determined, in case of dispute, under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

(5) This article does not apply in relation to any right to which section 138 of the 2008 Act (extinguishment of rights, and removal of apparatus, of statutory undertakers etc.) or article 33 (Statutory undertakers) applies.

(6) Paragraphs (1) to (3) have effect subject to—

(a) any notice given by the undertaker before—

() the completion of the acquisition of the land or acquisition of rights or the imposition of restrictive covenants over or affecting the land;

() the undertaker's appropriation of it;

() the undertaker's entry onto it; or

() the undertaker's taking temporary possession of it,

that any or all of those paragraphs will not apply to any right specified in the notice; and

(b) any agreement made at any time between the undertaker and the person in or to whom the right of way in question is vested or belongs.

(7) If any such agreement as is referred to in paragraph (6)(b)—

(a) is made with a person in or to whom the right is vested or belongs; and

(a) is expressed to have effect also for the benefit of those deriving title from or under that person,

it will be effective in respect of the persons so deriving title, whether the title was derived before or after the making of the agreement.

Application of the Compulsory Purchase (Vesting Declarations) Act 1981

25.—(1) The 1981 Act applies as if this Order were a compulsory purchase order.

(1) The 1981 Act, as so applied, has effect with the following modifications.

(1) In section 1 (Application of Act) for subsection (2) there is substituted—

(a) "(2) This section applies to any Minister, any local or other public authority or any other body or person authorised to acquire land by means of a compulsory purchase order."

(1) Section 5A (Time limit for general vesting declaration) is omitted(**a**).

(**a**) Section 5A to the 1981 Act was inserted by Section 182 of the Housing and Planning Act 2016 (c 22)

(5) In section 5B (Extension of time limit during challenge) —

(a) for "section 23 of the Acquisition of Land Act 1981 (Application to High Court in respect of compulsory purchase order)" substitute "section 118 of the Planning Act (Legal challenges relating to applications for orders granting development consent)"; and

(b) for "the three year period mentioned in section 4" substitute "the 7 year period mentioned in article 22 of the AQUIND Interconnector Order 202[*]".

(6) In section 6 (Notices after execution of declaration) for subsection (1)(b) there is substituted —

(a) "(1) (b) on every other person who has given information to the acquiring authority with respect to any of that land further to the invitation published and served under section 134 of the Planning Act 2008."

(7) In section 7 (Constructive notice to treat), in subsection (1)(a), the words "(as modified by section 4 of the Acquisition of Land Act 1981)" are omitted.

(8) In Schedule A1 (counter-notice requiring purchase of land not in general vesting declaration), omit paragraph 1(2).

(9) References to the 1965 Act in the Compulsory Purchase (Vesting Declarations) Act 1981 are to be construed as references to the 1965 Act as applied by section 125 of the 2008 Act (application of compulsory acquisition provisions) to the compulsory acquisition of land under this Order.

Modification of Part 1 of the Compulsory Purchase Act 1965

26.—(1) Part 1 of the 1965 Act, as applied to this Order by Section 125 (application of compulsory acquisition provisions) of the 2008 Act, is modified as follows:

(2) In section 4 (time limit for giving notice to treat) for "after the end of the period of 3 years beginning the day on which the compulsory purchase order becomes operative" substitute "after the end of the period stated in article 22 (Time limit for exercise of authority to acquire compulsorily) of the AQUIND Interconnector Order 202[ ]"

(3) In section 4A (1) (extension of time limit during challenge) –

(a) for "section 23 of the Acquisition of Land Act 1981 (application to High Court in respect of compulsory purchase order" substitute "section 118 of the 2008 Act (legal challenges relating to applications for orders granting development consent)"; and

(b) for "the three year period mentioned in section 4" substitute" substitute "the 7 year period mentioned in article 22 (Time limit for exercise of authority to acquire land compulsorily) of the AQUIND Interconnector Order 202[ ]".

(4) In section 11A (powers of entry: further notices of entry) –

(a) in subsection (1)(a) after "land" insert "under that provision"; and

(a) in subsection (2), after "land" insert "under that provision".

(5) In section 22(2) (interests omitted from purchase), for "section 4 of this Act" substitute "article 22 (Time limit for exercise of authority to acquire land compulsorily) of the AQUIND Interconnector Order 202[*]"

(6) In Schedule 2A (counter-notice requiring purchase of land not in notice to treat) –

( ) for paragraphs 1(2) and 14(2) substitute –

( ) "(2) But see article 26(3) (acquisition of subsoil only) of the AQUIND Interconnector Order 202[*], which excludes the acquisition of subsoil from this Schedule"; and

( ) at the end insert –

“Part 4

Interpretation

30. In this Schedule, references to entering on and taking possession of land do not include doing so under article 18 (protective work to buildings), article 30 (temporary use of land for carrying out the authorised development) or article 32 (temporary use of land for maintaining the authorised development) of the AQUIND Interconnector Order 202[ ].”

Acquisition of subsoil and airspace only

27. (1) The undertaker may acquire compulsorily so much of, or such rights in, the subsoil of and the airspace over the land referred to in paragraph (1) of article 20 (compulsory acquisition of land) or article 23 (Compulsory acquisition of rights and the imposition of restrictive covenants) as may be required for any purpose for which that land may be acquired under that provision instead of acquiring the whole of the land.

(2) Where the undertaker acquires any part of or rights in the subsoil of or the airspace over any land under paragraph (1) the undertaker will not be required to acquire an interest in any other part of the land.

(3) The following do not apply in connection with the exercise of the power under paragraph (1) in relation to subsoil or airspace only-

(a) Schedule 2A (counter-notice requiring purchase of land not in notice to treat) to the 1965 Act;

(b) Schedule A1 (counter-notice requiring purchase of land not in general vesting declaration) to the 1981 Act; and

(c) Section 153(4A) (blighted land: proposed acquisition of part interest; material detriment test) of the Town and Country Planning Act 1990.

(4) Paragraphs (2) and (3) are to be disregarded where the undertaker acquires a cellar, vault, arch or other construction forming part of a house, building or manufactory or airspace above a house, building or manufactory.

Acquisition of part of certain properties

28. (1) This article applies instead of section 8 of the 1965 Act (other provisions as divided land) (as applied by section 125 of the 2008 Act) where—

(a) a notice to treat is served on a person (“the owner”) under the 1965 Act (as so applied) in respect of land forming only part of a house, building or manufactory or of land consisting of a house with a park or garden (“the land subject to the notice to treat”); and

(a) a copy of this article is served on the owner with the notice to treat.

(2) In such a case, the owner may, within the period of 21 days’ beginning with the day on which the notice was served, serve on the undertaker a counter-notice objecting to the sale of the land subject to the notice to treat which states that the owner is willing and able to sell the whole (“the land subject to the counter-notice”).

(2) If no such counter-notice is served within that period, the owner is required to sell the land subject to the notice to treat.

(2) If such a counter-notice is served within that period, the question of whether the owner is required to sell only the land subject to the notice to treat must, unless the undertaker agrees to take the land subject to the counter-notice, be referred to the Tribunal.

(2) If on such a reference the Tribunal determines that the land subject to the notice to treat can be taken—

(a) without material detriment to the remainder of the land subject to the counter-notice; or

(b) where the land subject to the notice to treat consists of a house with a park or garden, without material detriment to the remainder of the land subject to the counter-notice and without seriously affecting the amenity and convenience of the house,

the owner must sell the land subject to the notice to treat.

(6) If on such a reference the Tribunal determines that only part of the land subject to the notice to treat can be taken—

( ) without material detriment to the remainder of the land subject to the counter-notice; or

( ) where the land subject to the notice to treat consists of a house with a park or garden, without material detriment to the remainder of the land subject to the counter-notice and without seriously affecting the amenity and convenience of the house,

the notice to treat is to be deemed to be a notice to treat for that part.

(7) If on such a reference the Tribunal determines that—

(a) the land subject to the notice to treat cannot be taken without material detriment to the remainder of the land subject to the counter-notice; but

(a) the material detriment is confined to a part of the land subject to the counter-notice,

the notice to treat is deemed to be a notice to treat for the land to which the material detriment is confined in addition to the land already subject to the notice, whether or not the additional land is land which the undertaker is authorised to acquire compulsorily under this Order.

(8) If the undertaker agrees to take the land subject to the counter-notice, or if the Tribunal determines that—

( ) none of the land subject to the notice to treat can be taken without material detriment to the remainder of the land subject to the counter-notice or, as the case may be, without material detriment to the remainder of the land subject to the counter-notice and without seriously affecting the amenity and convenience of the house; and

( ) the material detriment is not confined to a part of the land subject to the counter-notice,

the notice to treat is to be deemed to be a notice to treat for the land subject to the counter-notice whether or not the whole of that land is land which the undertaker is authorised to acquire compulsorily under this Order.

(9) Where by reason of a determination by the Tribunal under this article a notice to treat is deemed to be a notice to treat for less land or more land than that specified in the notice the undertaker may within the period of 6 weeks beginning with the day on which the determination is made withdraw the notice to treat; and in that event, pay the owner compensation for any loss or expense occasioned to the owner by the giving and withdrawal of the notice to be determined in case of dispute by the Tribunal.

(10) Where the owner is required under this article to sell only part of a house, building or manufactory or of land consisting of a house with a park or garden, the undertaker must pay the owner compensation for any loss sustained by the owner due to the severance of that part in addition to the value of the interest acquired.

Rights under or over streets

29.—(1) The undertaker may enter on and appropriate and use so much of the subsoil of, or air-space over, any street within the Order limits as may be required for the purposes of the authorised development and may use the subsoil or air-space for those purposes or any other purpose ancillary to the authorised development.

(2) Subject to paragraph (3), the undertaker may exercise any power conferred by paragraph (1) in relation to a street without being required to acquire any part of the street or any easement or right in the street.

(2) Paragraph (2) does not apply in relation to—

(a) any subway or underground building; or

(b) any cellar, vault, arch or other construction in, on or under a street which forms part of a building fronting onto the street.

(4) Subject to paragraph (5), any person who is an owner or occupier of land appropriated under paragraph (1) without the undertaker acquiring any part of that person's interest in the land, and who suffers loss as a result, will be entitled to compensation to be determined, in case of dispute, under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

(5) Compensation is not be payable under paragraph (4) to any person who is an undertaker to whom section 85 of the 1991 Act (sharing cost of necessary measures) applies in respect of measures of which the allowable costs are to be borne in accordance with that section.

Temporary use of land for the construction of the authorised development

30. (1) Subject to paragraph (5), the undertaker may in connection with the construction of the authorised development—

(a) enter on and take temporary possession of—

(i) the land specified in column (2) of Schedule 10 for the purpose specified in relation to that land in column (1) of that Schedule; and

(i) any other Order land in respect of which no notice of entry has been served under section 11 of the 1965 Act (powers of entry) and no declaration has been made under section 4 (execution of declaration) of the 1981 Act;

(b) remove any buildings and vegetation from that land;

(c) construct temporary works (including the provision of means of access), haul roads, security fencing, buildings and structures on that land;

(d) use the land for the purposes of a construction compound with access to the construction compound in connection with the authorised development; and

(e) construct any works specified in relation to that land in column (1) of Schedule 10 (land of which temporary possession may be taken), or any other mitigation works.

(2) Subject to paragraph (5), not less than 14 days' before entering on and taking temporary possession of land under this article the undertaker must serve notice of the intended entry on the owners and occupiers of the land.

(3) The undertaker may not, without the agreement of the owners of the land remain in possession under this article—

(a) in the case of land specified in paragraph 1(a)(i) above (excluding plot 10-14) after the end of the period of 1 year beginning with the date of completion of the part of the authorised development specified in relation to that land in column (1) of Schedule 10 unless and to the extent that it is authorised to do so by the acquisition of rights over land or the creation of new rights over land pursuant to article 23 (Compulsory acquisition of rights and the imposition of restrictive covenants);

(b) in the case of plot 10-14 and in relation to any and all times temporary possession is taken of that plot, once the purposes for which temporary possession may be taken have been achieved; or

(b) in the case of land referred to in paragraph 1(a)(ii), after the end of the period of 1 year beginning with the date of completion of the work for which temporary possession of the land was taken unless the undertaker has, by the end of that period, served a notice of entry under section 11 of the 1965 Act or made a declaration under section 4 of the 1981 Act in relation to that land.

(4) Before giving up possession of land of which temporary possession has been taken under this article, the undertaker must either acquire the land or rights over the land subject to the temporary possession or, unless otherwise agreed with the owners of the land, remove all temporary works and restore the land to the reasonable satisfaction of the owners of the land, but the undertaker is not required to—

(a) replace a building removed under this article;

(b) remove any drainage works installed by the undertaker under this article;

(c) remove any new road surface or other improvements carried out under this article to any street specified un Schedule 8 (Streets subject to street works);

(d) restore the land to a condition better than the relevant land was in before temporary possession;

(e) remove any ground strengthening works which have been placed on the land to facilitate construction and operation of the authorised development;

(f) remove any measures installed over or around statutory undertakers' apparatus to protect that apparatus from the authorised development; or

(f) remove or reposition any apparatus belonging to statutory undertakers or necessary mitigation works.

(5) In exercising the powers of the article in respect of plot 10-14 the undertaker may not undertake any of the activities listed in paragraph (1) (b), (c), (d) or (e) and must when entering on and taking temporary possession of any part of plot 10-14 provide so much notice to the owners and occupiers of the land (which may include notification following the taking of temporary possession where necessary) as is reasonably practicable in the circumstances.

(6) The undertaker must pay compensation to the owners and occupiers of land of which temporary possession is taken under this article for any loss or damage arising from the exercise in relation to the land of any power conferred by this article.

(7) Any dispute as to the persons entitlement to compensation under paragraph (5), or as to the amount of compensation, is to be determined under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

(7) Nothing in this article affects any liability to pay compensation under section 152 (compensation in case where no right to claim in nuisance) of the 2008 Act or under any other enactment in respect of loss or damage arising from the construction of the authorised development, other than loss or damage for which compensation is payable under paragraph (5).

(7) The undertaker may not compulsorily acquire under this Order the land referred to in paragraph (1)(a)(i) nor acquire compulsorily any new rights or impose any restrictive covenants over that land except that the undertaker is not precluded from carrying out a survey of that land under article 19 (Authority to survey and investigate the land).

(7) Where the undertaker takes possession of land under this article, the undertaker is not required to acquire the land or any interest in it.

(8) Section 13 of the 1965 Act (refusal to give possession to acquiring authority) applies to the temporary use of land pursuant to this article to the same extent as it applies to the compulsory acquisition of land under this Order by virtue of section 125 of the 2008 Act (application of compulsory acquisition provisions).

(8) Nothing in this article prevents the taking of temporary possession more than once in relation to any land specified in paragraph (1).

Time limit for exercise of authority to temporarily use land for the construction of the authorised development

31. (1) Subject to paragraph (2), the authority to enter onto land pursuant to article 30 (Temporary use of land for the construction of the authorised development) ceases to apply at the end of the period of 5 years beginning on the day on which this Order is made.

(2)) Nothing in paragraph (1) prevents the undertaker remaining in possession of land after the end of that period if the land was entered and possession was taken before the end of the period.

Temporary use of land for maintaining the authorised development

32. (1) Subject to paragraph (2), and without prejudice to any other rights enjoyed by the undertaker from time to time, at any time during the maintenance period relating to any part of the authorised development the undertaker may—

(a) enter on and take temporary possession of any land within the Order limits landwards of MLWS if such possession is reasonably required for the purpose of maintaining the authorised development;

(b) construct such temporary works (including the provision of means of access) and structures and buildings on the land as may be reasonably necessary for that purpose;

(b) enter onto any land within the Order limits landwards of MLWS for the purpose of gaining access as is reasonably required for the purpose of maintaining the authorised development.

(2) Paragraph (1) does not authorise the undertaker to take temporary possession of—

( ) any house or garden belonging to a house; or

( ) any building (other than a house) if it is for the time being occupied.

(3) Not less than 28 days' before entering on and taking temporary possession of land under this article the undertaker is required to serve notice of the intended entry on the owners and occupiers of the land.

(4) The undertaker is not required to serve notice under paragraph (3) where the undertaker has identified a potential risk to the safety of—

( ) the authorised development or any of its parts;

( ) the public; or

( ) the surrounding environment,

and in such circumstances, the undertaker may enter the land under paragraph (1) subject to giving such period of notice as is reasonably practical in the circumstances.

(5) The undertaker may only remain in possession of land under this article for so long as may be reasonably necessary to carry out the maintenance of the part of the authorised development for which possession of the land was taken.

(6) Before giving up possession of land of which temporary possession has been taken under this article, the undertaker is required to remove all temporary works and restore the land to the reasonable satisfaction of the owners of the land.

(7) The undertaker must pay compensation to the owners and occupiers of land of which temporary possession is taken under this article for any loss or damage arising from the exercise in relation to the land of the provisions of this article.

(8) Any dispute as to the persons entitlement to compensation under this article, or as to the amount of compensation, is to be determined under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

(9) Nothing in this article affects any liability to pay compensation under section 10(2) of the 1965 Act (Further provisions as to compensation for injurious affection) or under any other enactment in respect of loss or damage arising from the maintenance of the authorised development, other than loss or damage for which compensation is payable under paragraph (7).

(10) Where the undertaker takes possession of land under this article the undertaker is not required to acquire the land or any interest in it.

(11) Section 13 of the 1965 Act (refusal to give possession to acquiring authority) applies to the temporary use of land pursuant to this article to the same extent as it applies to the compulsory acquisition of land under this Order by virtue of section 125 of the 2008 Act (application of compulsory acquisition provisions).

(12) In this article "the maintenance period", in relation to any part of the authorised development means the period of 5 years beginning with the date on which that part of the authorised development is brought into operational use, except where the authorised development is replacement or landscape planting where "the maintenance period" means the period of 5 years beginning with the date on which that part of the replacement or landscape planting is completed.

Statutory undertakers

33.—(1) Subject to the provisions of Schedule 13 (Protective provisions), the undertaker may—

(a) acquire compulsorily or acquire new rights or impose restrictive covenants over the land belonging to statutory undertakers within the Order limits landwards of MLWS and described in the book of reference;

(b) extinguish or suspend the rights of, remove, alter, renew, relocate or reposition the apparatus belonging to statutory undertakers over or within the Order limits landwards of MLWS; and

(c) construct the authorised development in such a way as to cross underneath or over apparatus belonging to statutory undertakers and other like bodies within the Order limits landwards of MLWS.

(2) Subject to the provisions of Schedule 13 (Protective provisions) the undertaker may for the purposes of article 11 (Street works) remove or reposition apparatus belonging to statutory undertakers which is laid beneath any of the streets within the Order limits.

Recovery of costs of new connections

34.—(1) Where any apparatus of a public utility undertaker or of a public communications provider is removed under article 33 (Statutory undertakers) any person who is the owner or occupier of premises to which a supply was given from that apparatus is entitled to recover from the undertaker compensation in respect of expenditure reasonably incurred by that person, in consequence of the removal, for the purpose of effecting a connection between the premises and any other apparatus from which a supply is given.

(2) Paragraph (1) does not apply in the case of the removal of a public sewer but where such a sewer is removed under article 32 (Statutory undertakers), any person who is—

( ) the owner or occupier of premises the drains of which communicated with that sewer; or

( ) the owner of a private sewer which communicated with that sewer,

is entitled to recover from the undertaker compensation in respect of expenditure reasonably incurred by that person, in consequence of the removal, for the purpose of making the drain or sewer belonging to that person communicate with any other public sewer or with a private sewerage disposal plant.

(3) This article does not have effect in relation to apparatus to which Part 3 of the 1991 Act applies.

(4) In this article—

"public communications provider" has the meaning given in section 151(1) of the Communications Act 2003; and

"public utility undertaker" has the meaning given in section 329 of the 1980

Act. **No double recovery**

35.—(1) Compensation will not be payable in respect of the same matter both under this Order and under any other enactment, any contract or any rule of law, or under two or more provisions of this Order.

Special category land

36.—(1) So much of the special category land as is required for the purposes of the exercising by the undertaker of the Order rights is discharged from all rights, trusts and incidents to which it was previously subject, so far as their continuance would be inconsistent with the exercise of the Order rights.

(2) So far as the temporary use of land under either article 30 (Temporary use of land for carrying out the authorised development) and article 32 (Temporary use of land for maintaining

~~the authorised development) is concerned, then the discharge in paragraph (1) is only for such time as any land required only temporarily is being used under either of those articles.~~

~~(3) In this article—~~

~~"Order rights" means rights and powers exercisable over the special category land by the undertaker under article 23 (Compulsory acquisition of rights), article 30 (Temporary use of land for carrying out the authorised development) and article 32 (Temporary use of land for maintaining the authorised development); and~~

~~"the special category land" means the land identified as forming part of a common, open space, or fuel or field allotment in the book of reference and on the land plans.~~

PART 6

Operations

Deemed marine licence under the 2009 Act

37.—(1) The deemed marine licence set out in Schedule 15 (deemed marine licence under the 2009 Act) is deemed to be granted on the date this Order comes into force to the undertaker under Part 4 (marine licensing) of the 2009 Act for the licensed marine activities set out in Part 1, and subject to the conditions set out in Part 2 of that Schedule.

PART 7

Miscellaneous and general

Protective provisions

38.—(1) Schedule 13 (Protective provisions) to this Order has effect.

Application of landlord and tenant law

39.—(1) This article applies to—

(a) any agreement for leasing to any person the whole or any part of the authorised development or the right to operate the same; and

(b) any agreement entered into by the undertaker with any person for the construction, maintenance, use or operation of the authorised development, or any part of it,

so far as any such agreement relates to the terms on which any land which is the subject of a lease granted by or under that agreement is to be provided for that person's use.

(2) No enactment or rule of law regulating the rights and obligations of landlords and tenants is to prejudice the operation of any agreement to which this article applies.

(3) Accordingly, no such enactment or rule of law applies in relation to the rights and obligations of the parties to any lease granted by or under any such agreement so as to—

(a) exclude or in any respect modify any of the rights and obligations of those parties under the terms of the lease, whether with respect to the termination of the tenancy or any other matter;

(b) confer or impose on any such party any right or obligation arising out of or connected with anything done or omitted on or in relation to land which is the subject of the lease, in addition to any such right or obligation provided for by the terms of the lease; or

(c) restrict the enforcement (whether by action for damages or otherwise) by any party to the lease of any obligation of any other party under the lease.

Operational land for purposes of the 1990 Act

40.—(1) Development consent granted by this Order is to be treated as specific planning permission for the purposes of section 264(3)(a) of the 1990 Act (cases in which land is to be treated as operational land for the purposes of that Act).

Felling or lopping of trees and removal of hedgerows

41.—(1) The undertaker may fell, lop, prune, coppice, pollard or reduce in height any tree or shrub within or overhanging the Order limits landwards of MLWS, or may cut back the roots of a tree or shrub where they extend into the Order limits, if it reasonably believes it to be necessary to do so to prevent the tree or shrub from—

(a) obstructing or interfering with the construction, maintenance or operation of the authorised development or any apparatus used in connection with the authorised development; or

(b) constituting a danger to persons using the authorised development.

(2) In carrying out any activity authorised by paragraph (1) or (3), the undertaker must not do any unnecessary damage to any tree, shrub or hedgerow and must pay compensation to any person for any loss or damage arising from such activity for that loss or damage.

(3) The undertaker may, for the purposes of and in so far as it reasonably believes is necessary in connection with the authorised development—

(a) subject to paragraph (2), remove any hedgerows within the Order limits landwards of MLWS that may be required for the purposes of carrying out the authorised development; and

(b) remove important hedgerows as are within the Order limits landwards of MLWS and identified in Schedule 12.

(4) The power conferred by paragraph (3) removes any obligation upon the undertaker to secure any consent under the Hedgerow Regulations 1997(**a**).

(5) Nothing in this article authorises any works to any tree subject to a Tree Preservation Order.

(6) Any dispute as to a person's entitlement to compensation under paragraph (2), or as to the amount of compensation, must be determined under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

(7) In this article "hedgerow" and "important hedgerow" have the meaning given in the Hedgerow Regulations 1997.

Trees subject to tree preservation orders

42.—(1) The undertaker may fell, lop or prune part of any tree which is within, over or under land within the Order limits and which is described in column (1) of Schedule 11, or cut back its roots if it reasonably believes it to be necessary in order to do so to prevent the tree from obstructing or interfering with the construction, maintenance or operation of the authorised development or any apparatus used in connection with the authorised development.

(2) In carrying out any activity authorised by paragraph (1)—

(a) the undertaker must not cause unnecessary damage to any tree and must pay compensation to any person for any loss or damage arising from such activity; and

(b) the duty contained in section 206(1) of the 1990 Act (replacement of trees) does not apply.

(3) The authority given by paragraph (1) constitutes a deemed consent under the relevant tree preservation order.

(4) Any dispute as to a person's entitlement to compensation under paragraph (2), or as to the amount of compensation, is to be determined under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

Certification of plans, etc.

43.—(1) The undertaker must, as soon as practicable after the date on which this Order is made, submit to the Secretary of State copies of the documents and plans identified in Schedule 14 (Certified Documents) of this Order for certification that they are true copies of the documents referred to in this Order.

(2) A plan or document identified in Schedule 14 so certified is admissible in any proceedings as evidence of the contents of the document of which it is a copy.

(3) Where a plan or document certified under paragraph (1)—

(a) refers to a provision of this Order (including any specified requirement) when it was in draft form;

(b) identifies the provision by number or combination of numbers and letters, which is different from the number or combination of numbers and letters by which the corresponding provision of this Order is identified in the Order as made; and

(c) the reference in the plan or document concerned must be construed for the purposes of this Order as referring to the provision (if any) corresponding to that provision in the Order as made.

Service of notices

44.—(1) A notice or other document required or authorised to be served for the purposes of this Order may be served—

(a) by post; or

(b) by delivering it to the person on whom it is to be served or to whom it is to be given or supplied; or

(c) with the consent of the recipient and subject to paragraphs (6) to (9), by electronic transmission.

(2) Where the person on whom a notice or other document to be served for the purposes of this Order is a body corporate, the notice or document is duly served if it is served on the secretary or clerk of that body.

(3) For the purposes of section 7 of the Interpretation Act 1978(**a**) (references to service by post) as it applies for the purposes of this article, the proper address of any person in relation to the service on that person of a notice or document under paragraph (1) is, if that person has given an address for service, that address, and otherwise—

(a) in the case of the secretary or clerk of a body corporate, the registered or principal office of that body; and

(b) in any other case, the last known address of that person at the time of service.

(4) Where for the purposes of this Order a notice or other document is required or authorised to be served on a person as having an interest in, or as the occupier of, land and the name or address of that person cannot be ascertained after reasonable enquiry, the notice may be served by—

(a) addressing it to that person by name or by the description of "owner", or as the case may be "occupier", of the land (describing it); and

(b) either leaving it in the hands of a person who is or appears to be resident or employed on the land or leaving it conspicuously affixed to some building or object on or near the land.

(5) Paragraphs (6) to (9) apply where a person ("A") is required or authorised to serve or send a notice or other document for the purposes of this Order on or to another person ("B").

(6) A may serve or send the notice or other document by electronic transmission if—

(a) B has sent A notice that B agrees to receive that notice or document (or notices and documents of a description including that notice or document) by electronic transmission;

(**a**) 1978 c 30 There are amendments to this Act which are not relevant to this Order

(b) B has not subsequently withdrawn that agreement in accordance with paragraph (8); and

(c) A complies with any conditions as to addressing or mode of transmission that B has specified in agreeing to receive notices or other documents by electronic transmission.

(7) If B notifies A within 7 days' of receiving a notice or other document by electronic transmission that B requires a paper copy of all or any part of the notice or other document, A must provide B with such a copy as soon as reasonably practicable.

(8) B may withdraw agreement to receive a notice or document (or notices or documents of a specified description) by electronic transmission by sending a notice to that effect to A.

(9) Notice under paragraph (8) is final and takes effect on a date specified by B in the notice but that date must not be less than 7 days' after the date on which the notice is given.

(10)This article does not exclude the employment of any method of service not expressly provided for by it.

Arbitration

45.—(1) Subject to article 49 (saving provisions for Trinity House), except where otherwise expressly provided for in this Order and unless otherwise agreed in writing between the parties, any difference under any provision of this Order (other than a difference which falls to be determined by the Tribunal) must be referred to and settled by a single arbitrator to be agreed between the parties within 14 days of receipt of a notice of arbitration or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) by the Secretary of State.

(2) Should the Secretary of State fail to make an appointment under paragraph (1) within 14 days' of a referral, the referring party may refer to the Centre for Effective Dispute Resolution for appointment of an arbitrator.

Procedure in relation to requirements, appeals, etc.

46.—(1) Schedule 3 (Procedure for approvals, consents and appeals) is to have effect in relation to all consents, agreement or approvals granted, refused or withheld in relation to the requirements unless otherwise agreed between the undertaker and the discharging authority.

(2) The procedure set out in paragraph (1) relating to the appeal process of Schedule 3 has effect in relation to any other consent, agreement or approval required under this Order (including the requirements) where such consent, agreement or approval is granted subject to any condition to which the undertaker objects, or is refused or is withheld.

Crown rights

47.—(1) Nothing in this Order affects prejudicially any estate, right, power, privilege, authority or exemption of the Crown and in particular, nothing in this Order authorises the undertaker or any lessee or licensee to take, use, enter upon or in any manner interfere with any land or rights of any description (including any portion of the shore or bed of the sea or any river, channel, creek, bay or estuary)—

(a) belonging to Her Majesty in right of the Crown and forming part of the Crown Estate without the consent in writing of the Crown Estate Commissioners;

(b) belonging to Her Majesty in right of the Crown and not forming part of the Crown Estate without the consent in writing of the Government Department having the management of that land; or

(c) belonging to a Government Department or held in trust for Her Majesty for the purposes of a Government Department without the consent in writing of that Government Department.

(2) Paragraph (1) does not apply to the exercise of any right under this Order for the compulsorily acquisition of an interest in any Crown land (as defined in section 227 of the 2008 Act) which is for the time being held otherwise than by or on behalf of the Crown without the

consent in writing of the appropriate Crown authority (as defined in the 2008 Act).A consent under paragraph (1) may be given unconditionally or subject to terms and conditions and is deemed to have been given in writing where it is sent electronically.

Removal of human remains

48.—(1) In this article "the specified land" means land within the Order limits which the undertaker reasonably considers contains human remains.

(2) Before the undertaker carries out any development or works which will or may disturb any human remains in the specified land it will remove those human remains from the specified land, or cause them to be removed, in accordance with the following provisions of this article.

(3) Before any such remains are removed from the specified land the undertaker will give notice of the intended removal, describing the specified land and stating the general effect of the following provisions of this article, by—

(a) publishing a notice once in each of two successive weeks in a newspaper circulating in the area of the authorised development; and

(b) displaying a notice in a conspicuous place on or near to the specified land.

(4) As soon as reasonably practicable after the first publication of a notice under paragraph (3) the undertaker will send a copy of the notice to relevant discharging authority for the area in which the land is located.

(5) At any time within 56 days after the first publication of a notice under paragraph (3) any person who is a personal representative or relative of any deceased person whose remains are interred in the specified land may give notice in writing to the undertaker of that person's intention to undertake the removal of the remains.

(6) Where a person has given notice under paragraph (5), and the remains in question can be identified, that person may cause such remains to be—

(a) removed and re-interred in any burial ground or cemetery in which burials may legally take place; or

(b) removed to, and cremated in, any crematorium,

and that person will, as soon as reasonably practicable after such re-interment or cremation, provide to the undertaker a certificate for the purpose of enabling compliance with paragraph (11).

(7) If the undertaker is not satisfied that any person giving notice under paragraph (5) is the personal representative or relative as that person claims to be, or that the remains in question can be identified, the question is to be determined on the application of either party in a summary manner by the county court, and the court may make an order specifying who will remove the remains and as to the payment of the costs of the application.

(8) The undertaker will pay the reasonable expenses of removing and re-interring or cremating the remains of any deceased person under this article 48.

(9) If—

(a) within the period of 56 days referred to in paragraph (5) no notice under that paragraph has been given to the undertaker in respect of any remains in the specified land; or

(b) such notice is given and no application is made under paragraph (7) within 56 days after the giving of the notice but the person who gave the notice fails to remove the remains within a further period of 56 days; or

(c) within 56 days after any order is made by the county court under paragraph (7) any person, other than the undertaker, specified in the order fails to remove the remains; or

(d) it is determined that the remains to which any such notice relates cannot be identified, subject to paragraph (10) the undertaker will remove the remains and cause them to be re-interred in such burial ground or cemetery in which burials may legally take place as the undertaker thinks suitable for the purpose; and, so far as possible, remains from individual graves will be re-interred in individual containers which will be identifiable by

a record prepared with reference to the original position of burial of the remains that they contain.

(10) If the undertaker is satisfied that any person giving notice under paragraph (5) is the personal representative or relative as that person claims to be and that the remains in question can be identified, but that person does not remove the remains, the undertaker will comply with any reasonable request that person may make in relation to the removal and re-interment or cremation of the remains.

(11) On the re-interment or cremation of any remains under this article—

(a) a certificate of re-interment or cremation will be sent by the undertaker to the Registrar General by the undertaker giving the date of re-interment or cremation and identifying the place from which the remains were removed and the place in which they were re-interred or cremated; and

(b) a copy of the certificate of re-interment or cremation and the record mentioned in paragraph (9) will be sent by the undertaker to the relevant discharging authority for the area in which the land is located mentioned in paragraph (4).

(12) No notice is required under paragraph (3) before the removal of any human remains where the undertaker is satisfied that—

(a) that the remains were interred more than 100 years ago; and

(b) that no relative or personal representative of the deceased is likely to object to the remains being removed in accordance with this article.

(13) In this article—

(a) references to a relative of the deceased are to a person who—

(i) is a husband, wife, civil partner, parent, grandparent, child or grandchild of the deceased; or

(ii) is, or is a child of, a brother, sister, uncle or aunt of the deceased.

(b) references to personal representative of the deceased are to person who—

(i) is the lawful executor or executrix of the estate of the deceased; or

(ii) is the lawful administrator of the estate of the deceased.

(14) The removal of the remains of any deceased person under this article is to be carried out in accordance with any directions which may be given by the Secretary of State.

(15) Any jurisdiction or function conferred on the county court by this article may be exercised by the district judge of the court.

(16) Section 25 of the Burial Act 1857(**a**) (bodies not to be removed from burial grounds, save under faculty, without licence of Secretary of State) does not apply to a removal carried out in accordance with this article.

(17) Section 239 (use and development of burial grounds) of the 1990 Act applies—

(a) In relation to land, other than a right over land, acquired for the purposes of the authorised development (whether or not by agreement), so as to permit use by the undertaker in accordance with the provisions of the Order; and

(b) In relation to a right over land so acquired (whether or not by agreement), or the temporary use of land pursuant to article 30 (Temporary use of land for carrying out the authorised development) and article 32 (Temporary use of land for maintaining the authorised development), so as to permit the exercise of that right or the temporary use by the undertaker in accordance with the provisions of this Order,

And in section 240(1) (provisions supplemental to ss.238 and 239) of the 1990 Act reference to "regulations made for the purposes of section 283(3) and (4) and 239(2) means, so far as applicable to land or a right over land acquired under this Order, paragraphs (2) to (15) of this

(**a**) 1857 c 81

article and in section 240(3) of the 1990 Act reference to a "statutory undertaker" includes the undertaker and reference to "any other enactment" includes this Order.

(18) The Town and Country Planning Act (Churches, Places of Worship and Burial Grounds) Regulations 1950(**a**) do not apply to the authorised development.

Saving provisions for Trinity House

49.—(1) Nothing in this Order prejudices or derogates from any of the rights, duties or privileges of Trinity House.

Signed by Authority of the Secretary of State for Business, Energy and Industrial Strategy

Head of [x]

Address — Department for Business, Energy and Industrial Strategy

Name

Date

(**a**) S I 1950/792

SCHEDULE 1

Article 3

Authorised Development

1. Development which is to be treated as development in the field of energy for which development consent is required as directed by the Secretary of State in the direction issued pursuant to section 35(2)(a)(i) of the 2008 Act dated 30 July 2018 and associated development within the meaning of section 115(2) of the 2008 Act which is located approximately 13.5 kilometres north of the south coast near Lovedean to the exclusive economic zone boundary between the UK and France, comprising -

Work No.1 – substation connection works consisting of -

~~(a) extension of the existing substation, including site establishment, earthworks, civil and building works~~;

~~(b)~~(a) up to 2 400 kilovolt air and or gas insulated switchgears and associated equipment;

~~(c)~~(b) onshore HVAC cables of up to 800 metres in length (each cable circuit);

~~(d)~~(c) up to 5 link boxes per cable circuit with dimensions of up to 0.8 metres in length by 0.8 metres in width by 0.6 metres in height;

Work No. 2 – works to construct the converter station and associated equipment consisting of -

(a) Site clearance, preparation, establishment and earth works;

(b) onshore HVDC cables of up to 400 metres in length (each cable circuit);

(c) 2 converter hall buildings;

(d) 1 control building associated with the converter hall buildings;

(e) 6 transformers;

(f) a spare transformer;

(g) HVAC cable termination equipment including two 400 kilovolt air and or gas insulated switchgears and busbars;

(h) HVDC cable termination equipment including two 400 kilovolt air and or gas insulated switchgears and busbars;

(i) 2 valve cooling systems;

(j) 1 spares building with an internal perimeter fence;

(k) up to 2 standby back-up diesel generator with a capacity of up to 800 kilowatt;

(l) up to 2 distribution transformers (supplied from two individual DNO connections at 11 kilovolt), one per pole each 1680 kilowatt

(m) up to 2 auxiliary transformers (supplied from tertiary winding of main transformer), one per pole, each 1680 kilowatt

(n) 6 valve reactors;

(o) up to 6 AC filter banks. Each filter bank will typically contain reactor, resistor and capacitor banks

(p) up to 8 lightning masts;

(q) up to 40 lighting columns;

(r) HVAC cables of up to 100 metres in length (each cable circuit);

(s) Up to 5 link boxes per cable circuit with dimensions of up to 0.8 metres in length by 0.8 metres in width by 0.6 metres in height;

(t) converter station building outer security perimeter fence and inner electrified fence separated by a sterile zone including up to 2 security gates;

Commented [CZ19]: To ensure that the authorised development remains within the scope of the jurisdiction of section 14(6)(a) and 35(2)(a)(i) exclusively relating to the field of energy and for not extra-statutory purpose

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Commented [CZ20]: The Section 35 Direction did not include this development within its scope See **[APP-111]** and **[AS-040]** paragraph 3 5 1(A), and **[APP-118]** EIA Chapter 3

(u) ~~up to 2 telecommunications buildings with a security perimeter fence including a security gate and in-between sterile zone and parking for up to 2 vehicles at any one time and associated fibre optic data transmission cables~~ and

(v) an access road;

(w) works required to replace an 11 kilovolt overhead electricity line with an 11 kilovolt underground electricity cable to facilitate the safe passage of construction vehicles along the proposed construction access road;

(x) up to 2 attenuation ponds and associated landscaping with a combined capacity of up to 2,500m^3;

(y) up to 2 fire protection deluge systems;

(z) permanent car parking for up to 10 vehicles within Converter Station compound

(aa) soft and hard landscaping including bunds and haul roads to facilitate their construction;

(bb) access junction and associated gated highway link;

Work No. 3 – a temporary work area of up to five hectares associated with Work No. 1, Work No. 2 and Work No. 4 consisting of –

(a) a construction and laydown compound;

(b) car parking for up to 206 vehicles including associated vegetation removal and groundworks;

Work No. 4 – works to lay the onshore HVDC cables consisting of –

(a) onshore HVDC cables of up to 20,000 metres in length (each cable circuit);

(b) up to 25 joint bays per cable circuit with dimensions of up to 6 metres in length by 3 metres in width by 1.85 metres in depth;

(c) up to 6 link boxes per cable circuit with dimension of up to 0.8 metres in length by 0.8 metres in width by 0.6 metres in height;

(d) up to 6 link pillars per cable circuit with dimensions of up to 1 metres in length by 1 metres in width by 0.6 metres in height;

(e) 4 HDD crossings including entry/exit pits and associated temporary construction compounds;

(f) 1 trenchless installation technique crossing including an entry/exit pit and associated temporary construction compounds;

(g) temporary work areas and laydown areas associated with the installation and pulling of the onshore HVDC cables;

Work No. 5 – onshore connection works

(a) onshore HVDC cables of up to 50 metres in length (each cable circuit) from Work No. 4 to the transitional joint bays;

(b) 2 transitional joint bays with dimensions of up to 8 metres in length by 3 metres in width by 2 metres in depth with an excavation of up to 15 metres in length by 5 metres in width by 2 metres in depth;

(c) associated constructions working and pulling area;

(d) 1 HDD with up to 4 entry/exit pits and associated temporary construction compounds;

(e) onshore HVDC cables to Work No. 6 of up to 250 metres in length (each cable circuit);

(f) up to 1 link box per cable circuit with dimension of up to 0.8 metres in length by 0.8 metres in width by 0.6 metres in height;

(g) up to 1 link pillar per cable circuit with dimensions of up to 1 metres in length by 1 metres in width by 0.6 metres in height;

(h) 2 optical regeneration stations;

Commented [CZ21]: This development is outside the scope of sections 14(6)(a) and 35(2)(a)(i) of the Planning Act 2008, being in the field of commercial telecommunications

Commented [CZ22]: To confine the part of any access road within Little Denmead Farm to temporary use for construction purposes alone pending its subsequent removal after conclusion of the Construction Period

Commented [CZ23]: This parking can only relate to the Converter Station and cannot relate to the Telecommunications Building(s)

(i) compound for 2 optical regeneration stations with secure fencing, access and parking for up to two vehicles at any one time;

(j) auxiliary power supply equipment for the optical regeneration stations and fuel storage in relation to that equipment;

Work No. 6 – marine HVDC cables within the Order limits seaward of MHWS and landward of MLWS between Work No. 5 and Work No. 7 including where required works to facilitate HDD.

Work No. 7 – marine HVDC cable works consisting of –

(a) marine HVDC cables of up to 109 kilometres (each cable circuit) between the UK exclusive economic zone with France and Works No. 6 including where required works to facilitate HDD; and

(b) 1 HDD with up to 4 entry/exit pits; and

(c) a temporary work area for vessels to carry out intrusive activities.

2. In connection with Work Nos. 1 to 5 and to the extent that they do not otherwise form part of any such work, further associated development comprising such other works as may be necessary or expedient for the purposes of or in connection with the relevant part of the authorised development and which fall within the scope of the work assessed by the environmental statement, including but not limited to -

(a) ramps, means of access and footpaths;

(b) bunds, embankments, swales, landscaping, fencing and boundary treatments;

(c) cable ducts, cable protection, joint protection, manholes, marker posts, underground cable maker, tiles and tape and lighting and all other works associated with cable laying;

(d) works for the provision of apparatus, including cabling, water and electricity supply works, foul drainage provision, surface water management systems and culverting;

(e) works to alter the position of apparatus, including mains, sewers, drains and cables;

(f) works to alter the course or otherwise interfere with, non-navigable rivers, streams or watercourses;

(g) landscaping and other works to mitigate any adverse effects of the construction, maintenance or operation of the authorised development;

(h) works for the benefit of the protection of land affected by the authorised development;

(i) working sites in connection with the construction of the authorised development, lay down areas and works compounds, storage compounds and their restoration;

(j) permanent and temporary works for the benefit or protection of land, structures, apparatus or equipment affected by the authorised development; and

(k) such other works as may be necessary or expedient for the purpose of or in connection with the construction or use of the authorised development and which do not give rise to any materially new or materially different environmental effects from those assessed as set out in the environmental statement.

and in connection with such Works Nos. 6 to 7 and to the extent that they do not otherwise form part of any such work, further associated development within the meaning of section 115(2) of the 2008 Act comprising other works as may be necessary or expedient for the purposes of or in connection with the relevant part of the authorised development and which fall within the scope of the work assessed by the environmental statement and the provisions of this licence, including but not limited to –

(l) temporary cable burial equipment trials;

(m) cable protection;

(n) the removal of material from the seabed required for the construction of Work Nos. 6 and 7 and the disposal of up to 1,754,000m^3 of inert material of natural origin at the disposal sites with reference WI048 and WI049 within the extent of the Order limits seaward of MHWS produced during the Works;

(o) the construction of crossing structures over cables that are crossed by the marine HVDC cable; and

(p) such other works as may be necessary or expedient for the purpose of or in connection with the construction or use of the authorised development and which do not give rise to any materially new or materially different environmental effects from those assessed as set out in the environmental statement.

3. The grid coordinates for that part of the authorised development which is seaward of MHWS are specified below –

Point ID	*Latitude (DMS)*	*Longitude (DMS)*	*Point ID*	*Latitude (DMS)*	*Longitude (DMS)*
1	50 47′8.146″N	1 2′20.857″W	135	50 42′0.397″N	0 54′1.872″W
2	50 47′8.216″N	1 2′20.480″W	136	50 41′55.699″N	0 53′35.726″W
3	50 47′8.268″N	1 2′20.179″W	137	50 41′33.679″N	0 52′58 934″W
4	50 47′8.339″N	1 2′19.690″W	138	50 40′20.249″N	0 51′13 974″W
5	50 47′8.386″N	1 2′19.364″W	139	50 39′59.881″N	0 50′52.430″W
6	50 47′8.451″N	1 2′18.889″W	140	50 39′42.599″N	0 50 29.607″W
7	50 47′8.508″N	1 2′18.470″W	141	50 39′36.524″N	0 50′11.733″W
8	50 47′8.553″N	1 2′18.104″W	142	50 39′12.728″N	0 48′58 524″W
9	50 47′8.628″N	1 2′17.588″W	143	50 38′30.615″N	0 46 2.020″W
10	50 47′8.690″N	1 2′17.204″W	144	50 37′46.726″N	0 43 23.708″W
11	50 47′8.771″N	1 2′16.708″W	145	50 37′36.508″N	0 42′41 575″W
12	50 47′8.826″N	1 2′16.349″W	146	50 37′15.582″N	0 41′15 354″W
13	50 47′8.931″N	1 2′15.812″W	147	50 37′15.513″N	0 39′46 232″W
14	50 47′8.992″N	1 2′15.489″W	148	50 36′41.713″N	0 34 22.448″W
15	50 47′9.096″N	1 2′14.962″W	149	50 36′14.831″N	0 32′37.009″W
16	50 47′9.166″N	1 2′14.555″W	150	50 36′7.973″N	0 31′7 231″W
17	50 47′9.231″N	1 2′14.186″W	151	50 36′0.215″N	0 30′36 542″W
18	50 47′9.328″N	1 2′13.628″W	152	50 35′54.791″N	0 30′15.095″W
19	50 47′9.426″N	1 2′13.061″W	153	50 35′23.567″N	0 29′13.075″W
20	50 47′9.490″N	1 2′12.710″W	154	50 34′29.494″N	0 26′42.742″W
21	50 47′9.587″N	1 2′12.132″W	155	50 32′41.551″N	0 23′38.096″W
22	50 47′9.639″N	1 2′11.857″W	156	50 30′3.541″N	0 17′33 192″W
23	50 47′9.789″N	1 2′11.023″W	157	50 28′42.521″N	0 15′42.064″W
24	50 47′9.878″N	1 2′10.527″W	158	50 28′4.707″N	0 14′50 247″W
25	50 47′9.983″N	1 2′9.954″W	159	50 27′43.034″N	0 14 20 562″W
26	50 47′10.053″N	1 2′9.496″W	160	50 26′55.786″N	0 13′15.884″W
27	50 47′10.093″N	1 2′9.212″W	161	50 26′56.222″N	0 13′14.495″W
28	50 47′10.142″N	1 2′8.960″W	162	50 26′57.457″N	0 13′4.676″W
29	50 47′10.205″N	1 2′8.572″W	163	50 26′57.027″N	0 12′54.690″W
30	50 47′10.259″N	1 2′8.304″W	164	50 26′54.961″N	0 12′45 218″W
31	50 47′10.327″N	1 2′7.966″W	165	50 26′51.400″N	0 12′36 908″W
32	50 47′10.374″N	1 2′7.740″W	166	50 26′46.587″N	0 12′30 324″W
33	50 47′10.456″N	1 2′7.347″W	167	50 26′40.850″N	0 12 25 916″W
34	50 47′10.514″N	1 2′7.079″W	168	50 26′34.580″N	0 12 23 983″W
35	50 47′10.587″N	1 2′6.756″W	169	50 26′28.204″N	0 12 24.658″W
36	50 47′10.648″N	1 2′6.496″W	170	50 26′22.156″N	0 12 27.894″W
37	50 47′10.741″N	1 2′6.131″W	171	50 26′21.336″N	0 12 28.756″W
38	50 47′10.822″N	1 2′5.803″W	172	50 26′10.359″N	0 12′13.745″W
39	50 47′10.862″N	1 2′5.617″W	173	50 24′8.032″N	0 9 25 526″W
40	50 47′10.921″N	1 2′5.371″W	174	50 24′2.766″N	0 9′16 501″W

41	50 47′10.939″N	1 2′5.284″W	175	50 23′57.213″N	0 9′5.200″W
42	50 47′10.978″N	1 2′5.099″W	176	50 23′51.251″N	0 8′52.570″W
43	50 47′11.045″N	1 2′4.740″W	177	50 23′46.360″N	0 8′39.092″W
44	50 47′11.107″N	1 2′4.474″W	178	50 21′32.398″N	0 2′15.439″W
45	50 47′11.167″N	1 2′4.178″W	179	50 21′29.076″N	0 2′5.945″W
46	50 47′11.222″N	1 2′3.897″W	180	50 21′28.324″N	0 2′3.795″W
47	50 47′11.281″N	1 2′3.598″W	181	50 21′6.855″N	0 1′12.898″W
48	50 47′11.337″N	1 2′3.294″W	182	50 20′46.163″N	0 0′32.608″W
49	50 47′11.366″N	1 2′3.150″W	183	50 20′34.684″N	0 0′15.657″W
50	50 47′11.403″N	1 2 2.966″W	184	50 20′32.670″N	0 0′12.683″W
51	50 47′11.423″N	1 2 2.845″W	185	50 20′16.756″N	0 0′10.817″E
52	50 47′11.460″N	1 2 2.657″W	186	50 17′36.424″N	0 5′11.894″E
53	50 47′11.492″N	1 2 2.498″W	187	50 16′31.253″N	0 9′3.799″E
54	50 47′11.540″N	1 2 2.249″W	188	50 16′10.086″N	0 11 24.856″E
55	50 47′11.573″N	1 2 2.089″W	189	50 16′7.791″N	0 11′36.422″E
56	50 47′11.617″N	1 2′1.860″W	190	50 16′6.240″N	0 11′43.952″E
57	50 47′11.654″N	1 2′1.683″W	191	50 16′2.500″N	0 12 0.714″E
58	50 47′11.704″N	1 2′1.424″W	192	50 15′56.441″N	0 12′17.698″E
59	50 47′11.767″N	1 2′1.116″W	193	50 15′53.389″N	0 12 23.459″E
60	50 47′11.802″N	1 2 0.862″W	194	50 15′53.179″N	0 12 23.855″E
61	50 47′11.807″N	1 2 0.827″W	195	50 15′53.678″N	0 12 24.498″E
62	50 47′11.827″N	1 2 0.809″W	196	50 15′50.634″N	0 12′30.244″E
63	50 47′11.877″N	1 2 0.444″W	197	50 15′50.355″N	0 12′30.769″E
64	50 47′11.901″N	1 2 0.405″W	198	50 15′44.773″N	0 11′56.429″E
65	50 47′11.904″N	1 2 0.370″W	199	50 15′47.089″N	0 11′49.938″E
66	50 47′11.863″N	1 2 0.317″W	200	50 15′50.773″N	0 11′33.424″E
67	50 47′11.847″N	1 2 0.307″W	201	50 15′53.839″N	0 11′17.971″E
68	50 47′11.847″N	1 2 0.307″W	202	50 16′15.223″N	0 8′55.462″E
69	50 47′11.847″N	1 2 0.307″W	203	50 17′21.968″N	0 4′57.948″E
70	50 47′11.895″N	1 1′59.868″W	204	50 20′4.461″N	0 0′7.202″W
71	50 47′11.912″N	1 1′59.866″W	205	50 20′21.112″N	0 0′31.792″W
72	50 47′11.939″N	1 1′59.841″W	206	50 20′23.127″N	0 0′34.767″W
73	50 47′11.965″N	1 1′59.584″W	207	50 20′33.765″N	0 0′50.477″W
74	50 47′11.966″N	1 1′59.512″W	208	50 20′53.239″N	0 1 28.399″W
75	50 47′11.965″N	1 1′59.496″W	209	50 21′13.893″N	0 2′17.366″W
76	50 47′11.964″N	1 1′59.435″W	210	50 23′31.655″N	0 8′51.889″W
77	50 47′11.965″N	1 1′59.415″W	211	50 23′37.115″N	0 9′6.938″W
78	50 47′11.953″N	1 1′59.406″W	212	50 23′43.773″N	0 9 21.043″W
79	50 47′11.953″N	1 1′59.406″W	213	50 23′49.858″N	0 9′33.428″W
80	50 47′11.953″N	1 1′59.406″W	214	50 23′56.230″N	0 9′44.349″W
81	50 47′11.962″N	1 1′59.198″W	215	50 25′59.269″N	0 12′33.560″W
82	50 47′11.971″N	1 1′59.095″W	216	50 26′10.266″N	0 12′48.600″W
83	50 47′11.985″N	1 1′58.947″W	217	50 26′9.831″N	0 12′49.988″W
84	50 47′11.992″N	1 1′58.887″W	218	50 26′8.596″N	0 12′59.805″W
85	50 47′12.008″N	1 1′58.758″W	219	50 26′9.026″N	0 13 9.789″W
86	50 47′12.020″N	1 1′58.658″W	220	50 26′11.091″N	0 13′19.258″W
87	50 47′12.029″N	1 1′58.582″W	221	50 26′14.651″N	0 13 27.567″W
88	50 47′12.031″N	1 1′58.566″W	222	50 26′19.463″N	0 13′34.151″W
89	50 47′12.040″N	1 1′58.493″W	223	50 26′25.200″N	0 13′38.561″W
90	50 47′12.049″N	1 1′58.409″W	224	50 26′31.470″N	0 13′40.497″W
91	50 47′12.060″N	1 1′58.316″W	225	50 26′37.846″N	0 13′39.825″W

92	50 47′12.079″N	1 1′58.149″W	226	50 26′43.894″N	0 13′36.591″W
93	50 47′12.110″N	1 1′57.942″W	227	50 26′44.714″N	0 13′35.729″W
94	50 47′12.123″N	1 1′57.869″W	228	50 28′31.442″N	0 16′1.912″W
95	50 47′12.141″N	1 1′57.733″W	229	50 29′50.837″N	0 17′50.820″W
96	50 47′12.158″N	1 1′57.645″W	230	50 32′28.318″N	0 23′54.527″W
97	50 47′12.175″N	1 1′57.550″W	231	50 34′15.790″N	0 26′58.375″W
98	50 47′12.189″N	1 1′57.467″W	232	50 35′9.556″N	0 29 27.862″W
99	50 47′12.212″N	1 1′57.339″W	233	50 35′40.062″N	0 30 28.457″W
100	50 47′12.228″N	1 1′57.251″W	234	50 35′44.745″N	0 30′46.976″W
101	50 47′12.250″N	1 1′57.145″W	235	50 35′51.526″N	0 31′13.797″W
102	50 47′12.272″N	1 1′57.028″W	236	50 35′58.386″N	0 32′43.614″W
103	50 47′12.291″N	1 1′56.926″W	237	50 36′25.406″N	0 34 29.597″W
104	50 47′12.310″N	1 1′56.838″W	238	50 36′50.593″N	0 38′30.650″W
105	50 47′12.339″N	1 1′56.698″W	239	50 36′54.547″N	0 39 8.625″W
106	50 47′12.356″N	1 1′56.579″W	240	50 36′58.685″N	0 39′48.398″W
107	50 47′12.319″N	1 1′56.560″W	241	50 36′58.756″N	0 41 20.244″W
108	50 47′12.319″N	1 1′56.560″W	242	50 37′31.141″N	0 43′33.714″W
109	50 47′12.319″N	1 1′56.560″W	243	50 38′15.012″N	0 46′11.964″W
110	50 47′12.377″N	1 1′56.330″W	244	50 38′57.306″N	0 49 9.233″W
111	50 47′12.390″N	1 1′56.270″W	245	50 39′21.609″N	0 50 24.001″W
112	50 47′12.406″N	1 1′56.188″W	246	50 39′29.289″N	0 50′46.600″W
113	50 47′12.425″N	1 1′56.105″W	247	50 39′49.747″N	0 51′13.619″W
114	50 47′12.443″N	1 1′56.031″W	248	50 40′9.842″N	0 51′34.878″W
115	50 47′12.460″N	1 1′55.963″W	249	50 41′21.878″N	0 53′17.854″W
116	50 47′11.065″N	1 1′55.703″W	250	50 41′40.626″N	0 53′49.178″W
117	50 45′45.014″N	1 1′39.017″W	251	50 41′45.252″N	0 54′14.928″W
118	50 45′33.952″N	1 1′29.392″W	252	50 43′22.501″N	0 57′7.513″W
119	50 45 23.239″N	1 1′14.438″W	253	50 43′31.132″N	0 57 27.942″W
120	50 45′13.571″N	1 0′56.514″W	254	50 43′29.651″N	0 57 29.496″W
121	50 45 2.494″N	1 0′25.147″W	255	50 43′40.579″N	0 57′55.368″W
122	50 44′50.712″N	0 59′52.953″W	256	50 43′42.061″N	0 57′53.814″W
123	50 44′39.281″N	0 59′22.406″W	257	50 43′43.756″N	0 57′57.828″W
124	50 44 2.379″N	0 57′54.977″W	258	50 43′44.075″N	0 57′57.664″W
125	50 44 0.123″N	0 57′49.635″W	259	50 43′48.906″N	0 58 9.102″W
126	50 44 0.446″N	0 57′49.479″W	260	50 44′25.563″N	0 59′35.955″W
127	50 43′56.072″N	0 57′39.124″W	261	50 44′36.732″N	1 0′5.805″W
128	50 43′54.590″N	0 57′40.678″W	262	50 44′48.414″N	1 0′37.724″W
129	50 43′43.661″N	0 57′14.804″W	263	50 45′0.207″N	1 1′11.121″W
130	50 43′45.143″N	0 57′13.250″W	264	50 45′11.652″N	1 1′32.340″W
131	50 43′35.866″N	0 56′51.292″W	265	50 45′24.564″N	1 1′50.365″W
132	50 42 27.974″N	0 54′50.779″W	266	50 45′39.934″N	1 2′3.740″W
133	50 42 23.228″N	0 54′42.359″W	267	50 47′8.146″N	1 2 20.857″W
134	50 42′18.988″N	0 54′34.839″W			

SCHEDULE 2

Article 3

Requirements

Interpretation

1.—(1) In addition to article 2 (Interpretation), the terms in this Schedule have the following meaning, unless the context provides otherwise —

“converter station and telecommunications building parameter plans” means the document certified as the converter station and telecommunications building parameter plans by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order;

“design principles” means the design principles located at section 6 of the DAS;

“employment and skills strategy” means the document certified as the employment and skills strategy by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order;

“flood risk assessment” means the documents certified as the flood risk assessment and the flood risk assessment addendum by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order;

“framework construction traffic management plan” means the document certified as the framework construction traffic management plan by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order;

“framework construction worker travel plan” means the framework construction worker travel plan which forms part of the framework construction traffic management plan;

“lead local flood authority” means Hampshire County Council;

“operational broadband and octave band noise criteria document” means the document certified as the operational broadband and octave band noise criteria document by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order;

“optical regeneration stations parameter plan” means the document certified as the optical regeneration stations parameter plan by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order;

“onshore outline construction environmental management plan” means the document certified as the onshore outline construction environmental management plan by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order;

“outline landscape and biodiversity strategy” means the document certified as the outline landscape and biodiversity strategy by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order;

“outline materials management plan” means the outline materials management plan appended to the onshore outline construction environmental management plan;

“outline soil resources plan” means the outline soil resources plan appended to the onshore outline construction environmental management plan;

“outline site waste management plan” means the outline site waste management plan appended to the onshore outline construction environmental management plan;

“phase” means any defined section or part of the authorised development, the extent of which is shown in a scheme submitted to the relevant planning authority pursuant to requirement 3 and which may individually or collectively include the onshore site preparation works (phases of the authorised development onshore);

“Portsmouth Water” means Portsmouth Water Limited of PO Box No8, West Street, Havant, Hampshire, PO9 1LG;

"start-up and shut-down activities" means at the start of the working day the opening up of the site, the arrival of site staff & contractors, changing into appropriate PPE wear, pre-shift briefings, site inductions, tool box talks, and all associated site safety checks and at the end of the working day the cleaning and tidying of work areas, changing out PPE wear, post-shift debrief, the departure of site staff and contractors, and closing and securing the sites only;

"SPZ1" means the source protection zone 1 as shown on the document certified as the source protection zones plans by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order; and

"surface water drainage and aquifer contamination mitigation strategy" means the document certified as the aquifer contamination mitigation strategy by the Secretary of State under article 43 (Certification of plans, etc.) for the purposes of this Order,

(2) Where any requirement—

(a) refers to a scheme, drawing, document or plan, that scheme, document or plan will be taken to be the version certified by the Secretary of State under article 43 (Certification of plans, etc.) of this Order or to any subsequent version of that scheme, drawing, document or plan approved by the discharging authority under a requirement; or

(b) provides that the authorised development is to be carried out in accordance with details, or a scheme, plan or other document approved by the discharging authority, the approved details, scheme, plan or other document must be taken to include any amendments or revisions subsequently approved by the discharging authority.

(3) Where an approval of details or other document is required under the terms of any requirement or where compliance with a document contains the wording "unless otherwise agreed" by the discharging authority, such approval of details or of any other document (including any subsequent amendments or revisions) or agreement by the discharging authority is not to be given except in relation to minor or immaterial changes or deviations where it has been demonstrated to the satisfaction of the discharging authority that the subject matter of the approval or agreement sought does not give rise to any materially new or materially different environmental effects to those assessed in the Environmental Statement.

(4) Where any requirement identifies a parameter for a building or structure, that parameter identifies the envelope for that building or structure and does not include any external projections including telecommunications infrastructure (including aerials and satellites), access structures and safety measures (including ladders and handrails), mechanical plant, utilities infrastructure, minor architectural features (including gutters and lighting), external surface level areas, and associated compounds and storage areas.

(5) Unless otherwise provided in this Order, where a Requirement relates to a specific Works (or a part thereof) and it specifies "commencement of development", it refers to the commencement of development in relation to those Works only.

(6) For the purposes of requirement 5, the parameters for the buildings and other structures comprised in Work No. 2 and Works No. 5 are to be measured as follows—

(a) length is to be measured as the external horizontal dimension from abutment to abutment;

(b) height is to be measured as the vertical dimension from the finished floor level to the top of the highest part of the structure;

(c) width is to be measured as the external horizontal width from an abutment to a parallel abutment.

(7) For the purposes of discharging requirements in phases, the undertaker may—

(a) submit a plan or plans to the discharging authority identifying a part or parts of any of the sites to which each phase or design relates; or

(b) submit notices to the discharging authority in respect of individual or combined work packages.

Time limits

2.—(1) The authorised development must commence (which for the purposes of this requirement includes the undertaking of any works comprised in Work No.2 (bb)) no later than the expiration of five years beginning with the date on which this Order comes into force.

(2) The undertaker will provide to each local planning authority in whose area the authorised development is located landwards of MLWS written notice of commencement not less than 7 days' prior to the proposed date on which the authorised development is commenced.

(3) The undertaker will provide to each local planning authority in whose area the authorised development is located landwards of MLWS written notice of any onshore site preparation works first being undertaken not less than 7 days' prior to the proposed date on which they are to be first undertaken.

Phases of authorised development onshore

3.—(1) No authorised development landwards of MHWS including the onshore site preparation works may commence until a written scheme setting out all the phases of the authorised development has been submitted to the relevant planning authority detailing the phases of the onshore works within that planning authority's administrative area.

(2) The authorised development landwards of MHWS must be carried out in accordance with the written scheme submitted pursuant to paragraph 1 (as may be updated from time to time).

Converter station option confirmation

4. Prior to the commencement of Work No.2 or the carrying out of any onshore site preparation works in respect of the perimeter area where the converter station is to be located the undertaker will confirm to the relevant planning authority which converter station perimeter option shown on the converter station and telecommunications building parameter plans listed in Schedule 7 to the Order with reference EN020022-2.6-PARA-Sheet1 listed in Schedule 7 the converter station will be constructed within.

Converter station and optical regeneration station parameters

5.—(1) The buildings and equipment identified in Work No. 2 and listed in table WN2 may only be constructed within the relevant parameter plan zone listed in Table WN2 below and shown on the converter station and telecommunications building parameter plans listed in Schedule 7 to the Order; with reference EN020022-2.6-PARA-Sheet 2 in the event option b(i) is confirmed to be the location for the converter station in accordance with requirement 4; or with reference EN020022-2.6-PARA-Sheet 3 in the event option b(ii) is confirmed to be the location for the converter station in accordance with requirement 4, and in respect of any building in accordance with the maximum dimensions shown in that table for the building –

Table WN2

Component	*Parameter Zone*	*Maximum Parameter (m)*		
		Length	*Width*	*Height*
Converter Hall	4	90	50	26
Control Building	4	26	50	15
Transformers	3	-	-	-
Spare Transformer	3	-	-	-
HVAC cable termination equipment	3	-	-	-
HVDC cable termination equipment	3	-	-	-
Valve Cooling Systems	4	-	-	-
Spares building	4	27	25	15
Spares building internal perimeter	4	-	-	2.4

fence				
Standby back-up diesel generator	3	-	-	-
Auxiliary transformer	3	-	-	-
Reactors	3	-	-	-
Filters	3	-	-	-
Lightning masts	3/4	-	-	30
Lighting column	3	-	-	15
Outer security perimeter fence	2	-	-	2.4
Inner electrified fence	2	-	-	3.4
Telecommunications building	5	8	4	3
Telecommunications building compound	5	30	10	-
Telecommunications building security perimeter fence	5	30	10	2.45
Access road	1	1,200	7.3	-
Fire protection deluge system	3	-	-	-

(2) In accordance with the converter station and telecommunications building parameter plans no building within Work No. 2 may be a height which is above +111.100 metres above ordnance datum (excluding the lightning masts which may not be a height which is above +115.100 meters above ordnance datum).

(3) The optical regeneration stations identified in Works No.5 and listed in table WN5 may only be constructed within the relevant parameter plan zone shown on the optical regeneration stations parameter plan listed in Schedule 7 to the Order with reference EN020022-2.11-PARA-Sheet 1 and in accordance with the maximum dimensions shown in that table for the buildings and compound –

Table WN5

Component	*Maximum Parameter (m)*		
	Length	*Width*	*Height*
Optical Regeneration Station	11	4	4
Compound	35	18	-
Security Perimeter Fence	35	18	2.45

Detailed design approval

6.—(1) The construction of any phase of Works No. 2 (for the avoidance of doubt only excluding Works No. 2 (bb)) must not commence until written details of the –

(a) layout of buildings;

(b) scale of buildings;

(c) existing and proposed site levels;

(d) proposed finished ground floor slab level;

(e) proposed piling;

(f) external appearance and materials of buildings;

(g) hard surfacing materials;

(h) location of the attenuation ponds;

(i) the access road, permanent parking and circulation areas;

(j) external lighting and lightning protection;

(k) permanent fencing; and

(l) proposed services above and below, ground, including surface water drainage, foul water drainage, power and communications cables and pipelines, manholes and supports or any other associated ancillaries,

in so far as relevant to that phase of those works and confirming how those details accord with the design principles for the converter station and the surface water drainage and aquifer contamination mitigation strategy and the flood risk assessment (in so far as relevant to the design of Work No.2) have been submitted to and approved in writing by the relevant planning authority (in consultation with the South Downs National Park Authority and, in relation to matters relevant to the surface water drainage and aquifer contamination mitigation strategy only, the Environment Agency and Portsmouth Water).

(2) The construction of any phase of Work No.3 or the carrying out of any onshore site preparation works in respect of the area where the Works No.3 is to be located must not commence until written details of the –

(a) layout;

(b) surfacing materials;

(c) vehicular access, parking and circulation areas; and

(d) drainage measures,

relating to that phase of those works and confirming how those details accord with the surface water drainage and aquifer contamination mitigation strategy have been submitted to and approved in writing by the relevant planning authority (in consultation with the Environment Agency and Portsmouth Water in relation to matters relevant to the surface water drainage and aquifer contamination mitigation strategy only).

(3) The construction of any phase of Works No. 4 must not commence until written details of the –

(a) proposed layout of the onshore HVDC cables;

(b) proposed depth of installation of the onshore HVDC cables;

(c) indicative location of the joint bays, link boxes and link pillars;

(d) where included within the relevant phase the spatial extent and layout of any HDD compound (which must be located within the areas identified for HDD compounds on the works plans only); and

(e) where included within the relevant phase the spatial extent and layout of any trenchless installation techniques compound (which must be located within the areas identified for trenchless installation techniques compounds on the works plans only),

relating to that phase of those works and confirming how those details accord with the design principles for the onshore cable corridor and the flood risk assessment (in so far as is relevant) have been submitted to and approved in writing by the relevant planning authority.

(4) The construction of the optical regeneration stations within Works No. 5 must not commence until written details of the –

(a) layout;

(b) scale;

(c) proposed finished floor levels;

(d) external appearance and materials;

(e) hard surfacing materials;

(f) vehicular access, parking and circulation areas;

(g) permanent fencing; and

(h) proposed services above and below, ground, including drainage, power and communications cables and pipelines, manholes and supports, security measures and plant,

relating to the optical regeneration stations and confirming how those details accord with the design principles for the optical regeneration stations and the flood risk assessment have been submitted to and approved in writing by the relevant planning authority.

(5) The construction of any phase of Works No.5 (excluding the optical regeneration stations) must not commence until written details of the –

(a) layout;

(b) external appearance and materials;

(c) hard surfacing materials;

(d) vehicular access, parking and circulation areas;

(e) proposed services above and below, ground, including drainage, power and communications cables and pipelines, manholes and supports;

relating to that phase of those works and confirming how those details accord with the flood risk assessment have been submitted to and approved in writing by the relevant planning authority.

(6) Works No. 2, 3 and 5 must be carried out in accordance with the approved details.

(7) Works No. 4 must be carried out in accordance with the approved details, save for in relation to such details which are indicative which Work No.4 must be carried out substantially in accordance with.

(8) The external appearance of the buildings within Work No. 2 shall be retained as approved during the operational period unless an amendment or variation is previously agreed in writing by the relevant planning authority save that this shall not prevent the replacement of the approved materials with other materials with the same external appearance.

(9) Any approved permanent fencing in relation to the converter station, the telecommunications buildings and the optical regeneration stations must be completed before the converter station, the telecommunications buildings or the optical regeneration stations (respectively) are brought into use, and maintained for the operational lifetime of the converter station, the telecommunications buildings and the optical regeneration stations (respectively).

(10) HDD must be used for the purpose of passing under–

(a) Denmead Meadows (in the area identified as a trenchless crossing zone on Sheet 3 of the works plans);

(b) Langstone Harbour (in the area identified for a trenchless crossing zone on Sheets 7 and 8 of the works plans);

(c) Sea Defences at Milton Common (in the area identified as a trenchless crossing zone on Sheet 9 of the works plans);

(d) Eastney and Milton Allotments (in the area identified as a trenchless crossing zone on Sheet 10 of the works plans); and

(e) Eastney Beach (in the area identified as a trenchless crossing zone on Sheet 10 of the works plans)

(11) Trenchless installation techniques must be used for the purpose of passing under the Brighton to Southampton Railway Line (in the area identified for a trenchless crossing zone on Sheets 7 of the works plans).

Provision of landscaping

7.—(1) No phase of Works No. 2, Works No.4 or the construction of the optical regeneration stations within Works No. 5 may commence and no onshore site preparation works in relation to any such phase (for the avoidance of doubt excluding Work No. 2 (bb)) may be carried out until a detailed landscaping scheme in relation to that phase (which accords with the outline landscape and biodiversity strategy in so far as relevant to it and the design principles relating to landscaping) has been submitted to and approved by the relevant planning authority (and where related to any phase of Works No. 2 in consultation with the South Downs National Park Authority).

(2) A detailed landscaping scheme for any phase must include details of all proposed hard and soft landscaping works, including (in so far as relevant) -

(a) surveys, assessments and method statements as guided by BS 5837;

(b) location, number, species, size, plant protection measures and planting density of any proposed planting;

(c) cultivation, importing of materials and other operations to ensure plant establishment;

(d) hard surfacing materials;

(e) implementation timetables for all landscaping works;

(f) management, maintenance and monitoring plans and prescriptions; and

(g) management responsibilities.

Implementation and maintenance of landscaping

8.—(1) All landscaping and enhancement works must be carried out in accordance with any detailed landscaping scheme approved under requirement 7 applicable to them and to a reasonable standard in accordance with the relevant recommendations of appropriate British Standards.

(2) Any tree or shrub planted or any area seeded as part of an approved landscaping scheme that, within a period of five years after planting, is removed, dies or becomes, in the opinion of the relevant planning authority, seriously damaged or diseased, must be replaced in the first available planting season with a specimen of the same species and size as that originally planted, or in the case of any seed area, reseeded with the same type, unless otherwise approved by the relevant planning authority.

(3) All landscaping provided in connection with Works No.2 and the optical regeneration stations within Works No. 5 must be retained, managed and maintained during the operational period.

Biodiversity management plan

9.—(1) No phase of Works No. 2 or Works No. 5 may commence until a written biodiversity management plan in relation to that phase (which accords with the outline landscape and biodiversity strategy in so far as relevant and the relevant recommendations of appropriate British Standards) has been submitted to and approved by the relevant local planning authority in consultation with the relevant statutory nature conservation bodies and (where works have the potential to have an impact on wetland habitats) the Environment Agency.

(2) No phase of Works No.4 may commence until a written biodiversity management plan in relation to that phase (which accords with the outline landscape and biodiversity strategy in so far as relevant and the relevant recommendations of appropriate British Standards) has been submitted to and approved by the relevant local planning authority in consultation with the relevant statutory nature conservation bodies and (where works have the potential to have an impact on wetland habitats) the Environment Agency.

(3) No part of the onshore site preparation works (excluding Work No.2 (bb)) may commence until a written biodiversity management plan (which accords with the outline landscape and biodiversity strategy in so far as relevant to those works and the relevant recommendations of appropriate British Standards) relating to those works has been submitted to and approved by the relevant local planning authority in consultation with the relevant statutory nature conservation bodies.

(4) Any approved written biodiversity management plan must include:

(a) measures to protect existing scrub and trees that are to be retained;

(b) details of a scheme for the reinstatement of land used as temporary compounds during construction and any replacement planting to replace removed sections of hedgerow or removed trees;

(c) an implementation timetable;

(d) biodiversity management and maintenance measures; and

(e) reptile and stag beetle precautionary method statements of works.

(5) Any works for which a written biodiversity management plan has been approved must be carried out in accordance with the written biodiversity management plan approved in relation to them.

Highway accesses

10.—(1) No phase of the authorised development landwards of MHWS may commence until written details of the –

(a) siting;

(b) design

(c) layout

(d) visibility splays

(e) access management measures; and

(f) a maintenance programme,

in respect of any new permanent or temporary means of access to a highway to be used by vehicular traffic (for the avoidance of doubt excluding Work No.2 (bb)), or any alteration or improvement to an existing means of access to a highway used by vehicular traffic, relevant to that phase, has been submitted to and approved by the relevant highway authority (in consultation with the relevant planning authority).

(2) The highway accesses (including visibility splays) must be constructed and maintained in accordance with the approved details.

Construction fencing and other means of enclosure

11.—(1) All construction sites, must remain securely fenced at all times during construction of the authorised development landwards of MHWS.

(2) Any temporary fencing must be removed on completion of the construction of the phase of the authorised development landwards of MHWS it was erected in connection with.

Surface and foul water drainage

12.—(1) The construction of any phase of Work No.2 (excluding Works No.2 (a) and for the avoidance of doubt Work No.2 (bb)) must not commence until a surface water drainage and aquifer contamination management plan (in accordance with the surface water and aquifer contamination mitigation strategy) has been submitted to and approved by the relevant local planning authority in consultation with the Environment Agency, Portsmouth Water and the lead local flood authority.

(2) The surface water drainage and aquifer contamination management plan must include:

(a) emergency oil containment and water management plan;

(b) installation, operation and maintenance manual;

(c) sustainable drainage system operation and maintenance strategy; and

(d) civil asset management plan.

(3) The surface and foul water drainage system for each phase must be maintained in accordance with the approved surface water drainage and aquifer contamination management plan.

Contaminated land and groundwater

13.—(1) No phase of the authorised development landwards of MHWS within the area of a relevant planning authority may commence until a written scheme applicable to that phase in accordance with the onshore outline construction environmental management plan and surface

water drainage and aquifer contamination mitigation strategy (in so far as relevant), to deal with the contamination of any land, including groundwater, within the Order limits landwards of MHWS which is likely to cause significant harm to persons or pollution of controlled waters or the environment, has been submitted to and approved by the relevant planning authority in consultation with the Environment Agency and, to the extent it relates to the intertidal area, the MMO.

(2) The term commence as used in requirement 13(1) includes any onshore site preparation works (excluding Work No.2 (bb)).

(3) If, during the carrying out of the authorised development contamination of any land, including groundwater, within the Order limits landwards of MLWS which is likely to cause significant harm to persons or pollution of controlled waters or the environment not previously identified is found to be present then the developer will halt the continuation of such part of the authorised development as is to be carried out in the area where the contamination has been identified and submit, and obtain approval from the relevant planning authority in consultation with the Environment Agency and, to the extent it relates to the intertidal area, the MMO for, a written scheme detailing how the contamination will be dealt with.

(4) Any scheme submitted to deal with the contamination of any land, including groundwater, within the Order limits landwards of MHWS which is likely to cause significant harm to persons or pollution of controlled waters or the environment will include an investigation and assessment report, prepared by a specialist consultant approved by the relevant planning authority, to identify the extent of any contamination and the remedial measures to be taken to render the land fit for its intended purpose, together with a management plan which sets out long-term measures with respect to any contaminants remaining on the site.

(5) Remediation must be carried out in accordance with the approved scheme.

(6) Upon completion of the approved scheme, a verification report demonstrating completion of the works set out in the approved scheme and the effectiveness of the remediation will be submitted to and approved, in writing, by the relevant planning authority which must include results of sampling and monitoring carried out to demonstrate that site remediation criteria have been met and a plan for long-term monitoring of pollutant linkages, maintenance and arrangements for contingency action, if appropriate, and for the reporting of this to the relevant planning authority.

(7) Any approved long-term monitoring and maintenance plan will be implemented as approved.

Archaeology

14.—(1) No phase of the authorised development landwards of MHWS may commence until for that phase a written scheme for the investigation of areas of archaeological interest as identified in the environmental statement has been submitted to and approved by the relevant planning authority or the relevant planning authority has confirmed its agreement that a written scheme for the investigation of areas of archaeological interest is not required in relation to that phase.

(2) The term commence as used in requirement 14(1) includes any onshore site preparation works (excluding Work No.2 (bb)).

(3) The scheme will identify areas where field work and/or a watching brief are required, and the measures to be taken to protect, record or preserve any significant archaeological remains that may be found.

(4) Any archaeological works or watching brief carried out under the scheme must be by a suitably qualified person or body approved by the relevant local planning authority.

(5) Any archaeological works or watching brief must be carried out in accordance with the approved scheme.

Construction environmental management plan

15.—(1) No phase of the authorised development landwards of MHWS may commence and no onshore site preparation works in relation to any such phase may be carried out until a

construction environmental management plan relating to that phase has been submitted to and approved by the relevant planning authority.

(2) When approving any construction environmental management plan relating to a phase of Work No.2, Work No.3 and Work No.4 the relevant planning authority must consult with the Environment Agency and Portsmouth Water in relation to any:

(a) materials management plan;

(b) site waste management plan;

(c) construction surface water management plan;

(d) earthworks management plan;

(e) silt management plan;

(f) HDD management plan;

(g) environmental risk assessment and method statement;

(h) piling risk assessment,

in so far as those plans are relevant to be included within the construction environmental management plan relating to the relevant phase of the works and only in so far as they relate to SPZ1.

(3) Any construction environmental management plan must be in accordance with the onshore outline construction environmental management plan and, so far as relevant to that phase, must –

(a) contain a record of all sensitive environmental features that have the potential to be affected by construction;

(b) Contain details of a local community liaison responsibilities;

(c) Include the following management plans and measures (as relevant to and necessary in connection with the relevant phase of the authorised development) –

(i) soil resources management plan (in accordance with the outline soil resources plan);

(ii) materials management plan (in accordance with the outline materials management plan);

(iii) site waste management plan (in accordance with the outline site waste management plan);

(iv) arboriculture method statements;

(v) dust management plan;

(vi) construction surface water management plan;

(vii) emergency pollution and spill response plan;

(viii) earthworks management plan;

(ix) silt management plan;

(x) HDD management plan;

(xi) environmental risk assessment and method statement;

(xii) piling risk assessment; and

(xiii) air quality stakeholder communication plan.

(4) The construction of any phase of the authorised development landwards of MHWS must be carried out in accordance with the construction environmental management plan and all supplementary plans approved in relation to it.

External construction lighting

16. No phase of Works No. 2 may commence until written details of external construction lighting to be installed at any of the construction sites within that phase or in relation to that phase in accordance with the onshore outline construction environmental management plan (in so far as relevant) have been submitted to and approved by the relevant local planning authority (in

consultation with the South Downs National Park Authority) and any approved means of external construction lighting must be installed only in accordance with the approved details and removed prior to the operational period.

Construction traffic management plan

17.—(1) No phase of the authorised development landwards of MHWS may commence until a construction traffic management plan (in accordance with the framework construction traffic management plan) relating to that phase has been submitted to and approved by the relevant highway authority (in consultation with Highways England in so far as the relevant construction traffic management plan relates to the strategic road network managed by them).

(2) The construction of any phase of the authorised development landwards of MHWS must be carried out in accordance with the construction traffic management plan approved in relation to it.

Construction hours

18.—(1) Subject to requirements 18(3) and 18(4), other than where expressly stated in a construction environmental management plan approved pursuant to requirement 15, construction work landwards of MHWS will not take place other than:

(a) in relation to Works No.1, Works No.2 and Works No. 5 between 0800 and 1800 hours on weekdays and 0800 and 1300 hours on Saturdays, excluding public holidays, except in the event of emergency unless otherwise agreed by the relevant local planning authority; and

(b) in relation to Works No.3 between 0700 and 1800 hours on weekdays and 0800 and 1300 hours on Saturdays, excluding public holidays, except in the event of emergency unless otherwise agreed by the relevant local planning authority;

(c) in relation to Works No.4 between 0700 and 1700 hours on weekdays and 0800 and 1300 hours on Saturdays, excluding public holidays, except in the event of emergency unless otherwise agreed by the relevant local planning authority;

(2) In the event of an emergency, notification of that emergency must be given to the relevant planning authority as soon as is reasonably practicable.

(3) The operations which it is stated in the onshore outline construction environmental management plan may be carried out outside of the core working hours may be carried out outside of the core working hours in accordance with the working hours stated in the onshore outline construction environmental management plan;

(4) Nothing in this requirement 18 precludes –

(a) start-up and shut-down activities up to an hour either side of the core working hours; and

(b) the receipt of oversized deliveries, the arrival and departure of personnel to and from the site, on-site meetings or briefings, and the use of welfare facilities and non-intrusive activities.

(5) In this requirement –

(a) "core working hours" means the working hours stated in relation to the relevant operations at paragraphs (1)(a), (1)(b) and 1(c);

(b) "emergency" means a situation where, if the relevant action is not taken, there will be adverse health, safety, security or environmental consequences that in the reasonable opinion of the undertaker would outweigh the adverse effects to the public (whether individuals, classes or generally as the case may be) of taking that action; and

(c) "non-intrusive activities" means activities which would not create any discernible light, noise or vibration outside the Order limits.

Converter station operational access strategy

19. Prior to the operation of the converter station a strategy for the access and egress of vehicles associated with the operation and maintenance of the converter station shall be submitted to and approved by the relevant highway authority.

Control of noise during the operational period

20.—(1) Prior to the operation of that relevant part of the authorised development landwards of MHWS a noise management plan for:

(a) Work No.2; and

(b) the optical regeneration stations;

must be submitted to and approved by the relevant planning authority.

(2) The noise management plans must set out the particulars of –

(a) the broadband and octave band noise criteria that must be achieved, which unless otherwise agreed will be those set out in the operational broadband and octave band noise criteria document;

(b) the noise attenuation and mitigations required to achieve the broadband and octave band noise criteria; and

(c) a noise monitoring scheme for testing the attenuation and mitigation measures provided under subparagraph (b) which must include –

(i) the circumstances under which noise will be monitored;

(ii) the locations at which noise will be monitored, which unless otherwise agreed will be the locations specified in the operational broadband and octave band noise criteria document;

(iii) the method for noise measurement (which must be in accordance with BS 4142:2014+A1:2019, an equivalent successor standard or other agreed noise measurement methodology appropriate to the circumstances); and

(iv) a complaints procedure

(3) The noise management plans must be implemented as approved and maintained for the operational period of those parts of the authorised development.

Travel plan

21.—(1) No phase of the authorised development landwards of MHWS will be commenced until, after consultation with the relevant planning authority and the relevant highway authority, a travel plan for the contractor's workforce in accordance with the framework construction worker travel plan (in so far as relevant), which must include details of the expected means of travel to and from Works No. 2 (including in connection with Works No.4) and Works No.5 and any parking to be provided, has been submitted to and approved by the relevant planning authority(s).

(2) The plan approved under paragraph (1) must be implemented during the construction of the authorised development.

Restoration of land used temporarily for construction

22. The undertaker must confirm to the relevant planning authorities the date of the completion of the construction of the authorised development and any land within the Order limits landwards of MLWS which is used temporarily for construction of the authorised development must be reinstated to its former condition, or such condition as the relevant local planning authority may approve but which may not be to a standard which is higher than its former condition, within not more than twelve months of the date of the completion of the construction of the authorised development.

Control of lighting during the operational period

23. During the operational period there will be no external lighting of Works No.2 or the optical regeneration stations within Works No. 5 during the hours of darkness save for in exceptional circumstances, including in the case of emergency and where urgent maintenance is required.

Decommissioning

24.—(1) Within 12 months of the date that the undertaker decides to decommission any part of the authorised development landwards of MHWS, the undertaker must submit a written scheme of decommissioning for that part for approval by the relevant planning authority.

(2) No decommissioning works must be undertaken until the relevant planning authority has approved the written scheme of decommissioning submitted in sub-paragraph (1) in relation to such works.

(3) The written scheme of decommissioning submitted and approved must include details of—

(a) the buildings to be demolished;

(b) the means or removal of the materials resulting from the decommissioning works;

(c) the phasing of the demolition and removal works;

(d) any restoration works to restore the land to a condition agreed with the relevant planning authority;

(e) the phasing of any restoration works; and

(f) a timetable for the implementation of the scheme.

(4) Any approved written scheme of decommissioning must be implemented as approved, unless otherwise approved by the relevant planning authority.

(5) This requirement is without prejudice to any other consents or permissions which may be required to decommission any part of the authorised development landwards of MHWS.

Traffic management strategy

25.—(1) No phase of Works No.4 to be undertaken on the highway may commence until a traffic management strategy (substantially in accordance with the framework traffic management strategy) relating to that phase has been submitted to and approved by the relevant highway authority detailing:

(a) plans detailing the extent of the works;

(b) the construction methodology in relation to the works including details of the hours of the day within which the works are to be carried out;

(c) a schedule of timings for the works, including the dates and durations for any closures of any part of the public highway;

(d) the traffic management strategy to be implemented in relation to those works, including details of any traffic signals and signs and any traffic regulation measures proposed in connection with those works and the measures to be taken in relation to access to residences, businesses and community facilities;

(e) a schedule of condition of any part of the public highway to be affected by the works;

(f) a specification of the condition of the parts of the public highway where the works are to be undertaken;

(g) details of any lighting to be used in connection with the works for the duration that the works are being undertaken;

(h) contact details for the client and contractor carrying out the works;

(i) details of the advanced publicity to be carried out in connection with those works; and

(j) details of the proposed approach to the reinstatement of the public highway in connection with those works, including (where applicable) details of both temporary and permanent reinstatement.

(2) The construction of any phase of Works No.4 to be undertaken on the highway must be carried out in accordance with the traffic management strategy approved in relation to it.

Guarantees in respect of the payment of compensation etc.

26.—(1) The authorised development landwards of MHWS must not be commenced and the undertaker must not exercise the powers in articles 20 to 36 until:

(a) subject to paragraph (3), security of £4 97 million has been provided in respect of the liabilities of the undertaker to pay compensation to landowners in connection with the acquisition of their land or of rights over their land by the undertaker exercising its powers under Part 5 of this Order; and

(b) the Secretary of State has approved the security in writing.

(2) The security referred to in paragraph (1) may include, without limitation, any one or more of the following:

(a) the deposit of a cash sum;

(b) a payment into court;

(c) an escrow account;

(d) a bond provided by a financial institution;

(e) an insurance policy;

(f) a guarantee by a parent company or companies of the undertaker;

(g) a guarantee by a person of sufficient financial standing (other than the undertaker).

(3) The Secretary of State is to have no liability to pay compensation in respect of the compulsory acquisition of land or otherwise under this Order.

Employment and skills plan

27.—(1) No phase of the authorised development landwards of MHWS may commence until an employment and skills plan in relation to the authorised development landwards of MHWS (which accords with the employment and skills strategy) has been submitted to and approved by Winchester City Council (in consultation with Portsmouth City Council).

(2) The employment and skills plan must identify opportunities for access to employment, apprenticeships, supply chain opportunities, engagement with educational institutions and community support and engagement in connection with the construction of the authorised development, and the means for publicising such opportunities.

(3) The approved employment and skills plan must be implemented as

approved.

(3) **Requirement for written approval**

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28. Where under any of the above requirements the approval or agreement of the relevant planning authority or another person is required, that approval or agreement must be given in writing.

Amendments to approved details

29.—(1) With respect to any requirement which requires the authorised development to be carried out in accordance with the details approved by the relevant planning authority or the relevant highway authority or any other person, the approved details must be carried out as approved unless an amendment or variation is previously agreed in writing by the relevant planning authority or the relevant highway authority or that person in accordance with subparagraph (2).

(2) Any amendments to or variations from the approved details must be in accordance with the principles and assessments set out in the environmental statement. Such agreement may only be given in relation to changes which are not material where it has been demonstrated to the satisfaction of the relevant planning authority or the relevant highway authority or that person that the subject matter of the agreement sought is not likely to give rise to any materially new or materially different environmental effects from those assessed in the environmental statement.

(3) The approved details must be taken to include any amendments that may subsequently be approved in writing by the relevant planning authority or that other person.

SCHEDULE 3

Article 3

Procedure for approvals, consents and appeals

Applications made under a Requirement

1.—(1) Where an application has been made to a discharging authority for any consent, agreement or approval under a requirement included in this Order:

(a) the undertaker must give the discharging authority sufficient information to identify the requirement(s) to which the application relates;

(b) the undertaker must provide such particulars, and the request must be accompanied by such plans and drawings, as are reasonably considered necessary to deal with the application; and

(c) the discharging authority must give notice to the undertaker of its decision on the application before the end of the decision period.

(2) For the purposes of sub-paragraph (1) and (3), the decision period is –

(a) where no further information is requested under paragraph 2, 42 days from the day immediately following that on which the application is received by the authority;

(b) where further information is requested under paragraph 2, 42 days from the day immediately following that on which further information has been supplied by the undertaker under paragraph 2; or

(c) such longer period as may be agreed by the undertaker and the discharging authority in writing before the end of the period in sub-paragraph (a) or (b).

(3) In the event the discharging authority does not determine an application within the decision period the discharging authority is taken to have granted all parts of the application (without any condition or qualification) at the end of that period unless otherwise agreed in writing.

Further Information

2.—(1) In relation to any application to which this Schedule applies, the discharging authority has the right to request such further information from the undertaker as is necessary to enable it to consider the application.

(2) If the discharging authority considers such further information to be necessary and the requirement does not specify that consultation with a requirement consultee is required, it must, as soon as is reasonably practicable and within 5 working days of receipt of the application, notify the undertaker in writing specifying the further information required.

(3) If the requirement specifies that consultation with a requirement consultee is required, the discharging authority must issue a copy of materials in support of the application to the requirement consultee within 5 working days of receipt of the application, and must notify the undertaker in writing specifying any further information requested by the requirement consultee within 5 working days of receipt of such a request and in any event within 21 days of receipt of the application.

(4) If the discharging authority does not give such notification as specified in sub-paragraph (2) or (3) or otherwise fails to request any further information within the timescales provided for in this paragraph, it is deemed to have sufficient information to consider the application and is not thereafter entitled to request further information without agreement of the undertaker.

Appeals

3.—(1) The undertaker may appeal to the Secretary of state in the event that –

(a) the discharging authority refuses an application for any agreement or approval required by a requirement included in this Order;

(b) on receipt of a request for further information pursuant to paragraph 2 the undertaker considers that either the whole or part of the specified information requested by the discharging authority is not necessary for consideration of the application; or

(c) on receipt of any further information requested, the discharging authority notifies the undertaker that the information provided is inadequate and requests additional information which the undertaker considers is not necessary for consideration of the application.

(2) The procedure for appeals is as follows –

(a) the undertaker must submit to the Secretary of State a copy of the application submitted to the discharging authority and any supporting documentation which the undertaker may wish to provide ("the appeal documentation");

(b) the undertaker must on the same day provide copies of the appeal documentation to the discharging authority and requirement consultee (if applicable);

(c) as soon as is practicable after receiving the appeal documentation and within not more than 28 days, the Secretary of State must appoint a person to determine the appeal ("the appointed person") and must notify the appeal parties of the identity of the appointed person and the address to which all correspondence for that person's attention should be sent;

(d) the discharging authority and the requirement consultee (if applicable) must submit any written representations in respect of the appeal to the appointed person in respect of the appeal within 10 working days of the date on which the appeal parties are notified of the appointment of a person under sub-paragraph (c) and must ensure that copies of their written representations are sent to each other and to the undertaker on the day on which they are submitted to the appointed person;

(e) the appeal parties may make any counter-submissions to the appointed person within 10 working days beginning with the first day immediately following the date of receipt of written representations pursuant to sub-paragraph (d); and

(f) the appointed person must make a decision and notify it to the appeal parties, with reasons, as soon as reasonably practicable.

(3) If the appointed person considers that further information is necessary to enable the appointed person to consider the appeal, the appointed person must as soon as practicable notify the appeal parties in writing specifying the further information required, the appeal party from whom the information is sought, and the date by which the information is to be submitted.

(4) Any further information required pursuant to sub-paragraph (3) must be provided by the party from whom the information is sought to the appointed person and to other appeal parties by the date specified by the appointed person.

(5) Any written representations concerning matters contained in the further information must be submitted to the appointed person, and made available to all appeal parties within 10 working days of the date mentioned in sub-paragraph (3).

Outcome of appeals

4.—(1) On an appeal under paragraph 3 of this Schedule, the appointed person may—

(a) allow or dismiss the appeal; or

(b) reverse or vary any part of the decision of the discharging authority (whether the appeal relates to that part of it or not),

and may deal with the application as if it had been made to the appointed person in the first instance.

(2) The appointed person may proceed to a decision on an appeal taking into account only such written representations as have been sent within the time limits prescribed, or set by the appointed person, under paragraph 3 of this Schedule.

(3) The appointed person may proceed to a decision even though no written representations have been made within those time limits if it appears to the appointed person that there is sufficient material to enable a decision to be made on the merits of the case.

(4) The decision of the appointed person on an appeal is final and binding on the parties, and a court may entertain proceedings for questioning the decision only if the proceedings are brought by a claim for judicial review within 6 weeks of the date of the appointed person's decision beginning with the date of that decision.

(5) If an approval is given by the appointed person pursuant to this Schedule, it is deemed to be an approval for the purpose of Schedule 2 (Requirements) of this Order as if it had been given by the discharging authority.

(6) The discharging authority may confirm any determination given by the appointed person in identical form in writing but a failure to give such confirmation (or a failure to give it in identical form) must not be taken to affect or invalidate the effect of the appointed person's determination.

(7) Save where a direction is given pursuant to sub-paragraph (8) requiring the costs of the appointed person to be paid by the discharging authority, the reasonable costs of the appointed person must be met by the undertaker.

(8) On application by the discharging authority or the undertaker, the appointed person may give directions as to the costs of the appeal parties and as to the parties by whom the costs of the appeal are to be paid. In considering whether to make any such direction and the terms on which it must be made, the appointed person must have regard to the Planning Practice Guidance: Appeals (March 2014) or any circular or guidance which may from time to time replace it.

Interpretation of this Schedule

5. In this Schedule –

"the appeal parties means" the discharging authority, the requirement consultee and the undertaker; and

"requirement consultee" means any body named in a requirement which is the subject of an appeal as a body to be consulted by the discharging authority in discharging that requirement.

SCHEDULE 4

Article 2

Land plans

Drawing number	*Rev*	*Drawing Title*	*Scale*	*Paper size*
EN020022-2.2-LP-Sheet0	005	Land Plans - Sheet 0 of 10	1:22,500	A1
EN020022-2.2-LP-Sheet1	005	Land Plans - Sheet 1 of 10	1:2,500	A1
EN020022-2.2-LP-Sheet2	005	Land Plans - Sheet 2 of 10	1:2,500	A1
EN020022-2.2-LP-Sheet3	005	Land Plans - Sheet 3 of 10	1:2,500	A1
EN020022-2.2-LP-Sheet4	005	Land Plans - Sheet 4 of 10	1:2,500	A1
EN020022-2.2-LP-Sheet5	005	Land Plans - Sheet 5 of 10	1:2,500	A1
EN020022-2.2-LP-Sheet6	005	Land Plans - Sheet 6 of 10	1:2,500	A1
EN020022-2.2-LP-Sheet7	005	Land Plans - Sheet 7 of 10	1:2,500	A1
EN020022-2.2-LP-Sheet8	005	Land Plans - Sheet 8 of 10	1:2,500	A1
EN020022-2.2-LP-Sheet9	005	Land Plans - Sheet 9 of 10	1:2,500	A1
EN020022-2.2-LP-Sheet10	005	Land Plans - Sheet 10 of 10	1:2,500	A1

SCHEDULE 5

Article 2

Works plans

Drawing number	*Rev*	*Drawing Title*	*Scale*	*Paper size*
EN020022-2.4-WP-Sheet0	006	Works Plans - Sheet 0 of 12	1:150,000	A1
EN020022-2.4-WP-Sheet1	006	Works Plans - Sheet 1 of 12	1:2,500	A1
EN020022-2.4-WP-Sheet2	006	Works Plans - Sheet 2 of 12	1:2,500	A1
EN020022-2.4-WP-Sheet3	006	Works Plans - Sheet 3 of 12	1:2,500	A1
EN020022-2.4-WP-Sheet4	006	Works Plans - Sheet 4 of 12	1:2,500	A1
EN020022-2.4-WP-Sheet5	006	Works Plans - Sheet 5 of 12	1:2,500	A1
EN020022-2.4-WP-Sheet6	006	Works Plans - Sheet 6 of 12	1:2,500	A1
EN020022-2.4-WP-Sheet7	006	Works Plans - Sheet 7 of 12	1:2,500	A1
EN020022-2.4-WP-Sheet8	006	Works Plans - Sheet 8 of 12	1:2,500	A1
EN020022-2.4-WP-Sheet9	006	Works Plans - Sheet 9 of 12	1:2,500	A1
EN020022-2.4-WP-Sheet10	006	Works Plans - Sheet 10 of 12	1:2,500	A1
EN020022-2.4-WP-Sheet11	006	Works Plans - Sheet 11 of 12	1:75,000	A1
EN020022-2.4-WP-Sheet12	006	Works Plans - Sheet 12 of 12	1:75,000	A1

SCHEDULE 6

Article 2

Access and rights of way plans

Drawing number	*Rev*	*Drawing Title*	*Scale*	*Paper size*
EN020022-2.5-AROW-Sheet0	004	Access and Right of Way Plan - Sheet 0 of 10	1:22,500	A1
EN020022-2.5-AROW-Sheet1	004	Access and Right of Way Plan - Sheet 1 of 10	1:2,500	A1
EN020022-2.5-AROW-Sheet2	004	Access and Right of Way Plan - Sheet 2 of 10	1:2,500	A1
EN020022-2.5-AROW-Sheet3	004	Access and Right of Way Plan - Sheet 3 of 10	1:2,500	A1
EN020022-2.5-AROW-Sheet4	004	Access and Right of Way Plan - Sheet 4 of 10	1:2,500	A1
EN020022-2.5-AROW-Sheet5	004	Access and Right of Way Plan - Sheet 5 of 10	1:2,500	A1
EN020022-2.5-AROW-Sheet6	004	Access and Right of Way Plan - Sheet 6 of 10	1:2,500	A1
EN020022-2.5-AROW-Sheet7	004	Access and Right of Way Plan - Sheet 7 of 10	1:2,500	A1
EN020022-2.5-AROW-Sheet8	004	Access and Right of Way Plan - Sheet 8 of 10	1:2,500	A1
EN020022-2.5-AROW-Sheet9	004	Access and Right of Way Plan - Sheet 9 of 10	1:2,500	A1
EN020022-2.5-AROW-Sheet10	004	Access and Right of Way Plan - Sheet 10 of 10	1:2,500	A1

SCHEDULE 7

Article 2

Parameter plans

Drawing number	*Rev*	*Drawing Title*	*Scale*	*Paper size*
EN020022-2.6-PARA- Sheet1	02	Converter Station and Telecommunications Buildings Parameter Plans Combined Options - Sheet 1 of 3	1:1,250	A1
EN020022-2.6-PARA-Sheet2	02	Converter Station and Telecommunications Buildings Parameter Plans Option B(i) - Sheet 2 of 3	1:1,250	A1
EN020022-2.6-PARA-Sheet3	02	Converter Station and Telecommunications Buildings Parameter Plans Option B(ii) - Sheet 3 of 3	1:1,250	A1
EN020022-2.11-PARA-Sheet1	02	Optical Regeneration Parameter Plan - Sheet 1 of 1	1:500	A1

SCHEDULE 8

Article 13

Streets, public rights of way and permissive paths to be temporarily closed, altered, diverted or restricted

(1) Street, public right of way or permissive paths to be temporarily closed, altered, diverted or restricted	*(2) Extent of temporary closure, alteration, diversion or restriction*	*(3) Access and rights of way plans sheet number*
Highways (footway and roadway)		
Broadway Lane and Day Road	Between points TSH/1/b and TSH/1/c	Sheet 1
Broadway Lane	Between points TSH/1/d and TSH/1/e	Sheet 1
Anmore Road	Between points TSH/2/a and TSH/2/b	Sheet 2
London Road	TSH/5/a and TSH/5/b	Sheet 5
Farlington Avenue, Havant Road and Eveleigh Road	Between points TSH/6/a, TSH/6/b and TSH/6/c	Sheet 6
Havant Road	Between points TSH/6/d and TSH/6/e	Sheet 6
Eastern Avenue	Between points TSH/9/a and TSH/9/b	Sheet 9
Moorings Way	Between points TSH/9/c and TSH/9/d	Sheets 9 and 10
Bransbury Road and Ironbridge Lane	Between points TSH/10/a and TSH/10/b	Sheet 10
Ironbridge Lane	Between points TSH/10/c and TSH/10/d	Sheet 10
Unnamed road	Between points TSH/10/e and TSH/10/f	Sheet 10
Footpaths		
Footpath 4	Between points TSF/1/b and TSF/1/c	Sheet 1
Footpath 13	Between points TSF/2/a and TSF/2/b	Sheet 2
Footpath 24	Between points TSF/6/a and TSF/6/b	Sheet 6
Footpath 33	Between point TSF/7/a and TSF/7/b	Sheet 7
Permissive paths		
Permissive paths in and around Milton Common	Between points TSPP/9/a, TSPP/9/b and TSPP/9/c	Sheet 9
	Between points TSPP/9/d and TSPP/9/e	Sheet 9
	Between points TSPP/9/f and TSPP/9/g	Sheet 9
	Between points TSPP/9/h and TSPP/9/i	Sheet 9
	Between points TSPP/9/j and TSPP/9/k	Sheet 9
	Between points TSPP/9/l and	Sheet 9

	TSPP/9/m	
	Between points TSPP/9/n and TSPP/9/o	Sheet 9
	Between points TSPP/9/r, TSPP/9/p and TSPP/9/q	Sheet 9

SCHEDULE 9

Article 26

Modification of compensation and compulsory purchase enactments for the creation of new rights and restrictive covenants

Compensation enactments

1. The enactments for the time being in force with respect to compensation for the compulsory purchase of land apply, with the necessary modifications as respects compensation, in the case of a compulsory acquisition under this Order of a right by the creation of a new right or the imposition of a restrictive covenant as they apply in respects compensation on the compulsory purchase of land and interests in land.

2.—(1) Without limiting paragraph (1), the Land Compensation Act 1973(a)(**a**) has effect subject to the modifications set out in sub-paragraphs (2) and (3).

(2) In section 44(1) (compensation for injurious affection), as it applies to compensation for injurious affection under section 7 of the 1965 Act as substituted by paragraph [4] —

(a) for "land is acquired or taken" substitute "a right or restrictive covenant over land is purchased from or imposed on"; and

(b) for "acquired or taken from him" substitute "over which the right is or the restrictive covenant enforceable".

3. [In section 58(1) (determination of material detriment where part of house etc. proposed for compulsory acquisition), as it applies to determinations under section 8 (other provisions as to divided land) of the 1965 Act as substituted by paragraph 6—

(a) for "part" in paragraphs (a) and (b) substitute "a right or restrictive covenant affecting land consisting"; and

(b) for "severance" substitute "right or restrictive covenant over or affecting the whole of the park or garden".]

4.—(1) Without limitation on the scope of paragraph 1, the Land Compensation Act 1961 has effect subject to the modification set out in sub-paragraph (2).

(2) For section 5A(5A) of the 1961 Act, after 'if' substitute—

"(a) the acquiring authority enters on land for the purpose of exercising a right in pursuance of a notice of entry under section 11(1) of the 1965 Act;

(b) the acquiring authority is subsequently required by a determination under paragraph 13 of Schedule 2A to the 1965 Act (as substituted by paragraph 10 of Schedule 9 to the AQUIND Interconnector Order [*]) to acquire an interest in the land; and

( ) the acquiring authority enters on and takes possession of that land,

the authority is deemed for the purposes of subsection (3)(a) to have entered on that land where it entered on that land for the purpose of exercising that right."

Application of the 1965 Act

5.—(1) The 1965 Act has effect with the modifications necessary to make it apply to the compulsory acquisition under this Order of a right by the creation of a new right, or to the imposition under this Order of a restrictive covenant, as it applies to the compulsory acquisition under this Order of land, so that, in appropriate contexts, references in that Act to land must be

(**a**) 1973 c 26

read (according to the requirements of the particular context) as referring to, or as including references to—

(a) the right acquired or to be acquired, or the restriction imposed or to be imposed; or

(b) the land over which the right is or is to be exercisable, or the restriction is or is to be enforceable.

(2) Without limitation on the scope of sub-paragraph (1), Part 1 of the 1965 Act applies in relation to the compulsory acquisition under this Order of a right by the creation of a new right or, in relation to the imposition of a restriction, with the modifications specified in the following provisions of this Schedule.

6. For section 7 of the 1965 Act (measure of compensation) substitute—

> "**7.** In assessing the compensation to be paid by the acquiring authority under this Act, regard must be had not only to the extent (if any) to which the value of the land over which the right is to be acquired or the restrictive covenant is to be imposed is depreciated by the acquisition of the right or the imposition of the covenant but also to the damage (if any) to be sustained by the owner of the land by reason of its severance from other land of the owner, or injuriously affecting that other land by the exercise of the powers conferred by this or the special Act."

7. For section 8 of the 1965 Act (other provisions as to divided land) there is substituted the following section—

> "**8.**—(1) Where in consequence of the service on a person under section 5 of this Act of a notice to treat in respect of a right over land consisting of a house or building or of a park or garden belonging to a house ("the relevant land")—
>
> (a) a question of disputed compensation in respect of the purchase of the right would apart from this section fall to be determined by the Upper Tribunal ("the tribunal"); and
>
> (b) before the tribunal has determined that question the tribunal is satisfied that the person has an interest in the whole of the relevant land and is able and willing to sell that interest, and—
>
> (c) where that land consists of a house or building, that the right cannot be purchased without material detriment to that land; or
>
> (d) where that land consists of such a park or garden, that the right cannot be purchased without seriously affecting the amenity or convenience of the house to which that land belongs,
>
> the AQUIND Interconnector Order [*]) ("the Order"), in relation to that person, ceases to authorise the purchase of the right and is deemed to authorise the purchase of that person's interest in the whole of the relevant land including, where the land consists of such a park or garden, the house to which it belongs, and the notice is deemed to have been served in respect of that interest on such date as the tribunal directs.
>
> (2) Any question as to the extent of the land in which the Order is deemed to authorise the purchase of an interest by virtue of subsection (1) of this section is to be determined by the tribunal.
>
> (3) Where in consequence of a determination of the tribunal that it is satisfied as mentioned in subsection (1) of this section the Order is deemed by virtue of that subsection to authorise the purchase of an interest in land, the acquiring authority may, at any time within the period of 6 weeks beginning with the date of the determination, withdraw the notice to treat in consequence of which the determination was made; but nothing in this subsection prejudices any other power of the authority to withdraw the notice."

8.—(1) The following provisions of the 1965 Act (which state the effect of a deed poll executed in various circumstances where there is no conveyance by persons with interests in the land), that is to say—

(a) section 9(4) (failure by owners to convey);

(b) paragraph 10(3) of Schedule 1 (owners under incapacity);

(c) paragraph 2(3) of Schedule 2 (absent and untraced owners); and

(d) paragraphs 2(3) and 7(2) of Schedule 4 (common land),

are modified to secure that, as against persons with interests in the land which are expressed to be overridden by the deed, the right which is to be compulsorily acquired or the restrictive covenant which is to be imposed is vested absolutely in the acquiring authority.

9. Section 11 of the 1965 Act (powers of entry) is modified to secure that, as from the date on which the acquiring authority has served notice to treat in respect of any right or restriction, [as well as notice of entry as required by subsection (1)], it has power, exercisable in equivalent circumstances and subject to equivalent conditions, to enter for the purpose of exercising that right or enforcing that restrictive covenant (which is deemed for this purpose to have been created on the date of service of the notice); and sections 11A (powers of entry: further notices of entry), 11B (counter-notice requiring possession to be taken on a specified date), 12 (penalty for unauthorised entry) and 13 (entry on warrant in the event of obstruction) of the 1965 Act are modified correspondingly.

0. Section 20 of the 1965 Act (protection for interests of tenants at will, etc.) applies with the modifications necessary to secure that persons with such interests in land as are mentioned in that section are compensated in a manner corresponding to that in which they would be compensated on a compulsory acquisition under this Order of that land, but taking into account only the extent (if any) of such interference with such an interest as is actually caused, or likely to be caused, by the exercise of the right or the enforcement of the restrictive covenant in question.

1. Section 22 (interests omitted from purchase) of the 1965 Act is modified so as to enable the acquiring authority, in circumstances corresponding to those referred to in that section, to continue to be entitled to exercise the right acquired, subject to compliance with that section as respects compensation.

2. For Schedule 2A of the 1965 Act substitute—

"SCHEDULE 2A

COUNTER-NOTICE REQUIRING PURCHASE OF LAND

Introduction

1. – (1) This Schedule applies where an acquiring authority serve a notice to treat in respect of a right over, or restrictive covenant affecting, the whole or part of a house, building or factory and have not executed a general vesting declaration under section 4 of the 1981 Act as applied by article 25 (Application of the Compulsory Purchase (Vesting Declarations) Act 1981) of the AQUIND Interconnector Order [*] in respect of the land to which the notice to treat relates.

(2) But see article 27(3) (acquisition of subsoil or airspace only) of the AQUIND Interconnector Order 202[*] which excludes acquisition of subsoil only from this Schedule.

2. In this Schedule, "house" includes any park or garden belonging to a house.

Counter-notice requiring purchase of land

3. A person who is able to sell the house, building or factory ("the owner") may serve a counter-notice requiring the authority to purchase the owner's interest in the house, building or factory.

4. A counter-notice under paragraph 3 must be served within the period of 28 days beginning with the day on which the notice to treat was served.

Response to counter-notice

5. On receiving a counter-notice, the acquiring authority must decide whether to—

(a) withdraw the notice to treat;

(b) accept the counter-notice; or

(c) refer the counter-notice to the Upper Tribunal.

6. The authority must serve notice of their decision on the owner within the period of 3 months beginning with the day on which the counter-notice is served ("the decision period").

7. If the authority decides to refer the counter-notice to the Upper Tribunal they must do so within the decision period.

8. If the authority does not serve notice of a decision within the decision period they are to be treated as if they had served notice of a decision to withdraw the notice to treat at the end of that period.

9. If the authority serves notice of a decision to accept the counter-notice, the compulsory purchase order and the notice to treat are to have effect as if they included the owner's interest in the house, building or factory.

Determination by Upper Tribunal

10. On a referral under paragraph 7, the Upper Tribunal must determine whether the acquisition of the right or the imposition of the restrictive covenant would—

(a) in the case of a house, building or factory, cause material detriment to the house, building or factory; or

(b) in the case of a park or garden, seriously affect the amenity or convenience of the house to which the park or garden belongs.

11. In making its determination, the Upper Tribunal must take into account—

(a) the effect of the acquisition of the right or the imposition of the covenant;

(b) the use to be made of the right or covenant proposed to be acquired or imposed; and

(c) if the right or covenant is proposed to be acquired or imposed for works or other purposes extending to other land, the effect of the whole of the works and the use of the other land.

12. If the Upper Tribunal determines that the acquisition of the right or the imposition of the covenant would have either of the consequences described in paragraph 10, it must determine how much of the house, building or factory the authority ought to be required to take.

13. If the Upper Tribunal determines that the authority ought to be required to take some or all of the house, building or factory, the compulsory purchase order and the notice to treat are to have effect as if they included the owner's interest in that land.

14.—(1) If the Upper Tribunal determines that the authority ought to be required to take some or all of the house, building or factory, the authority may at any time within the period of 6 weeks beginning with the day on which the Upper Tribunal makes its determination withdraw the notice to treat in relation to that land.

(2) If the acquiring authority withdraws the notice to treat under this paragraph they must pay the person on whom the notice was served compensation for any loss or expense caused by the giving and withdrawal of the notice.

(3) Any dispute as to the compensation is to be determined by the Upper Tribunal."

SCHEDULE 10

Article 30

Land of which temporary possession may be taken

(1) Purpose for which temporary possession may be taken	*(2) Plot reference (as shown on land plans)*	*(3) Land plans sheet number*
Activities in connection with the construction of Work. No. 2	1-34, 1-45, 1-46, 1-49a, 1-50, 1-54, 1-57, 1-60, 1-65, 1-71, 1-73	Sheet 1
Temporary work area (Work No. 3) in connection with Work No.s 1, 2 and 4	1-39, 1-60	Sheet 1
Activities in connection with Work No. 4	3-11, 7-10a, 7-14, 7-15, 8-09, 10-02, 10-03, 10-08, 10-09	Sheets 3, 7, 8 and 10
For the purpose of and for the duration required to clear any breakout of bentonite drilling lubricant in connection with the undertaking of a HDD beneath the Eastney and Milton Allotments	10-14	Sheet 10

SCHEDULE 11

Article 42

Trees subject to tree preservation orders

Type survey reference	*Indicative works to be carried out*	*TPO reference*	*TPO name*
T2016, T2018	Potential removal	43/1977	No.2, 2A & 4 Down End Road, Farlington, Portsmouth
T925	Potential removal	201/1997	Scoutlands, 261 Havant Road, Farlington, Portsmouth
T59	Potential removal	195/1997	Great Salterns, Mansion, Eastern Road, Copnor, Portsmouth
G593, G602, G739	Potential removal	230/2004	Halliday Crescent, Southsea
T168, T169, T172	Potential removal	1002	150-152, London Road, Waterlooville
G651	Potential removal	1303	Land south of the Vicarage, London Road, Purbrook
W2001	Potential removal	1472	The Vicarage, London Road, Purbrook
T2006	Potential removal	1560	Elettra Avenue, Waterlooville
T154	Potential removal	1619	1 and 2 Silverthorne Way, Waterlooville
G652	Potential removal	1842	Land South of Marrelswood Estate
T160	Potential removal	1899	134 London Road, Waterlooville
G688	Potential removal	1945	138 London Road, Waterlooville
T161	Potential removal	2007	Land to the west of Maurepas Way, Waterlooville
T2016, T2018	Potential removal	43/1977	No.2, 2A & 4 Down End Road, Farlington, Portsmouth

SCHEDULE 12

Article 41

Removal of important hedgerows

Area	*Hedgerow ID*	*Sheet Plan Reference*	*Removal, partial removal or retained*	
			Option B(i)	*Option B(ii)*
Winchester	HR05	EN020022-2.12-HTPO-Sheet1	Partial removal	Retained
Winchester	HR06	EN020022-2.12-HTPO-Sheet1	Partial removal	Retained
Winchester	HR07	EN020022-2.12-HTPO-Sheet1	Partial removal	Partial removal
Winchester	HR08	EN020022-2.12-HTPO-Sheet1	Removal	Retained
Winchester	HR10	EN020022-2.12-HTPO-Sheet1	Partial removal	Retained
Winchester	HR13	EN020022-2.12-HTPO-Sheet1	Partial removal	Partial removal
Winchester	HR15	EN020022-2.12-HTPO-Sheet1	Partial removal	Partial removal
Winchester	HR16	EN020022-2.12-HTPO-Sheet1	Removal	Removal
East Hampshire	HR17	EN020022-2.12-HTPO-Sheet1	Partial removal	Partial removal
Winchester	HR19	EN020022-2.12-HTPO-Sheet1	Partial removal	Partial removal
East Hampshire	HR20	EN020022-2.12-HTPO-Sheet1	Partial removal	Partial removal
East Hampshire	HR23	EN020022-2.12-HTPO-Sheet1	Removal	Removal
Winchester	HR28	EN020022-2.12-HTPO-Sheet1	Partial removal	Partial removal
Winchester	HR31	EN020022-2.12-HTPO-Sheet3	Partial removal	Partial removal
Winchester	HR57	EN020022-2.12-HTPO-Sheet3	Partial removal	Partial removal
Havant	HR66	EN020022-2.12-HTPO-Sheet4	Partial removal	Partial removal

SCHEDULE 13

Article 38

Protective provisions

Part 1

PROTECTION FOR ELECTRICITY, GAS, WATER AND SEWERAGE UNDERTAKERS

[Application

1.—(1) The provisions of this Part have effect for the protection of the statutory undertakers referred to in this Part, unless otherwise agreed in writing between the undertaker and the statutory undertaker concerned.

Interpretation

2.—(1) In this part —

"alternative apparatus" means alternative apparatus adequate to enable the statutory undertaker in question to fulfil its statutory functions in a manner not less efficient than previously;

"apparatus" means—

(a) in the case of a statutory undertaker within paragraph (a) of the definition of that term, electric lines or electrical plant (as defined in the Electricity Act 1989), belonging to or maintained by the statutory undertaker for the purposes of electricity supply;

(b) in the case of a gas undertaker, any mains, pipes or other apparatus belonging to or maintained by a gas transporter for the purposes of gas supply;

(c) in the case of a statutory undertaker within paragraph (c) of the definition of that term, mains, pipes or other water apparatus belonging to or maintained by the statutory undertaker for the purposes of water supply and any water mains or service pipes (or part of a water main or service pipe) that is the subject of an agreement to adopt made under section 51A (agreements to adopt water main or service pipe at future date) of the Water Industry Act 1991 at the time of the works mentioned in this Part; and

(d) in the case of a sewerage undertaker—

(i) any drain or works vested in the sewerage undertaker under the Water Industry Act 1991; and

(ii) any sewer which is so vested or is the subject of a notice of intention to adopt given under section 102(4) of that Act or an agreement to adopt made under section 104 of that Act, and

includes a sludge main, disposal main (within the meaning of section 219 of that Act) or sewer outfall and any manholes, ventilating shafts, pumps or other accessories forming part of any such sewer, drain or works, and in each case includes any structure in which apparatus is or is to be lodged or which gives or will give access to apparatus;

"in" in a context referring to apparatus or alternative apparatus in land includes a reference to apparatus or alternative apparatus under, over or upon land;

"statutory undertaker" means—

(a) any licence holder within the meaning of Part 1 of the Electricity Act 1989;

(b) a gas transporter within the meaning of Part 1 (gas supply) of the Gas Act 1986(**a**);

(c) a water undertaker within the meaning of the Water Industry Act 1991(**b**);

(d) a sewerage undertaker within the meaning of part 1 (preliminary) of the Water Industry Act 1991; and

for the area of the authorised development, and in relation to any apparatus, means the statutory undertaker to whom it belongs or by whom it is maintained.

On-street apparatus

3. This Part does not apply to apparatus in respect of which the relations between the undertaker and the statutory undertaker are regulated by Part 3 of the 1991 Act.

Apparatus in stopped up streets

4. Regardless of the temporary stopping up or diversion of any highway under the powers conferred by article 13 (temporary stopping up of streets and public rights of way), a statutory undertaker is at liberty at all times to take all necessary access across any such stopped up highway and to execute and do all such works and things in, upon or under any such highway as may be reasonably necessary or desirable to enable it to maintain any apparatus which at the time of the stopping up or diversion was in that highway.

Protective works to buildings

5. The undertaker, in the case of the powers conferred by article 19 (protective work to buildings), must exercise those powers so as not to obstruct or render less convenient the access to any apparatus.

Acquisition of apparatus

6. Regardless of any provision in this Order or anything shown on the land plans, the undertaker must not acquire any apparatus otherwise than by agreement.

Removal of apparatus

7.—(1) If, in the exercise of the powers conferred by this Order, the undertaker acquires any interest in any land in which any apparatus is placed or requires that the statutory undertakers apparatus is relocated or diverted, that apparatus must not be removed under this Part of this Schedule and any right of a statutory undertaker to maintain that apparatus in that land and to gain access to it will not be extinguished until, if so required by the statutory undertaker, alternative apparatus has been constructed and is in operation to the reasonable satisfaction of the statutory undertaker in question in accordance with paragraphs (2) to (6).

(2) If, for the purpose of executing any works in, on or under any land purchased, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, it must give to the statutory undertaker in question 28 days' written notice of that requirement, together with a plan and section of the work proposed and of the proposed position of the alternative apparatus to be provided or constructed and in that case (or if in consequence of the exercise of any of the powers conferred by this Order a statutory undertaker reasonably needs to remove any of its apparatus) the undertaker must, subject to sub-paragraph (3), afford to the statutory undertaker the necessary facilities and rights for the construction of alternative apparatus in other land of the undertaker and subsequently for the maintenance of that apparatus.

(a) 1986 c 44. A new section 7 was substituted by section 5 of the Gas Act 1995 (c 45), and was further amended by section 76 of the Utilities Act 2000 (c 27)

(b) 1991 c 56

(3) If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in other land of the undertaker, or the undertaker is unable to afford such facilities and rights as are mentioned in subparagraph (2) in land in which the alternative apparatus or part of such apparatus is to be constructed the statutory undertaker in question must, on receipt of a written notice to that effect from the undertaker, as soon as reasonably possible use its best endeavours to obtain the necessary facilities and rights in other land in which the alternative apparatus is to be constructed.

(4) Any alternative apparatus to be constructed in land of the undertaker under this Part of this Schedule must be constructed in such manner and in such line or situation as may be agreed between the statutory undertaker in question and the undertaker or in default of agreement settled by arbitration in accordance with article 45 (arbitration).

(5) The statutory undertaker in question must, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 45 (Arbitration), and after the grant to the statutory undertaker of any such facilities and rights as are referred to in sub-paragraph (2) and (3), proceed without unnecessary delay to construct and bring into operation the alternative apparatus and subsequently to remove any apparatus required by the undertaker to be removed under this Part of this Schedule.

(6) Regardless of anything in sub-paragraph (5), if the undertaker gives notice in writing to the statutory undertaker in question that it desires itself to execute any work, or part of any work in connection with the construction or removal of apparatus, that work, instead of being executed by the statutory undertaker, must be executed by the undertaker without unnecessary delay under the superintendence, if given, and to the reasonable satisfaction of the statutory undertaker.

Facilities and rights for alternative apparatus

8.—(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to a statutory undertaker facilities and rights for the construction and maintenance in land of the undertaker for alternative apparatus in substitution for apparatus to be removed, those facilities and rights will be granted upon such terms and conditions as may be agreed between the undertaker and the statutory undertaker in question or in default of agreement settled by arbitration in accordance with article 45 (Arbitration).

(2) If the facilities and rights to be afforded by the undertaker in respect of any alternative apparatus, and the terms and conditions subject to which those facilities and rights are to be granted, are in the opinion of the arbitrator less favourable on the whole to the statutory undertaker in question than the facilities and rights enjoyed by it in respect of the apparatus to be removed and the terms and conditions to which those facilities and rights are subject, the arbitrator may make such provision for the payment of compensation by the undertaker to that statutory undertaker as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Retained apparatus: protection

9.—(1) Not less than 28 days before starting the execution of any works referred to in paragraph 7(2) that are near to, or will or may affect, any apparatus the removal of which has not been required by the undertaker under paragraph 7(2), the undertaker must submit to the statutory undertaker in question a plan, section and description of the works to be executed.

(2) Those works must be executed only in accordance with the plan, section and description submitted under sub-paragraph (1) and in accordance with such reasonable requirements as may be made in accordance with sub-paragraph (3) by the statutory undertaker for the protection of the apparatus, or for securing access to it, and the statutory undertaker is entitled to watch and inspect the execution of those works.

(3) Any requirements made by a statutory undertaker under sub-paragraph (2) must be made within a period of 21 days beginning with the date on which a plan, section and description under sub-paragraph (1) are submitted to it.

(4) If a statutory undertaker in accordance with sub-paragraph (3) and in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives

written notice to the undertaker of that requirement, paragraph 1 to 3 and 6 to 8 apply as if the removal of the apparatus had been required by the undertaker under paragraph 7(2).

(5) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 28 days before commencing the execution of any works, a new plan, section and description instead of the plan, section and description previously submitted, and having done so the provisions of this paragraph apply to and in respect of the new plan, section and description.

(6) The undertaker is not required to comply with sub-paragraph (1) in a case of emergency but in that case it must give to the statutory undertaker in question notice as soon as is reasonably practicable and a plan, section and description of those works as soon as reasonably practicable subsequently and must comply with sub-paragraph (3) in so far as is reasonably practicable in the circumstances.

Compensation

10.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any of the works referred to in paragraphs 5 or 7(2), any damage is caused to any apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or property of a statutory undertaker, or there is any interruption in any service provided, or in the supply of any goods, by any statutory undertaker, the undertaker must—

(a) bear and pay on demand the cost reasonably incurred by that statutory undertaker in making good such damage or restoring the supply; and

(b) make reasonable compensation to that statutory undertaker for any other expenses, loss, demands or proceedings, damages, claims, penalty or costs incurred by the statutory undertaker,

by reason or in consequence of any such damage or interruption.

(2) The fact that any act or thing may have been done by a statutory undertaker on behalf of the undertaker or in accordance with a plan approved by a statutory undertaker or in accordance with any requirement of a statutory undertaker or under its supervision does not, subject to subparagraph (3), excuse the undertaker from liability under the provisions of sub-paragraph (1).

(3) Nothing in sub-paragraph (1) must impose any liability on the undertaker with respect to any damage or interruption to the extent that it is attributable to the neglect or default of a statutory undertaker, its officers, servants, contractors or agents.

(4) A statutory undertaker must give the undertaker reasonable prior written notice of any claim or demand, and no settlement or compromise may be made without the consent of the undertaker who, if it withholds such consent, shall have the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand..

Expenses

11.—(1) Subject to the following provisions of this paragraph, the undertaker must repay to the statutory undertaker in question the reasonable expenses incurred by that statutory undertaker in, or in connection with, the inspection, removal, alteration or protection of any apparatus or the construction of any new apparatus which may be required in consequence of the execution of any such works as are referred to in paragraph 7(2)..

(2) The value of any apparatus removed under this Part is to be deducted from any sum payable under sub-paragraph (1), that value being calculated after removal.

(3) If in accordance with this Part of this Schedule —

(a) apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or

(b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was situated,

and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by the undertaker or, in default of agreement, is not determined by arbitration in accordance with article 45 (arbitration) to be necessary, then, if such placing involves cost in the construction of works under this Part of this Schedule exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity or dimensions, or at the existing depth, as the case may be, the amount which apart from this sub-paragraph would be payable to the statutory undertaker in question by virtue of sub- paragraph (1) is to be reduced by the amount of that excess.

(4) For the purposes of sub-paragraph (3)—

(a) an extension of apparatus to a length greater than the length of existing apparatus is not to be treated as a placing of apparatus of greater dimensions than those of the existing apparatus; and

(b) where the provision of a joint in a cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole is to be treated as if it also had been agreed or had been so determined.

(5) An amount which apart from this sub-paragraph would be payable to a statutory undertaker in respect of works by virtue of sub-paragraph (1) must, if the works include the placing of apparatus provided in substitution for apparatus placed more than 7 years and 6 months earlier so as to confer on the statutory undertaker in question any financial benefit by deferment of the time for renewal of the apparatus in the ordinary course, be reduced by the amount which represents that benefit.

Co-operation

12. Where in consequence of the proposed construction of any of the authorised development, the undertaker or a statutory undertaker requires the removal of apparatus under paragraph 7(2) or a statutory undertaker makes requirements for the protection or alteration of apparatus under paragraph 9, the undertaker must use best endeavours to co-ordinate the execution of the works in the interests of safety and the efficient and economic execution of the authorised development and taking into account the need to ensure the safe and efficient operation of the statutory undertaker's undertaking and each statutory undertaker must use its best endeavours to co-operate with the undertaker for that purpose.

Disputes

13. Any difference or dispute arising between the undertaker and a statutory undertaker under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and the statutory undertaker in question, be determined by arbitration in accordance with article 45 (arbitration).

Enactments and agreements

14. Nothing in this Part of this Schedule affects the provisions of any enactment or agreement regulating the relations between the undertaker and a statutory undertaker in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

Part 2

PROTECTION FOR OPERATORS OF ELECTRONIC COMMUNICATIONS NETWORKS

Application

1.—(1) The provisions of this Part have effect for the protection of operators unless otherwise agreed in writing between the undertaker and the operator in question.

(2) This Part does not apply to—

(a) any apparatus in respect of which the relations between the undertaker and an operator are regulated by Part 3 (street works in England and Wales) of the 1991 Act; or

(b) any damage, or any interruption, caused by electro-magnetic interference arising from the construction or use of the authorised development.

Interpretation

2. In this part —

"2003 Act" means the Communications Act 2003;

"electronic communications apparatus" has the same meaning as in the electronic communications code;

"electronic communications code" has the same meaning as in Chapter 1 of Part 2 of the 2003 Act;

"electronic communications code network" means—

(a) so much of an electronic communications network or infrastructure system provided by an electronic communications code operator as is not excluded from the application of the electronic communications code by a direction under section 106 (application of the electronic communications code) of the 2003 Act; and

(b) an electronic communications network which the Secretary of State is providing or proposing to provide;

"electronic communications code operator" means a person in whose case the electronic communications code is applied by a direction under section 106 of the 2003 Act;

"infrastructure system" has the same meaning as in the electronic communications code and references to providing an infrastructure system are to be construed in accordance with paragraph 7(2) of that code; and

"operator" means the operator of an electronic communications code network.

Electronic communications apparatus installed on, under or over any land

3. The exercise of the powers in article 33 (statutory undertakers) is subject to Part 10 (undertaker's works affecting electronic communications apparatus) of the electronic communications code.

Compensation

4.—(1) Subject to sub-paragraphs (2) to (3), if as the result of the authorised development or its construction, any damage is caused to any electronic communications apparatus belonging to an operator (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or the property of an operator, the undertaker must—

(a) bear and pay on demand the cost reasonably incurred by that statutory undertaker in making good such damage or restoring the supply;

(b) make reasonable compensation to that statutory undertaker for any other expenses, loss, demands or proceedings, damages, claims, penalty or costs incurred by the statutory undertaker,

by reason or in consequence of any such damage or interruption.

(2) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to any damage to the extent that it is attributable to the act, neglect or default of an operator, its officers, servants, contractors or agents.

(3) Any difference arising between the undertaker and the operator under this paragraph must, unless otherwise agreed in writing between the operator and the undertaker, be referred to and settled by arbitration under article 45 (Arbitration).

(4) The operator must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise of the claim or demand is to be made without the consent of the undertaker which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

Co-operation

5. In respect of any specified work or the acquisition of rights under or over or use of the statutory undertaker's property, the statutory undertaker must co-operate with the undertaker with a view to avoiding undue delay.

Enactments and agreements

6. Nothing in this Part affects the provisions of any enactment or agreement regulating the relations between the undertaker and an operator in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

Part 3

FOR THE PROTECTION OF SOUTHERN GAS NETWORKS PLC AS GAS UNDERTAKER

[Application

1. For the protection of SGN the following provisions will, unless otherwise agreed in writing between the undertaker and SGN, have effect.

Interpretation

2. In this part —

"1991 Act" means the New Roads and Street Works Act 1991;

"alternative apparatus" means appropriate alternative apparatus to the satisfaction of SGN to enable SGN to fulfil its statutory functions in a manner no less efficient than previously;

"apparatus" means any gas mains, pipes, pressure governors, ventilators, cathodic protections, cables or other apparatus belonging to or maintained by SGN for the purposes of gas distribution together with any replacement apparatus and such other apparatus constructed pursuant to the Order that becomes operational apparatus of SGN for the purposes of transmission, distribution and/or supply and includes any structure in which apparatus is or will be lodged or which gives or will give access to apparatus;

"authorised works" has the same meaning as is given to the term "authorised development" in article 2 of this Order and includes any associated development authorised by the Order and for the purposes of this Part of this Schedule includes the use and maintenance of the authorised works and construction of any works authorised by this Schedule;

"commence" has the same meaning as in article 2 and commencement shall be construed to have the same meaning save that for the purposes of this Part of the Schedule the terms commence and commencement include all include all matters comprised in the Onshore Site Preparation Works save for the temporary display of site notices and advertisement;

"deed of consent" means a deed of consent, crossing agreement, deed of variation or new deed of grant agreed between the parties acting reasonably in order to vary and/or replace existing easements, agreements, enactments and other such interests so as to secure land rights and interests as are necessary to carry out, maintain, operate and use the apparatus in a manner consistent with the terms of this Part of this Schedule;

"functions" includes powers and duties;

"ground mitigation scheme" means a scheme approved by SGN (such approval not to be unreasonably withheld or delayed) setting out the necessary measures (if any) for a ground subsidence event;

"ground monitoring scheme" means a scheme for monitoring ground subsidence which sets out the apparatus which is to be subject to such monitoring, the extent of land to be monitored, the manner in which ground levels are to be monitored, the timescales of any monitoring activities and the extent of ground subsidence which, if exceeded, shall require the undertaker to submit for SGN's approval a ground mitigation scheme;

"ground subsidence event" means any ground subsidence identified by the monitoring activities set out in the ground monitoring scheme that has exceeded the level described in the ground monitoring scheme as requiring a ground mitigation scheme;

"in" in a context referring to apparatus or alternative apparatus in land includes a reference to apparatus or alternative apparatus under, over, across, along or upon such land;

"maintain" and "maintenance" shall include the ability and right to do any of the following in relation to any apparatus or alternative apparatus of SGN including retain, lay, construct, inspect, maintain, protect, use, access, enlarge, replace, renew, remove, decommission or render unusable or remove the apparatus;

"plan" or "plans" include all designs, drawings, specifications, method statements, soil reports, programmes, calculations, risk assessments and other documents that are reasonably necessary properly and sufficiently to describe and assess the works to be executed;

"rights" shall include rights and restrictive covenants, and in relation to decommissioned apparatus the surrender of rights, release of liabilities and transfer of decommissioned apparatus;

"SGN" means Southern Gas Networks plc or its successors in title or successor bodies and/or any successor as a gas transporter within the meaning of Part 1 of the Gas Act 1986.

"specified works" means any of the authorised works or activities undertaken in association with the authorised works which will or may be:

(a) situated over, or within 15m measured in any direction of any apparatus the removal of which has not been required by the undertaker under sub-paragraph 6(2) or otherwise; and/or

(b) may in any way adversely affect any apparatus the removal of which has not been required by the undertaker under sub-paragraph 7(2) or otherwise;

"undertaker" means the undertaker as defined in article 2 of this Order.

On street apparatus

3.—(1) Except for paragraphs 4 (Apparatus of SGN in stopped up streets), 7 (Removal of apparatus) in so far as sub-paragraph 3(2) applies, 8 (Facilities and rights for alternative apparatus) in so far as sub-paragraph 3(2) below applies, 9 (Retained apparatus: protection of SGN) and 10 (Expenses and costs) of this Part of this Schedule which will apply in respect of the exercise of all or any powers under the Order affecting the rights and apparatus of SGN, the other provisions of this Part of this Schedule do not apply to apparatus in respect of which the relations between the undertaker and SGN are regulated by the provisions of Part 3 of the 1991 Act.

(2) Paragraph 7 and 8 of this Part of this Schedule shall apply to diversions even where carried out under the 1991 Act, in circumstances where any apparatus is diverted from an alignment within the existing adopted public highway but not wholly replaced within existing adopted public highway.

(3) Notwithstanding articles [11], [12], [30] and [35] or any other powers in the Order generally, s85 of the 1991 Act in relation to cost sharing and the regulations made thereunder shall not apply in relation to any diversion of apparatus of SGN under the 1991 Act.

Apparatus of SGN in stopped up streets

4.—(1) Notwithstanding the temporary stopping up or diversion of any highway under the powers of article 13 (temporary stopping up of streets and public rights of way), SGN will be at liberty at all times to take all necessary access across any such stopped up highway and/or to execute and do all such works and things in, upon or under any such highway as may be reasonably necessary or desirable to enable it to maintain any apparatus which at the time of the temporary stopping up or diversion was in that highway.

Protective works to buildings

5.—(1) The undertaker, in the case of the powers conferred by article 18 (*protective works to buildings*), must exercise those powers so as not to obstruct or render less convenient the access to any apparatus without the written consent of SGN and, if by reason of the exercise of those powers any damage to any apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal or abandonment) or property of SGN or any interruption in the supply of gas by SGN, as the case may be, is caused, the undertaker must bear and pay on demand the cost reasonably incurred by SGN in making good such damage or restoring the supply; and, subject to sub-paragraph (2), shall:

(a) pay compensation to SGN for any loss sustained by it by reason or in consequence of any such damage or interruption; and

(b) indemnify SGN against all claims, demands, proceedings, costs, damages and expenses which may be made or taken against or recovered from or incurred by SGN, by reason of any such damage or interruption.

(2) Nothing in this paragraph imposes any liability on the undertaker with respect to any damage or interruption to the extent that such damage or interruption is attributable to the act, neglect or default of SGN or its contractors or workmen.

(3) SGN will give to the undertaker reasonable notice of any claim or demand as aforesaid and no settlement or compromise thereof shall be made by SGN, save in respect of any payment required under a statutory compensation scheme, without first consulting the undertaker and giving the undertaker an opportunity to make representations as to the claim or demand.

Acquisition of land

6.—(1) Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker may not appropriate or acquire any land interest or appropriate, acquire, extinguish, interfere with or override any easement, other interest or right and/or apparatus of SGN otherwise than by agreement.

(2) As a condition of agreement between the parties in sub-paragraph (1), prior to the carrying out of any part of the authorised works (or in such other timeframe as may be agreed between SGN and the undertaker) that are subject to the requirements of this Part of this Schedule that will cause any conflict with or breach the terms of any easement and/or other legal or land interest of SGN and/or affects the provisions of any enactment or agreement regulating the relations between SGN and the undertaker in respect of any apparatus laid or erected in land belonging to or secured by the undertaker, the undertaker must as SGN reasonably requires enter into such deeds of consent and variations upon such terms and conditions as may be agreed between SGN and the

undertaker acting reasonably and which must be no less favourable on the whole to SGN unless otherwise agreed by SGN.

(3) The undertaker and SGN agree that where there is any inconsistency or duplication between the provisions set out in this Part of this Schedule relating to the relocation and/or removal of apparatus (including but not limited to the payment of costs and expenses relating to such relocation and/or removal of apparatus) and the provisions of any existing easement, rights, agreements and licences granted, used, enjoyed or exercised by SGN and/or other enactments relied upon by SGN as of right or other use in relation to the apparatus, then the provisions in this Schedule shall prevail.

(4) Any agreement or consent granted by SGN under paragraph 9 or any other paragraph of this Part of this Schedule, shall not be taken to constitute agreement under sub-paragraph 6(1).

(5) As a condition of an agreement between the parties in sub-paragraph 6(1) that involves de-commissioned apparatus being left in situ in any land of the undertaker, the undertaker must accept a surrender of any existing easement and/or other interest of SGN in such decommissioned apparatus and consequently acquire title to such decommissioned apparatus and release SGN from all liabilities in respect of such de-commissioned apparatus from the date of such surrender.

(6) Where an undertaker acquires land which is subject to any SGN right or interest (including, without limitation, easements and agreements relating to rights or other interests) and the provisions of paragraph 7 do not apply, the undertaker must:

(a) retain any notice of SGN's easement, right or other interest on the title to the relevant land when registering the undertaker's title to such acquired land; and

(b) (where no such notice of SGN's easement, right or other interest exists in relation to such acquired land or any such notice is registered only on the Land Charges Register) include (with its application to register title to the undertaker's interest in such acquired land at the Land Registry) a notice of SGN's easement, right or other interest in relation to such acquired land; and

(c) provide up to date official entry copies to SGN within 20 working days of receipt of such up to date official entry copies.

Removal of apparatus

7.—(1) If, in the exercise of the powers conferred by this Order or under any agreement reached in accordance with paragraph 6 or in any other authorised manner, the undertaker acquires any interest in any land in which any apparatus is placed or requires that SGN's apparatus is relocated or diverted, that apparatus must not be decommissioned or removed under this Part of this Schedule and any right of SGN to maintain that apparatus in that land must not be extinguished until alternative apparatus has been constructed, is in operation and the rights and facilities referred to in sub-paragraph (2) have been provided to the reasonable satisfaction of SGN and in accordance with sub-paragraph (2) to (5) inclusive.

(2) If, for the purpose of executing any works in, on, under or over any land purchased, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, it must give to SGN not less than 28 days' written notice of that requirement, together with a plan and section of the work proposed, and of the proposed position of the alternative apparatus to be provided or constructed and in that case (or if in consequence of the exercise of any of the powers conferred by this Order SGN reasonably needs to move or remove any of its apparatus) the undertaker must, subject to sub-paragraph (3), afford to SGN to its satisfaction (taking into account sub-paragraph 8(1) below) the necessary facilities and rights:

(a) for the construction of alternative apparatus (including appropriate working areas required to reasonably and safely undertake necessary works by SGN in respect of the apparatus);

(b) subsequently for the maintenance of that apparatus (including appropriate working areas required to reasonably and safely undertake necessary works by SGN in respect of the apparatus); and

(c) to allow access to that apparatus (including appropriate working areas required to reasonably and safely undertake necessary works by SGN in respect of the apparatus).

(3) If the undertaker is unable to afford the alternative apparatus such necessary facilities and rights as are mentioned in sub-paragraph (2) in the land in which the alternative apparatus or part of such apparatus is to be constructed, SGN must, on receipt of a written notice to that effect from the undertaker, take such steps as are reasonable in the circumstances in an endeavour to assist the undertaker in obtaining the necessary facilities and rights in the land in which the alternative apparatus is to be constructed save that this obligations shall not extend to the requirement for SGN to use its compulsory purchase powers to this end unless it (in its absolute discretion) elects to so do.

(4) Any alternative apparatus to be constructed in land of or land secured by the undertaker under this Part of this Schedule must be constructed in such manner and in such line or situation as may be agreed between SGN and the undertaker.

(5) SGN must, after the alternative apparatus to be provided or constructed has been agreed, and subject to the grant to SGN of such facilities and rights as are referred to in sub-paragraph (2) or (3) have been afforded to SGN to its satisfaction, then proceed without unnecessary delay to construct and bring into operation the alternative apparatus and subsequently to decommission or remove any apparatus required by the undertaker to be decommissioned or removed under the provisions of this Part of this Schedule.

Facilities and rights for alternative apparatus

8.—(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to or secures for SGN facilities and rights in land for the access to, construction and maintenance of alternative apparatus in substitution for apparatus to be decommissioned or removed, those facilities and rights must be granted upon such terms and conditions as may be agreed between the undertaker and SGN and must be no less favourable on the whole to SGN than the facilities and rights enjoyed by it in respect of the apparatus to be decommissioned or removed unless otherwise agreed by SGN.

(2) If the facilities and rights to be afforded by the undertaker and agreed with SGN under sub-paragraph 8(1) above in respect of any alternative apparatus, and the terms and conditions subject to which those facilities and rights are to be granted, are less favourable on the whole to SGN than the facilities and rights enjoyed by it in respect of the apparatus to be decommissioned or removed (in SGN's reasonable opinion) then the terms and conditions to which those facilities and rights are subject in the matter will be referred to arbitration in accordance with paragraph 14 of this Part of this Schedule (arbitration) and the arbitrator shall make such provision for the payment of compensation by the undertaker to SGN as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Retained apparatus: protection of SGN

9.—(1) Not less than 56 days before the commencement of any specified works the undertaker must submit to SGN a plan and, if reasonably required by SGN, a ground monitoring scheme in respect of those works.

(2) The plan to be submitted to SGN under sub-paragraph (1) must include a method statement and describe—

(a) the exact position of the works;

(b) the level at which these are proposed to be constructed or renewed;

(c) the manner of their construction or renewal including details of excavation, positioning of plant etc.;

(d) the position of all apparatus;

(e) by way of detailed drawings, every alteration proposed to be made to or close to any such apparatus; and

(f) any intended maintenance regimes.

(3) SGN shall use its reasonable endeavours to provide its approval to or any comments on any plan submitted pursuant to sub-paragraph (2) and detail any reasonable requirements as may be made in accordance with sub-paragraph (6)(a) within not more than 28 days of the date on which a plan under sub-paragraph (1) is submitted to it.

(4) Where SGN provides comments on any plan submitted pursuant to sub-paragraph (1) the undertaker shall provide a response to those comments and where necessary provide any updates to that plan to address the comments made by SGN and SGN shall use reasonable endeavours to confirm whether the plan is approved or whether it has any further comments within 14 days following the date of the response from the undertaker.

(5) Where SGN has provided comments on any plan submitted to sub-paragraph (1) or in response to any response received from the undertaker the undertaker must not commence any works to which sub-paragraphs (1) and (2) apply until SGN has given written approval of the plan so submitted.

(6) Any approval of SGN provided under sub-paragraph (3)—

(a) may be given subject to reasonable conditions for any purpose mentioned in sub paragraphs (5) or (7); and

(b) must not be unreasonably withheld or delayed.

(7) In relation to any work to which sub-paragraphs (1) and/or (2) apply, SGN may require such modifications to be made to the plans as may be reasonably necessary for the purpose of securing apparatus against interference or risk of damage or for the purpose of providing or securing proper and convenient means of access to any apparatus.

(8) Works to which this paragraph applies must only be executed in accordance with the plan, submitted under sub-paragraph (1) or as relevant sub-paragraph (4), as approved and in accordance with such reasonable conditions given in accordance with sub-paragraph (6)(a) or as amended from time to time by agreement between the undertaker and SGN, and SGN will be entitled to watch and inspect the execution of those works.

(9) Where SGN requires any protective works to be carried out by itself or by the undertaker (whether of a temporary or permanent nature) such protective works, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, must be carried out to SGN's reasonable satisfaction prior to the commencement of any authorised works (or any relevant part thereof) for which protective works are required.

(10) Any requirements made by SGN under sub-paragraph (8) must be made within a period of 42 days beginning with the date on which a plan under sub-paragraph (1) is submitted to it

(11) If SGN, in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives written notice to the undertaker of that requirement, paragraphs 1 to 3 and 6 to 8 apply as if the removal of the apparatus had been required by the undertaker under sub-paragraph 7(2).

(12) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 56 days before commencing the execution of the authorised works, a new plan, instead of the plan previously submitted, and having done so the provisions of this paragraph will apply to and in respect of the new plan.

(13) The undertaker is not required to comply with sub-paragraphs (1) where it needs to carry out emergency works as defined in the 1991 Act but in that case it must give to SGN notice as soon as is reasonably practicable and a plan of those works and must comply with—

(a) the conditions imposed under sub-paragraph (6)(a) insofar as is reasonably practicable in the circumstances; and

(b) sub-paragraph (14) at all times.

(14) As soon as reasonably practicable after any ground subsidence event attributable to the authorised works the undertaker shall implement an appropriate ground mitigation scheme save that SGN retains the right to carry out any further necessary protective works for the safeguarding of its apparatus and can recover any such costs in line with paragraph 10.

Expenses and costs

10.—(1) Subject to the following provisions of this paragraph, the undertaker must pay to SGN following receipt of an invoiced demand (including where necessary anticipated disbursements) all charges, costs and expenses reasonably anticipated or incurred by SGN in, or in connection with, the inspection, removal, relaying or replacing, alteration or protection of any apparatus or rights or the construction of any new or alternative apparatus which may be required in consequence of the execution of any authorised works as are referred to in this Part of this Schedule including without limitation—

(a) any costs reasonably incurred by or compensation properly paid by SGN in connection with the negotiation or acquisition of rights or the exercise of statutory powers for such apparatus including without limitation all costs (including professional fees) incurred by SGN as a consequence of SGN;

(i) if it elects to do so using its own compulsory purchase powers to acquire any necessary rights under sub-paragraph 7(3); and/or

(ii) exercising any compulsory purchase powers in the Order transferred to or benefitting SGN;

(b) in connection with the cost of the carrying out of any diversion work or the provision of any alternative apparatus;

(c) the cutting off of any apparatus from any other apparatus or the making safe of redundant apparatus;

(d) the approval of plans;

(e) the carrying out of protective works, plus a capitalised sum to cover the cost of maintaining and renewing permanent protective works;

(f) the survey of any land, apparatus or works, the inspection and monitoring of works or the installation or removal of any temporary works reasonably necessary in consequence of the execution of any such works referred to in this Part of this Schedule;

(g) any watching brief pursuant to sub-paragraph 9(7).

(2) There shall be deducted from any sum payable under sub-paragraph (1) the value of any apparatus removed under the provisions of this Part of this Schedule and which is not re-used as part of the alternative apparatus, that value being calculated after removal.

(3) If in accordance with the provisions of this Part of this Schedule—

(a) apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or

(b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was situated,

and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by the undertaker or, in default of agreement, is not determined by arbitration in accordance with paragraph 14 of this Part of this Schedule (Arbitration) to be necessary, then, if such placing involves cost in the construction of works under this Part of this Schedule exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity or dimensions, or at the existing depth, as the case may be, the amount which apart from this sub-paragraph would be payable to SGN by virtue of sub-paragraph (1) will be reduced by the amount of that excess save where it is not possible or appropriate in the circumstances (including due to statutory or regulatory changes) to obtain the existing type of apparatus at the same capacity and dimensions or place at the existing depth in which case full costs will be borne by the undertaker.

(4) For the purposes of sub-paragraph (3)—

(a) an extension of apparatus to a length greater than the length of existing apparatus will not be treated as a placing of apparatus of greater dimensions than those of the existing apparatus; and

(b) where the provision of a joint in a pipe or cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole will be treated as if it also had been agreed or had been so determined.

Enactments and agreements

11. Save to the extent provided for to the contrary elsewhere in this Part of this Schedule or by agreement in writing between SGN and the undertaker, nothing in this Part of this Schedule shall affect the provisions of any enactment or agreement regulating the relations between the undertaker and SGN in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

Co-operation

12.—(1) Where in consequence of the proposed construction of any of the authorised works, the undertaker or SGN requires the removal of apparatus under sub-paragraph 7(2) or SGN makes requirements for the protection or alteration of apparatus under paragraph 9, the undertaker must use its best endeavours to co-ordinate the execution of the works

(a) in the interests of safety;

(b) taking into account the efficient and economic execution of the authorised works; and

(c) taking into account the need to ensure the safe and efficient operation of SGN's undertaking;

and SGN must co-operate with the undertaker for that purpose.

(2) For the avoidance of doubt whenever SGN's consent, agreement or approval is required in relation to plans, documents or other information submitted by the undertaker or the taking of action by the undertaker, it must not be unreasonably withheld or delayed.

Access

13. If in consequence of the agreement reached in accordance with sub paragraph 6(1) or the powers granted under this Order the access to any apparatus (including appropriate working areas required to reasonably and safely undertake necessary works by SGN in respect of the apparatus) is materially obstructed, the undertaker must provide such alternative rights and means of access to such apparatus as will enable SGN to maintain or use the apparatus no less effectively than was possible before such obstruction.

Arbitration

14. Save for differences or disputes arising under sub-paragraphs paragraph 9 any difference or dispute arising between the undertaker and SGN under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and SGN, be determined by arbitration in accordance with article 45 (arbitration).

Notices

15. The plans submitted to SGN by the undertaker pursuant to sub-paragraph 9(1) must be sent to SGN at easements@sgn.co.uk or such other address as SGN may from time to time appoint instead for that purpose and notify to the undertaker.]

Part 4

FOR PROTECTION OF RAILWAY INTERESTS

[Application

1. The following provisions of this Schedule have effect, unless otherwise agreed in writing between the undertaker and Network Rail and, in the case of paragraph 15, any other person on whom rights or obligations are conferred by that paragraph.

Interpretation

2. In this part —

“construction” includes execution, placing, alteration and reconstruction and “construct” and “constructed” have corresponding meanings;

“the engineer” means an engineer appointed by Network Rail for the purposes of this Order;

“network licence” means the network licence, as the same is amended from time to time, granted to Network Rail Infrastructure Limited by the Secretary of State in exercise of his powers under section 8 of the Railways Act l993;

“Network Rail” means Network Rail Infrastructure Limited and any associated company of Network Rail Infrastructure Limited which holds property for railway purposes, and for the purpose of this definition “associated company” means any company which is (within the meaning of section 1159 of the Companies Act 2006(**a**) the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited;

“plans” includes sections, designs, design data, software, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), staging proposals, programmes and details of the extent, timing and duration of any proposed occupation of railway property;

“railway operational procedures” means procedures specified under any access agreement (as defined in the Railways Act 1993) or station lease;

“railway property” means any railway belonging to Network Rail Infrastructure Limited and—

(a) any station, land, works, apparatus and equipment belonging to Network Rail Infrastructure Limited or connected with any such railway; and

(b) any easement or other property interest held or used by Network Rail Infrastructure Limited for the purposes of such railway or works, apparatus or equipment; and

“specified work” means so much of any of the authorised works as is situated upon, across, under, over or within 15m of, or may in any way adversely affect, railway property.

Railway operational procedures

3.—(1) Where under this Schedule Network Rail is required to give its consent or approval in respect of any matter, that consent or approval is subject to the condition that Network Rail complies with any relevant railway operational procedures and any obligations under its network licence or under statute.

(2) In so far as any specified work or the acquisition or use of railway property is or may be subject to railway operational procedures, Network Rail must—

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(a) co-operate with the undertaker with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements emanating from those procedures; and

(b) use their reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised works pursuant to this Order.

Acquisition of land

4.—(1) The undertaker must not exercise the powers conferred by article 20 (Compulsory acquisition of land) article 23 (Compulsory acquisition of rights and the imposition of restrictive covenants), article 26 (Acquisition of subsoil only) and article 29 (Temporary use of land for carrying out authorised development) or the powers conferred by section 11(3) of the 1965 Act in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.

(2) The undertaker must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Network Rail.

(3) The undertaker must not exercise the powers conferred by sections 271 or 272 of the 1990 Act, article 33 (Statutory Undertakers), in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.

(4) The undertaker must not under the powers of this Order acquire or use or acquire new rights over any railway property except with the consent of Network Rail.

(5) Where Network Rail is asked to give its consent pursuant to this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions.

Approval of plans etc.

5.—(1) The undertaker must before commencing construction of any specified work supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration.

(2) The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated his disapproval of those plans and the grounds of his disapproval the undertaker may serve upon the engineer written notice requiring the engineer to intimate his approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from the undertaker. If by the expiry of the further 28 days the engineer has not intimated his approval or disapproval, he shall be deemed to have approved the plans as submitted.

(3) If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Network Rail gives notice to the undertaker that Network Rail desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker desires such part of the specified work to be constructed, Network Rail must construct it with all reasonable dispatch on behalf of and to the reasonable satisfaction of the undertaker in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision (where appropriate and if given) of the undertaker.

(4) When signifying his approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in his opinion should he carried out before the commencement of the construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail or the services of operators using the same (including any relocation de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of

passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes must be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works must be carried out at the expense of the undertaker in either case with all reasonable dispatch and the undertaker must not commence the construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to his reasonable satisfaction.

Carrying out of works

6.—(1) Any specified work and any protective works to he constructed by virtue of paragraph 5(4) must, when commenced, be constructed—

(a) with all reasonable dispatch in accordance with the plans approved or deemed to have been approved or settled under paragraph 5;

(b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;

(c) in such manner as to cause as little damage as is possible to railway property; and

(d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Network Rail or the traffic thereon and the use by passengers of railway property.

(2) If any damage to railway property or any such interference or obstruction shall be caused by the carrying out of, or in consequence of the construction of a specified work, the undertaker must, notwithstanding any such approval, make good such damage and must pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may sustain by reason of any such damage, interference or obstruction.

(3) Nothing in this Schedule imposes any liability on the undertaker with respect to any damage, costs, expenses or loss attributable to the negligence of Network Rail or its servants, contractors or agents or any liability on Network Rail with respect of any damage, costs, expenses or loss attributable to the negligence of the undertaker or its servants, contractors or agents.

Facilities

7.—(1) The undertaker must-

(a) at all times afford reasonable facilities to the engineer for access to a specified work during its construction; and

(b) supply the engineer with all such information as he may reasonably require with regard to a specified work or the method of constructing it.

8. Network Rail must at all times afford reasonable facilities to the undertaker and its agents for access to any works carried out by Network Rail under this Schedule during their construction and must supply the undertaker with such information as it may reasonably require with regard to such works or the method of constructing them.

Network Rail Apparatus

9.—(1) If any permanent or temporary alterations or additions to railway property, are reasonably necessary in consequence of the construction of a specified work, or during a period of 24 months after the completion of that work in order to ensure the safety of railway property or the continued safe operation of the railway of Network Rail, such alterations and additions may be carried out by Network Rail and if Network Rail gives to the undertaker reasonable notice of its intention to carry out such alterations or additions (which must be specified in the notice), the undertaker must pay to Network Rail the reasonable cost of those alterations or additions including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by Network Rail in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If during the construction of a specified work by the undertaker, Network Rail gives notice to the undertaker that Network Rail desires itself to construct that part of the specified work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker decides that part of the specified work is to be constructed, Network Rail must assume construction of that part of the specified work and the undertaker must, notwithstanding any such approval of a specified work under paragraph 5(3), pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may suffer by reason of the execution by Network Rail of that specified work.

(3) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 10(a) provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

(4) If the cost of maintaining, working or renewing railway property is reduced in consequence of any such alterations or additions a capitalised sum representing such saving must be set off against any sum payable by the undertaker to Network Rail under this paragraph.

Expenses

10.—(1) The undertaker must repay to Network Rail all reasonable fees, costs, charges and expenses reasonably incurred by Network Rail—

(a) in constructing any part of a specified work on behalf of the undertaker as provided by paragraph 5(3) or in constructing any protective works under the provisions of paragraph 5(4) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;

(b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by him of the construction of a specified work;

(c) in respect of the employment or procurement of the services of any inspectors, signalmen, watchmen and other persons whom it shall he reasonably necessary to appoint for inspecting, signalling, watching and lighting railway property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work;

(d) in respect of any special traffic working resulting from any speed restrictions which may in the opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work or from the substitution of diversion of services which may be reasonably necessary for the same reason; and

(e) in respect of any additional temporary lighting of railway property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work.

Electromagnetic interference

11.—(1) In this paragraph-

"EMI" means, subject to sub-paragraph (2), electromagnetic interference with Network Rail apparatus generated by the operation of the authorised works (including the operation of tramcars using the tramway comprised in the works) where such interference is of a level which adversely affects the safe operation of Network Rail's apparatus; and

"Network Rail's apparatus" means any lines, circuits, wires, apparatus or equipment (whether or not modified or installed as part of the authorised works) which are owned or used by 7

Network Rail for the purpose of transmitting or receiving electrical energy or of radio, terlegraphic, telephonic, electric, electronic or other like means of signaling or other communications.

(2) This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to Network Rail's apparatus carried out after approval of plans under paragraph 5(1) for

the relevant part of the authorised works giving rise to EMI (unless the undertaker has been given notice in writing before the approval of those plans of the intention to make such change).

(3) Subject to sub-paragraph (5), the undertaker must in the design and construction of the authorised works take all measures necessary to prevent EMI and must establish with Network Rail (both parties acting reasonably) appropriate arrangements to verify their effectiveness.

(4) In order to facilitate the undertaker's compliance with sub-paragraph (3)-

(a) the undertaker must consult with Network Rail as early as reasonably practicable to identify all Network Rail's apparatus which may be at risk of EMI, and thereafter must continue to consult with Network Rail (both before and after formal submission of plans under paragraph 5(1)) in order to identify all potential causes of EMI and the measures required to eliminate them;

(b) Network Rail must make available to the undertaker all information in the possession of Network Rail reasonably requested by the undertaker in respect of Network Rail's apparatus identified pursuant to sub-paragraph (a); and

(c) Network Rail must allow the undertaker reasonable facilities for the inspection of Network Rail's apparatus identified pursuant to sub-paragraph (a).

(5) In any case where it is established that EMI can only reasonably be prevented by modifications to Network Rail's apparatus, Network Rail must not withhold its consent unreasonably to modifications of Network Rail's apparatus, but the means of prevention and the method of their execution must be selected in the reasonable discretion of Network Rail, and in relation to such modifications paragraph 5(1) have effect subject to the sub-paragraph.

(6) If at any time prior to the commencement of regular revenue-earning operations on the authorised railway comprised in the authorised works and notwithstanding any measures adopted pursuant to sub-paragraph (3), the testing or commissioning of the authorised works causes EMI then the undertaker must immediately upon receipt of notification by Network Rail of such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as reasonably practicable after it has been issued) forthwith cease to use (or procure the cessation of use of) the undertaker's apparatus causing such EMI until all measures necessary have been taken to remedy such EMI by way of modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in sub-paragraph (5)) to Network Rail's apparatus.

(7) In the event of EMI having occurred –

(a) the undertaker must afford reasonable facilities to Network Rail for access to the undertaker's apparatus in the investigation of such EMI;

(b) Network Rail must afford reasonable facilities to the undertaker for access to Network Rail's apparatus in the investigation of such EMI; and

(c) Network Rail must make available to the undertaker any additional material information in its possession reasonably requested by the undertaker in respect of Network Rail's apparatus or such EMI.

(8) Where Network Rail approves modifications to Network Rail's apparatus pursuant to sub-paragraphs (5) or (6) –

(a) Network Rail must allow the undertaker reasonable facilities for the inspection of the relevant part of Network Rail's apparatus;

(b) any modifications to Network Rail's apparatus approved pursuant to those subparagraphs must be carried out and completed by the undertaker in accordance with paragraph 6.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 15(1) applies to the costs and expenses reasonably incurred or losses suffered by Network Rail through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Network Rail's apparatus) or in consequence of any EMI to which subparagraph (6) applies.

(10)For the purpose of paragraph 10(a) any modifications to Network Rail's apparatus under this paragraph shall be deemed to be protective works referred to in that paragraph.

(11)In relation to any dispute arising under this paragraph the reference in article 45 (Arbitration) to the Institution of Civil Engineers shall be read as a reference to the Institution of Electrical Engineers.

Maintenance of the authorised development

12. If at any time after the completion of a specified work, not being a work vested in Network Rail, Network Rail gives notice to the undertaker informing it that the state of maintenance of any part of the specified work appears to be such as adversely affects the operation of railway property, the undertaker must, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work in such state of maintenance as not adversely to affect railway property.

Illuminated signs etc.

13. The undertaker must not provide any illumination or illuminated sign or signal on or in connection with a specified work in the vicinity of any railway belonging to Network Rail unless it has first consulted Network Rail and it must comply with Network Rail's reasonable requirements for preventing confusion between such illumination or illuminated sign or signal and any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway.

Additional expenses

14. Any additional expenses which Network Rail may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the making of this Order by reason of the existence of a specified work must, provided that 56 days' previous notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker, be repaid by the undertaker to Network Rail.

Indemnity

15.—(1) The undertaker must pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Schedule which may he occasioned to or reasonably incurred by Network Rail—

(a) by reason of the construction or maintenance of a specified work or the failure thereof or

(b) by reason of any act or omission of the undertaker or of any person in its employ or of its contractors or others whilst engaged upon a specified work;

and the undertaker must indemnify and keep indemnified Network Rail from and against all claims and demands arising out of or in connection with a specified work or any such failure, act or omission: and the fact that any act or thing may have been done by Network Rail on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under his supervision shall not (if it was done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this sub-paragraph.

(2) Network Rail must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise of such a claim or demand shall be made without the prior consent of the undertaker.

(3) The sums payable by the undertaker under sub-paragraph (1) shall include a sum equivalent to the relevant costs.

(4) Subject to the terms of any agreement between Network Rail and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, Network

Rail must promptly pay to each train operator the amount of any sums which Network Rail receives under sub-paragraph (3) which relates to the relevant costs of that train operator.

(5) The obligation under sub-paragraph (3) to pay Network Rail the relevant costs shall, in the event of default, be enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator pursuant to sub-paragraph (4).

(6) In this paragraph—

"the relevant costs" means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any restriction of the use of Network Rail's railway network as a result of the construction, maintenance or failure of a specified work or any such act or omission as mentioned in subparagraph (1); and

"train operator" means any person who is authorised to act as the operator of a train by a licence under section 8 of the Railways Act 1993.

Cost estimates

16. Network Rail must, on receipt of a request from the undertaker, from time to time provide the undertaker free of charge with written estimates of the costs, charges, expenses and other liabilities for which the undertaker is or will become liable under this Schedule (including the amount of the relevant costs mentioned in paragraph 15) and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to he made pursuant to this Schedule (including any claim relating to those relevant costs).

17. In the assessment of any sums payable to Network Rail under this Schedule there must not be taken into account any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by Network Rail if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by the undertaker under this Schedule or increasing the sums so payable.

Agreements relating to the transfer of land etc.

18. The undertaker and Network Rail may, subject in the case of Network Rail to compliance with the terms of its network licence, enter into, and carry into effect, agreements for the transfer to the undertaker of—

(1) any railway property shown on the works and land plans and described in the book of reference;

(2) any lands, works or other property held in connection with any such railway property; and

(3) any rights and obligations (whether or not statutory) of Network Rail relating to any railway property or any lands, works or other property referred to in this paragraph.

Enactments

19. Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part I of the Railways Act 1993.

Notice in relation to transfer

20. The undertaker must give written notice to Network Rail if any application is proposed to be made by the undertaker for the Secretary of State's consent, under article 7 (Consent to transfer benefit of Order) of this Order and any such notice must be given no later than 28 days before any such application is made and must describe or give (as appropriate)—

(1) the nature of the application to be made;

(2) the extent of the geographical area to which the application relates; and

(3) the name and address of the person acting for the Secretary of State to whom the application is to be made.

Provision of plans

21. The undertaker must no later than 28 days from the date that the plans submitted to and certified by the Secretary of State in accordance with article 43 (Certification of Plans) are certified by the Secretary of State, provide a set of those plans to Network Rail in the form of a computer disc with read only memory.]

Part 5

FOR THE PROTECTION OF NATIONAL GRID AS ELECTRICITY UNDERTAKER

[Application

1. For the protection of National Grid as referred to in this Part of this Schedule the following provisions have effect, unless otherwise agreed in writing between the undertaker and National Grid.

(1) Subject to sub-paragraph (3) or to the extent otherwise agreed in writhing between the undertaker and National Grid, where the benefit of this Order is transferred or granted to another person under article [●] (consent to transfer benefit of Order) –

(a) any agreement of the type mentioned in subparagraph (1) has effect as if it had been made between national Grid and the transferee or grantee (as the case may be); and

(b) written notice of the transfer or grant must be given to National Grid on or before the date of that transfer or grant

(2) Sub-paragraph (2) does not apply where the benefit of the Order is transferred or granted to National Grid.

Interpretation

2. In this Part of this Schedule—

"1991 Act" means the New Roads and Street Works Act 1991;

"acceptable credit provider" means a bank or financial institution with a credit rating that is not lower than: (i) "A-" if the rating is assigned by Standard & Poor's Ratings Group or Fitch Ratings; and "A3" if the rating is assigned by Moody's Investors Services Inc.;

"acceptable insurance" means a third party liability insurance effected and maintained by the undertaker with a limit of indemnity of not less than £25,000,000.00 (twenty five million pounds) per occurrence or series of occurrences arising out of one event. Such insurance shall be maintained for the construction period of the authorised works which constitute specified works and arranged with an internationally recognised insurer of repute operating in the London and worldwide insurance market underwriters whose security/credit rating meets the same requirements as an "acceptable credit provider", such policy shall include (but without limitation):

(a) National Grid Electricity Transmission Plc as a Co-Insured;

(b) a cross liabilities clause; and

(c) contractors' pollution liability for third party property damage and third party bodily damage arising from a pollution/contamination event with cover of £10,000,000.00 (ten million pounds) per event or £20,000,000.00 (twenty million pounds) in aggregate;

"acceptable security**"** means either:

(a) a parent company guarantee from a parent company in favour of National Grid Electricity Transmission Plc to cover the undertaker's liability to National Grid Electricity Transmission Plc to a total liability cap of £25,000,000.00 (twenty five million pounds) (in a form reasonably satisfactory to National Grid and where required by National Grid,

accompanied with a legal opinion confirming the due capacity and authorisation of the parent company to enter into and be bound by the terms of such guarantee); or

(b) a bank bond or letter of credit from an acceptable credit provider in favour of National Grid Electricity Transmission Plc to cover the undertaker's liability to National Grid Electricity Transmission Plc for an amount of not less than £10,000,000.00 (ten million pounds) per asset per event up to a total liability cap of £25,000,000.00 (twenty five million pounds) (in a form reasonably satisfactory to the National Grid);

"alternative apparatus" means appropriate alternative apparatus to the satisfaction of National Grid to enable National Grid to fulfil its statutory functions in a manner no less efficient than previously;

"apparatus" means any electric lines or electrical plant as defined in the Electricity Act 1989, belonging to or maintained by National Grid together with any replacement apparatus and such other apparatus constructed pursuant to the Order that becomes operational apparatus of National Grid for the purposes of transmission, distribution and/or supply and includes any structure in which apparatus is or will be lodged or which gives or will give access to apparatus;

"authorised works" has the same meaning as is given to the term "authorised development" in article 2(1) of this Order and includes any associated development authorised by the Order and for the purposes of this Part of this Schedule includes the use and maintenance of the authorised works and construction of any works authorised by this Schedule;

"commence" and "commencement" in this Part of this Schedule shall include any below ground surveys, monitoring, ground work operations or the receipt and erection of construction plant and equipment,

"deed of consent" means a deed of consent, crossing agreement, deed of variation or new deed of grant agreed between the parties acting reasonably in order to vary or replace existing easements, agreements, enactments and other such interests so as to secure land rights and interests as are necessary to carry out, maintain, operate and use the apparatus in a manner consistent with the terms of this Part of this Schedule;

"functions" includes powers and duties;

"ground mitigation scheme" means a scheme approved by National Grid (such approval not to be unreasonably withheld or delayed) setting out the necessary measures (if any) for a ground subsidence event;

"ground monitoring scheme" means a scheme for monitoring ground subsidence which sets out the apparatus which is to be subject to such monitoring, the extent of land to be monitored, the manner in which ground levels are to be monitored, the timescales of any monitoring activities and the extent of ground subsidence which, if exceeded, shall require the undertaker to submit for National Grid's approval a ground mitigation scheme;

"ground subsidence event" means any ground subsidence identified by the monitoring activities set out in the ground monitoring scheme that has exceeded the level described in the ground monitoring scheme as requiring a ground mitigation scheme;

"in" in a context referring to apparatus or alternative apparatus in land includes a reference to apparatus or alternative apparatus under, over, across, along or upon such land;

"maintain" and "maintenance" shall include the ability and right to do any of the following in relation to any apparatus or alternative apparatus of National Grid including construct, use, repair, alter, inspect, renew or remove the apparatus;

"National Grid" means National Grid Electricity Transmission Plc (Company Number 2366977) whose registered office is at 1-3 Strand, London, WC2N 5EH or any successor as a licence holder within the meaning of Part 1 of the Electricity Act 1989;

"parent company" means a parent company of the undertaker acceptable to and which shall have been approved by National Grid acting reasonably

"undertaker" means the undertaker as defined in article 2(1) of this Order;

"specified works" means any of the authorised works or activities undertaken in association with the authorised works which:

(a) will or may be situated over, or within 15 metres measured in any direction of any apparatus the removal of which has not been required by the undertaker under paragraph 7(2) or otherwise; and/or

(b) may in any way adversely affect any apparatus the removal of which has not been required by the undertaker under paragraph 7(2) or otherwise; and/or

(c) includes any of the activities that are referred to in development near overhead lines EN43-8 and HSE's guidance note 6 "Avoidance of Danger from Overhead Lines"

On Street Apparatus

3. Except for paragraphs 4 (apparatus in stopped up streets), 9 (*retained apparatus protection*) 10 (*expenses*) and 11 (*indemnity*) of this Schedule which will apply in respect of the exercise of all or any powers under the Order affecting the rights and apparatus of National Grid, the other provisions of this Schedule do not apply to apparatus in respect of which the relations between the undertaker and National Grid are regulated by the provisions of Part 3 of the 1991 Act.

Apparatus of National Grid in stopped up streets

4.—(1) Where any street is stopped up under article [●] [(*permanent stopping up)* if National Grid has any apparatus in the street or accessed via that street National Grid has the same rights in respect of that apparatus as it enjoyed immediately before the stopping up and the undertaker must grant to National Grid, or procure the granting to National Grid of, legal easements reasonably satisfactory to National Grid in respect of such apparatus and access to it prior to the stopping up of any such street or highway but nothing in this paragraph affects any right of the undertaker or National Grid to require the removal of that apparatus under paragraph 7 or the power of the undertaker, subject to compliance with this sub-paragraph, to carry out works under paragraph 9.

(2) Notwithstanding the temporary stopping up or diversion of any highway under the powers of article [●] (*temporary stopping up of streets*), National Grid is at liberty at all times to take all necessary access across any such stopped up highway and to execute and do all such works and things in, upon or under any such highway as may be reasonably necessary or desirable to enable it to maintain any apparatus which at the time of the stopping up or diversion was in that highway.

Protective works to buildings

5.—(1) The undertaker, in the case of the powers conferred by article [●] [(protective work to buildings)], must exercise those powers so as not to obstruct or render less convenient the access to any apparatus without the written consent of National Grid and, if by reason of the exercise of those powers any damage to any apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal or abandonment) or property of National Grid or any interruption in the supply of electricity by National Grid is caused, the undertaker must bear and pay on demand the cost reasonably incurred by National Grid in making good such damage or restoring the supply; and, subject to sub-paragraph (2), shall—

(a) pay compensation to National Grid for any loss sustained by it; and

(b) National Grid the undertaker against all claims, demands, proceedings, costs, damages and expenses which may be made or taken against or recovered from or incurred by that undertaker, by reason of any such damage or interruption.

(2) Nothing in this paragraph imposes any liability on the undertaker with respect to any damage or interruption to the extent that such damage or interruption is attributable to the act, neglect or default of National Grid or its contractors or workmen; and National Grid will give to the undertaker reasonable notice of any claim or demand as aforesaid and no settlement or compromise thereof shall be made by National Grid, save in respect of any payment required under a statutory compensation scheme, without first consulting the undertaker and giving the undertaker an opportunity to make representations as to the claim or demand.

Acquisition of land

6.—(1) *Regardless* of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker may not (a) appropriate or acquire or take temporary possession of any land or apparatus or ((b) appropriate, acquire, extinguish, interfere with or override any easement, other interest or right and/or apparatus of National Grid otherwise than by agreement (such agreement not to be unreasonably withheld).

(2) As a condition of an agreement between the parties in sub-paragraph (1), prior to the carrying out of any part of the authorised works (or in such other timeframe as may be agreed between National Grid and the undertaker) that is subject to the requirements of this Part of this Schedule that will cause any conflict with or breach the terms of any easement or other legal or land interest of National Grid or affect the provisions of any enactment or agreement regulating the relations between National Grid and the undertaker in respect of any apparatus laid or erected in land belonging to or secured by the undertaker, the undertaker must as National Grid reasonably requires enter into such deeds of consent upon such terms and conditions as may be agreed between National Grid and the undertaker acting reasonably and which must be no less favourable on the whole to National Grid unless otherwise agreed by National Grid, and it will be the responsibility of the undertaker to procure and/or secure the consent and entering into of such deeds and variations by all other third parties with an interest in the land at that time who are affected by such authorised works.

(3) The undertaker and National Grid agree that where there is any inconsistency or duplication between the provisions set out in this Part of this Schedule relating to the relocation and/or removal of apparatus/including but not limited to the payment of costs and expenses relating to such relocation and/or removal of apparatus) and the provisions of any existing easement, rights, agreements and licences granted, used, enjoyed or exercised by National Grid and/or other enactments relied upon by National Grid as of right or other use in relation to the apparatus, then the provisions in this Schedule shall prevail.

(4) Any agreement or consent granted by National Grid under paragraph 9 or any other paragraph of this Part of this Schedule, shall not be taken to constitute agreement under subparagraph (1).

Removal of apparatus

7.—(1) — If, in the exercise of the powers conferred by this Order , the undertaker acquires any interest in or possesses temporarily any land in which any apparatus is placed, that apparatus must not be removed under this Part of this Schedule and any right of National Grid to maintain that apparatus in that land must not be extinguished until alternative apparatus has been constructed, and is in operation to the reasonable satisfaction of National Grid in accordance with subparagraph (2) to (5).

(2) If, for the purpose of executing any works in, on, under or over any land purchased, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, it must give to National Grid advance written notice of that requirement, together with a plan of the work proposed, and of the proposed position of the alternative apparatus to be provided or constructed and in that case (or if in consequence of the exercise of any of the powers conferred by this Order National Grid reasonably needs to remove any of its apparatus) the undertaker must, subject to sub-paragraph (3), secure any necessary consents for the alternative apparatus and afford to National Grid to its reasonable satisfaction (taking into account paragraph 8(1) below) the necessary facilities and rights

(a) for the construction of alternative apparatus in other land of or land secured by the undertaker; and

(b) subsequently for the maintenance of that apparatus.

(3) If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in other land of or land secured by the undertaker, or the undertaker is unable to afford such facilities and rights as are mentioned in sub-paragraph (2) in the land in which the alternative apparatus or part of such apparatus is to be constructed, National Grid must, on receipt of a written notice to

that effect from the undertaker, take such steps as are reasonable in the circumstances in an endeavour to obtain the necessary facilities and rights in the land in which the alternative apparatus is to be constructed save that this obligation shall not extend to the requirement for National Grid to use its compulsory purchase powers to this end unless it elects to so do.

(4) Any alternative apparatus to be constructed in land of or land secured by the undertaker under this Part of this Schedule must be constructed in such manner and in such line or situation as may be agreed between National Grid and the undertaker.

(5) National Grid must, after the alternative apparatus to be provided or constructed has been agreed, and subject to a written diversion agreement having been entered into between the parties and the grant to National Grid of any such facilities and rights as are referred to in sub-paragraph (2) or (3), proceed without unnecessary delay to construct and bring into operation the alternative apparatus and subsequently to remove any apparatus required by the undertaker to be removed under the provisions of this Part of this Schedule.

Facilities and rights for alternative apparatus

8.—(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to or secures for National Grid facilities and rights in land for the construction, use, maintenance and protection of alternative apparatus in substitution for apparatus to be removed, those facilities and rights must be granted upon such terms and conditions as may be agreed between the undertaker and National and must be no less favourable on the whole to National Grid than the facilities and rights enjoyed by it in respect of the apparatus to be removed unless otherwise agreed by National Grid.

(2) If the facilities and rights to be afforded by the undertaker in respect of any alternative apparatus, and the terms and conditions subject to which those facilities and rights are to be granted, are less favourable on the whole to National Grid than the facilities and rights enjoyed by it in respect of the apparatus to be removed and the terms and conditions to which those facilities and rights are subject the matter may be referred to arbitration in accordance with paragraph 15 (*Arbitration*) of this Part of this Schedule and the arbitrator must make such provision for the payment of compensation by the undertaker to National Grid as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Retained apparatus: protection of electricity undertaker

9.—(1) Not less than 56 days before the commencement of any specified works the undertaker must submit to National Grid a plan of the works to be executed and seek from National Grid details of the underground extent of their electricity tower foundations.

(2) In relation to works which will or may be situated on, over, under or within (i) 15 metres measured in any direction of any apparatus, or (ii) involve embankment works within 15 metres of any apparatus, the plan to be submitted to National Grid under sub-paragraph (1) must include a method statement and describe—

(a) the exact position of the works;

(b) the level at which these are proposed to be constructed or renewed;

(c) the manner of their construction or renewal including details of excavation, positioning of plant;

(d) the position of all apparatus;

(e) by way of detailed drawings, every alteration proposed to be made to or close to any such apparatus;

(f) any intended maintenance regimes; and

(g) an assessment of risks of rise of earth issues.

(3) In relation to any works which will or may be situated on, over, under or within 10 metres of any part of the foundations of an electricity tower or between any two or more electricity towers,

the plan to be submitted under sub-paragraph (1) must, in addition to the matters set out in sub-paragraph (2), include a method statement describing; -

(a) details of any cable trench design including route, dimensions, clearance to pylon foundations;

(b) demonstration that pylon foundations will not be affected prior to, during and post construction;

(c) details of load bearing capacities of trenches;

(d) details of any cable installation methodology including access arrangements, jointing bays and backfill methodology;

(e) a written management plan for high voltage hazard during construction and ongoing maintenance of any cable route;

(f) written details of the operations and maintenance regime for any cable, including frequency and method of access;

(g) assessment of earth rise potential if reasonably required by National Grid's engineers; and

(h) evidence that trench bearing capacity is to be designed to support overhead line construction traffic of at least 26 tonnes in weight.

(4) The undertaker must not commence any works to which sub-paragraphs (2) or (3) apply until National Grid has given written approval of the plan so submitted.

(5) Any approval of National Grid required under sub-paragraphs (4)—

(a) may be given subject to reasonable conditions for any purpose mentioned in subparagraphs (6) or (8); and,

(b) must not be unreasonably withheld.

(6) In relation to any work to which sub-paragraphs (2) or (3) apply, National Grid may require such modifications to be made to the plans as may be reasonably necessary for the purpose of securing its apparatus against interference or risk of damage, for the provision of protective works or for the purpose of providing or securing proper and convenient means of access to any apparatus.

(7) Works executed under sub-paragraphs (2) or (3) must be executed in accordance with the plan, submitted under sub-paragraph (1) or as relevant sub-paragraph (6), as approved or as amended from time to time by agreement between the undertaker and National Grid and in accordance with such reasonable requirements as may be made in accordance with sub-paragraphs (6) or (8) by National Grid for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and National Grid will be entitled to watch and inspect the execution of those works.

(8) Where under sub-paragraph (6) National Grid requires any protective works to be carried out by itself or by the undertaker (whether of a temporary or permanent nature) such protective works, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, must be carried out to National Grids' satisfaction prior to the commencement of any authorised development (or any relevant part thereof) for which protective works are required and National Grid shall give notice its requirement for such works within 42 days of the date of submission of a plan pursuant to this paragraph (except in an emergency).

(9) If National Grid in accordance with sub-paragraphs (6) or (8) and in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives written notice to the undertaker of that requirement, paragraphs 1 to 3 and 6 to 8 apply as if the removal of the apparatus had been required by the undertaker under paragraph 7(2).

(10) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 56 days before commencing the execution of the authorised development, a new plan, instead of the plan previously submitted, and having done so the provisions of this paragraph shall apply to and in respect of the new plan.

(11) The undertaker will not be required to comply with sub-paragraph (1) where it needs to carry out emergency works as defined in the 1991 Act but in that case it must give to National

Grid notice as soon as is reasonably practicable and a plan of those works and must comply with sub-paragraphs (6), (7) and (8) insofar as is reasonably practicable in the circumstances and comply with sub-paragraph (12) at all times.

(12) At all times when carrying out any works authorised under the Order, the undertaker must comply with National Grid's policies for development near overhead lines EN43-8 and HSE's guidance note 6 "Avoidance of Danger from Overhead Lines".

Expenses

10.—(1) Save where otherwise agreed in writing between National Grid and the undertaker and subject to the following provisions of this paragraph, the undertaker must pay to National Grid within 30 days of receipt of an itemised invoice or claim from National Grid all charges, costs and expenses reasonably anticipated within the following three months or reasonably and properly incurred by National Grid in, or in connection with, the inspection, removal, relaying or replacing, alteration or protection of any apparatus or the construction of any new or alternative apparatus which may be required in consequence of the execution of any authorised works including without limitation—

(a) any costs reasonably incurred by or compensation properly paid by National Grid in connection with the acquisition of rights or the exercise of statutory powers for such apparatus including without limitation all costs incurred by National Grid as a consequence of National Grid;

(i) using its own compulsory purchase powers to acquire any necessary rights under paragraph 7(3); or

(ii) exercising any compulsory purchase powers in the Order transferred to or benefitting National Grid;

(b) in connection with the cost of the carrying out of any diversion work or the provision of any alternative apparatus, where no written diversion agreement is otherwise in place;

(c) the cutting off of any apparatus from any other apparatus or the making safe of redundant apparatus;

(d) the approval of plans;

(e) the carrying out of protective works, plus a capitalised sum to cover the cost of maintaining and renewing permanent protective works;

(f) the survey of any land, apparatus or works, the inspection and monitoring of works or the installation or removal of any temporary works reasonably necessary in consequence of the execution of any such works referred to in this Part of this Schedule.

(2) There will be deducted from any sum payable under sub-paragraph (1) the value of any apparatus removed under the provisions of this Part of this Schedule and which is not re-used as part of the alternative apparatus, that value being calculated after removal.

(3) If in accordance with the provisions of this Part of this Schedule—

(a) apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or

(b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was situated,

and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by the undertaker or, in default of agreement, is not determined by arbitration in accordance with paragraph 15 (*arbitration*) to be necessary, then, if such placing involves cost in the construction of works under this Part of this Schedule exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity or dimensions, or at the existing depth, as the case may be, the amount which apart from this sub-paragraph would be payable to National Grid by virtue of sub-paragraph (1) will be reduced by the amount of that excess save to the extent that it is not possible in the

circumstances to obtain the existing type of apparatus at the same capacity and dimensions or place at the existing depth in which case full costs will be borne by the undertaker.

(4) For the purposes of sub-paragraph (3)—

(a) an extension of apparatus to a length greater than the length of existing apparatus will not be treated as a placing of apparatus of greater dimensions than those of the existing apparatus; and

(b) where the provision of a joint in a pipe or cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole will be treated as if it also had been agreed or had been so determined.

(5) Any amount which apart from this sub-paragraph would be payable to National Grid in respect of works by virtue of sub-paragraph (1) will, if the works include the placing of apparatus provided in substitution for apparatus placed more than 7 years and 6 months earlier so as to confer on National Grid any financial benefit by deferment of the time for renewal of the apparatus in the ordinary course, be reduced by the amount which represents that benefit.

Indemnity

11.—(1) — Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any works authorised by this Part of this Schedule or in consequence of the construction, use maintenance or failure of any of the authorised works by or on behalf of the undertaker or in consequence of any act or default of the undertaker (or any person employed or authorised by him) in the course of carrying out such works, including without limitation works carried out by the undertaker under this Part of this Schedule or any subsidence resulting from any of these works, any damage is caused to any apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of the authorised works) or property of National Grid, or there is any interruption in any service provided, or in the supply of any goods, by National Grid, or National Grid becomes liable to pay any amount to any third party, the undertaker will—

(a) bear and pay on demand the cost reasonably and properly incurred by National Grid in making good such damage or restoring the supply; and

(b) indemnify National Grid for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from National Grid, by reason or in consequence of any such damage or interruption or National Grid becoming liable to any third party as aforesaid and including Network Code Claims other than arising from any default of National Grid.

(2) The fact that any act or thing may have been done by National Grid on behalf of the undertaker or in accordance with a plan approved by National Grid or in accordance with any requirement of National Grid or under its supervision will not (unless sub-paragraph (3) applies), excuse the undertaker from liability under the provisions of this sub-paragraph (1) unless National Grid fails to carry out and execute the works properly with due care and attention and in a skilful and workman like manner or in a manner that does not accord with the approved plan.

(3) Nothing in sub-paragraph (1) shall impose any liability on the undertaker in respect of—

(a) any damage or interruption to the extent that it is attributable to the neglect or default of National Grid, its officers, servants, contractors or agents;

(b) any authorised works and/or any other works authorised by this Part of this Schedule carried out by National Grid as an assignee, transferee or lessee of the undertaker with the benefit of the Order pursuant to section 156 of the Planning Act 2008 or article [●] (*consent to transfer benefit of order*] subject to the proviso that once such works become apparatus ("new apparatus"), any authorised works yet to be executed and not falling within this sub-section 3(b) will be subject to the full terms of this Part of this Schedule including this paragraph 11.

(4) National Grid must give the undertaker reasonable notice of any such third party claim or demand and no settlement, or compromise must, unless payment is required in connection with a

statutory compensation scheme, be made without first consulting the undertaker and considering their representations.

(5) National Grid must, in respect of any matter covered by the indemnity given by the undertaker in this paragraph, at all times act reasonably and in the same manner as it would as if settling third party claims on its own behalf from its own funds.

(6) Not to commence construction (and not to permit the commencement of such construction) of the authorised works on any land owned by National Grid or in respect of which National Grid has an easement or wayleave for its apparatus or any other interest or to carry out any works within 15 metres of National Grid's apparatus until the following conditions are satisfied:

(a) unless and until National Grid is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the undertaker has first provided the acceptable security (and provided evidence that it shall maintain such acceptable security for the construction period of the authorised works from the proposed date of commencement of construction of the authorised works) and National Grid has confirmed the same to the undertaker in writing; and

(b) unless and until National Grid is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the undertaker has procured acceptable insurance (and provided evidence to National Grid that it shall maintain such acceptable insurance for the construction period of the authorised works from the proposed date of commencement of construction of the authorised works) and National Grid has confirmed the same in writing to the undertaker.

(7) In the event that the undertaker fails to comply with 11(6) of this Part of this Schedule, nothing in this Part of this Schedule shall prevent National Grid from seeking injunctive relief (or any other equitable remedy) in any court of competent jurisdiction.

Enactments and agreements

12. Save to the extent provided for to the contrary elsewhere in this Part of this Schedule or by agreement in writing between National Grid and the undertaker, nothing in this Part of this Schedule affects the provisions of any enactment or agreement regulating the relations between the undertaker and National Grid in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

Co-operation

13.—(1) Where in consequence of the proposed construction of any part of the authorised works, the undertaker or National Grid requires the removal of apparatus under paragraph 7(2) or National Grid makes requirements for the protection or alteration of apparatus under paragraph 9 the undertaker shall use its best endeavours to co-ordinate the execution of the works in the interests of safety and the efficient and economic execution of the authorised works and taking into account the need to ensure the safe and efficient operation of National Grid's undertaking and National Grid shall use its best endeavours to co-operate with the undertaker for that purpose.

(2) For the avoidance of doubt whenever National Grid's consent, agreement or approval is required in relation to plans, documents or other information submitted by the undertaker or the taking of action by the undertaker, it must not be unreasonably withheld or delayed.

Access

14. If in consequence of the agreement reached in accordance with paragraph 6(1) or the powers granted under this Order the access to any apparatus is materially obstructed, the undertaker must provide such alternative means of access to such apparatus as will enable National Grid to maintain or use the apparatus no less effectively than was possible before such obstruction.

Arbitration

15. Save for differences or disputes arising under paragraph 7(2), 7(4) 8(1), and 9 any difference or dispute arising between the undertaker and National Grid under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and National Grid, be determined by arbitration in accordance with article [●] (*arbitration*).

Notices

16. Notwithstanding article [●] (service of notices), any plans submitted to National Grid by the undertaker pursuant to this Part must be sent to National Grid Plant Protection at plantprotection@nationalgrid.com or such other address as National Grid may from time to time appoint instead for that purpose and notify to the undertaker in writing.]

Part 6

FOR THE PROTECTION OF HIGHWAYS ENGLAND

[Application

1. The provisions of this Part of this Schedule apply for the protection of Highways England and have effect unless otherwise agreed in writing between the undertaker and Highways England.

Interpretation

2.—(1) Where the terms defined in article 2 (interpretation) of this Order are inconsistent with sub-paragraph 2 the latter shall prevail.

(2) In this part of this Schedule—

"as built information" means one digital copy of the following information—

(a) as constructed drawings in both PDF and Auto CAD DWG formats for anything designed by the undertaker; in compliance with Interim Advice Note 184 or any successor document;

(b) list of suppliers and materials used and test results; and

(c) method statements for the works carried out.

"condition survey" means a survey of the condition of Highways England structures, assets within the Order limits that in the reasonable opinion of Highways England may be affected by a specified work;

"contractor" means any contractor or sub-contractor appointed by the undertaker to carry out a specified work;

"detailed design information" means drawings specifications and calculations as appropriate for the following—

(a) earthworks including supporting geotechnical assessments required by CD622 (Managing geotechnical risk) of the DMRB or any successor document and any required strengthened earthworks appraisal form certification in so far as is relevant to trenchless construction;

(b) topographical survey;

(c) health and safety information including any asbestos survey required by GD05/16 (asbestos management in trunk road assets) or any successor document; and

(d) other such information that may be reasonably required by Highways England to inform the detailed design of a specified work.

"DMRB" means the Design Manual for Roads and Bridges or any replacement, revision or modification of it;

"highways structure" means structures or installations within the scope of the DMRB and that are situated under, over or adjacent to a motorway or other trunk road;

"nominated persons" means the undertaker's representatives or the contractor's representatives on site during the carrying out of a specified work as notified to Highways England from time to time;

"programme of works" means a document setting out the sequence and timetabling of a specified work;

"specific work" means so much of any work authorised by this Order, including any maintenance of that work, as is in or under the trunk road network for which Highways England is the highway authority; and

"trunk road network" for these protective provisions means the crossing under the A27 in the location shown on the Works Plans Sheet No.7.

General

3. The undertaker acknowledges that parts of the works authorised by this Order affect or may affect parts of the trunk road network.

Prior approvals

4.—(1) No specified works may commence until—

(a) The programme of works has been approved by Highways England, such approval not to be unreasonably withheld or delayed;

(b) The following details relating to the specific work have been submitted to and approved by Highways England, such approval not to be unreasonably withheld or delayed—

(i) the detailed design information;

(ii) the identity of the contractor and nominated persons.

(c) any further information that Highways England may reasonably request within 14 days of the submission of the detailed design of a specified work has been supplied to Highways England; and

(d) a condition survey and a reasonable regime of monitoring the structures and assets that were surveyed under the condition survey has been submitted to and approved, acting reasonably, by Highways England.

(2) Highways England must provide the undertaker with a list, which is to be agreed between the parties acting reasonably, of all the structures and assets to be subject to both a condition survey and reasonable regime of monitoring pursuant to sub-paragraph (1)(d) and paragraph 7(1) of this Part of this Schedule before the first condition survey is conducted and the reasonable regime of monitoring is implemented.

(3) Highways England must prior to the commencement of a specified work inform the undertaker of the identity of the person who will act as a point of contact on behalf of Highways England to consider the information required under sub-paragraph (1) and of the identity of the person or persons who are authorised to give consent or approval on behalf of Highways England for any matter requiring approval or consent in these provisions.

(4) Any approval of Highway England required by this paragraph—

(a) must not be unreasonably withheld or delayed;

(b) in the case of a refusal must be accompanied by a statement of grounds of refusal;

(c) is deemed to have been refused if it is neither given or refused within 56 days of the submission of the relevant information (if further information is requested by Highways England any such request must be submitted to the undertaker within 14 days of submission of the relevant information under this and the provision of such further

information by the undertaker will not be deemed to constitute a new application for approval pursuant to this paragraph); and

(d) may be given subject to any reasonable conditions as Highways England considers necessary.

(5) If the undertaker requires entry onto land which forms part of the trunk road network to exercise the powers over that land set out in article 19 (authority to survey and investigate the land) of this Order, the undertaker must supply details of any proposed road space bookings (in accordance with Highways England's Asset Management Operational Requirements (AMOR) including Network Occupancy Management System (NOMS) used to manage road space bookings and network occupancy) and submit to Highways England and obtain the approval of Highways England of a scheme of traffic management prior to the exercise of the power.

Construction of specified work

5.—(1) The undertaker must, prior to commencement of a specified work, give to Highways England 28 days' notice in writing of the date on which the specified work will start unless otherwise agreed by Highways England.

(2) If the carrying out of any part of the authorised development requires the booking of road space with Highways England, the undertaker must comply with Highways England's usual road space booking procedures prior to and during the carrying out of the specified work and no specified work for which a road space booking with Highways England is required must commence without a road space booking having first been secured from Highways England.

(3) Any specified work must be carried out to the reasonable satisfaction of Highways England (acting reasonably) in accordance with—

(a) the relevant detailed design information and programme of works approved pursuant to paragraph 4(1)(a) and 4(1)(b)(i) or as subsequently varied by agreement between the undertaker and Highways England;

(b) any conditions of Highways England notified by Highways England to the undertaker pursuant to paragraph 4(4)(d) of this Part of this Schedule.

(4) The undertaker must ensure that (where possible) without entering the highway the specified work is carried out without disturbance to the highway and so that the highway remains open for traffic at all times unless otherwise agreed with Highways England.

(5) The undertaker must permit and must require the contractor to permit at all reasonable times persons authorised by Highways England (whose identity must have been previously notified to the undertaker by Highways England) to gain access to a specified work for the purposes of inspection and supervision of a specified work or method of construction of such work.

(6) If any specified work is constructed—

(a) other than in accordance with the requirements of this Part of this Schedule; or

(b) in a way that causes damage to the highway, any highway structure or asset or any other land of Highways England,

Highways England may by notice in writing require the undertaker, at the undertaker's own expense, to comply with the requirements of this Part of this Schedule or put right any damage notified to the undertaker under this Part of this Schedule.

(7) If within 56 days of the date on which a notice under sub-paragraph (6) is served on the undertaker, the undertaker has failed to take steps to comply with the notice, Highways England may carry out the steps required of the undertaker and may recover from the undertaker any expenditure reasonably incurred by Highways England in so doing, such sum to be payable within 30 days of demand. Where the steps required to be taken pursuant to any notice require the submission of any information for the prior approval of Highways England, the submission of that information will evidence that the undertaker has taken steps to comply with a notice served by Highways England under sub-paragraph (6).

(8) Highways England may, at its discretion, in its notice in writing to the undertaker given pursuant to sub-paragraph (6) state that Highways England intend to put right the damage notified

to the undertaker, and if it intends to do so it must give the undertaker not less than 28 days' notice of its intention to do so and Highways England may recover from the undertaker any reasonable expenditure incurred by Highways England in so doing.

(9) Nothing in this Part of this Schedule prevents Highways England from, in the event of an emergency or to prevent the occurrence of danger to the public, carrying out any work or taking any such action as it reasonably believes to be necessary as a result or in connection with of the carrying out of the authorised works without prior notice to the undertaker and Highways England may recover from the undertaker any reasonable expenditure incurred by Highways England in so doing.

Payments

6.—(1) The undertaker must pay to Highways England a sum equal to the whole of any costs and expenses which Highways England incurs (including costs and expenses for using internal or external staff) in relation to any specified work including—

(a) the checking and approval of the information required under paragraph 4(1) of this Part of this Schedule;

(b) the supervision of a specified work;

(c) reasonable legal and administrative costs, reasonably and properly incurred, in relation to sub-paragraphs (a) and (b); and

(d) any value added tax which is payable by Highways England only in respect of such costs and expenses arising under this paragraph 6(1) and for which it cannot obtain reinstatement from HM Revenue and Customs,

together comprising "the HE costs".

(2) The undertaker must pay to Highways England upon demand and prior to such costs being incurred the total costs that Highways England believe will be properly and necessarily incurred by Highways England in undertaking any statutory procedure or preparing and bringing into force any traffic regulation order or orders necessary to carry out or for effectively implementing any specified work or that are incurred in connection with a specified work.

(3) Highways England must provide the undertaker with a fully itemised invoice showing its estimate of the HE costs prior to the commencement of a specified work and the undertaker must pay to Highways England the estimate of the HE costs prior to commencing a specified work and in any event prior to Highways England incurring any cost.

(4) If at any time after the payment referred to in sub-paragraph (3) has become payable, Highways England reasonably believes that the HE costs will exceed the estimated HE costs in respect of a specified work it may give notice to the undertaker of the amount that it believes the HE costs will exceed the estimate of the HE costs (excess) and the undertaker must pay to Highways England within 28 days of the date of the notice a sum equal to the excess.

(5) Highways England must give the undertaker a final account of the costs, as a fully itemised invoice, referred to in sub-paragraph (1) within 30 days of the undertaker notifying to Highways England that a specified work has been completed.

(6) Within 30 days of the issue of the final account—

(a) if the final account shows a further sum as due to Highways England the undertaker must pay to Highways England the sum shown due to it; or

(b) if the account shows that the payment or payments previously made by the undertaker have exceeded the costs incurred by Highways England, Highways England must refund the difference to the undertaker.

Completion of a specified work

7.—(1) Within 56 days of the completion of a specified work, the undertaker must arrange for the highway structures and assets that were the subject of the condition survey carried out in

respect of the specified work to be re-surveyed and must submit the re-survey to Highways England for it approval.

(2) If the re-survey carried out pursuant to sub-paragraph (1) indicates that any damage has been caused to any highways structure, the undertaker must submit a scheme for remedial works in writing to Highways England for its approval in writing, which must not be unreasonably withheld or delayed, and must carry out the remedial works at its own cost and in accordance with the approved scheme.

(3) If the undertaker fails to carry out the remedial work in accordance with the approved scheme, Highways England may carry out the steps required of the undertaker and may recover from the undertaker any expenditure reasonably incurred by Highways England in so doing, such sum to be payable within 30 days of demand.

(4) Highways England may, at its discretion, at the same time as giving its approval to the condition survey, give notice in writing to the undertaker stating that Highways England will remedy the damage identified by the condition survey and Highways England may recover from the undertaker any reasonable expenditure incurred by Highways England in so doing.

(5) Within 10 weeks of the completion of a specified work, the undertaker must submit to Highways England the as built information.

(6) The undertaker must make available to Highways England upon reasonable request copies of any survey or inspection reports produced pursuant to any inspection or survey of any specified work following its completion that the undertaker may from time to time carry out.

Indemnification

8.—(1) The undertaker must indemnify Highways England from and against all costs, expenses, damages, losses and liabilities suffered by Highways England arising from or in connection with any claim, demand, action or proceedings resulting from the construction or maintenance of a specified work.

(2) Within 30 days of the receipt of the notification referred to in sub-paragraph (1) the undertaker must pay to Highways England the amount specified as the quantum of such claim.

(3) Sub-paragraphs (1) and (2) do not apply if the costs, expenses, liabilities and damages were caused by or arose out of the neglect or default of Highways England or its officers, servants agents or contractors or any person or body for whom it is responsible.

Expert determination

9.—(1) Article 45 (arbitration) of this Order does not apply to this Part of this Schedule;

(2) Any difference under this Part of this Schedule may be referred to and settled by a single independent and suitable person who holds appropriate professional qualifications and is a member of a professional body relevant to the matter in dispute acting as an expert, such person to be agreed by the parties or, in the absence of agreement, identified by the President of the Institution of Civil Engineers.

(3) All parties involved in settling any difference must use best endeavours to do so within 21 days from the date of a dispute first being notified in writing by one party to the other and in the absence of the difference being settled within that period the expert must be appointed within 21 days of the notification of the dispute.

(4) The expert must—

(a) invite the parties to make submission to the expert in writing and copied to the other party to be received by the expert within 21 days of the expert's appointment;

(b) permit a party to comment on the submissions made by the other party within 21 days of receipt of the submission;

(c) issue a decision within 42 days of receipt of the submissions under sub-paragraph (b); and

(d) give reasons for the decision.

(5) Any determination by the expert is final and binding, except in the case of manifest error in which case the difference that has been subject to expert determination may be referred to and settled by arbitration under article 45 (arbitration).

(6) The fees of the expert are payable by the parties in such proportions as the expert may determine or, in the absence of such determination, equally.]

Part 7

For the Protection of the Owners of Little Denmead Farm

Commented [CZ24]: See BM Deadline 8 Document: "Development Consent Protective Provisions in relation to Little Denmead Farm" as submitted at Deadline 8

SCHEDULE 14

Article 43

Certified documents

Document title	*Document reference*	*Revision*
Book of reference – regulation 5(2)(d)	Application Document 4.3	006
Environmental statement – Regulation 5(2)(a)	Application Document 6.1 – 6.4	001
Onshore outline construction environmental management plan – Regulation 5(2)(o)	Application Document 6.9	006
Habitats regulations assessment – Regulation 5(2)(g)	Application Document 6.8	005
Land plans – Regulation 5(2)(i)	Application Document 2.2	005
Crown land plans – Regulation 5(2)(n)	Application Document 2.3	004
Works plans – Regulation 5(2)(j)	Application Document 2.4	006
Access and rights of way plans – Regulation 5(2)(k)	Application Document 2.5	004
Converter station and telecommunications building parameter plan – Regulation 5(2)(o)	Application Document 2.6	002
Optical regeneration stations parameter plans – Regulation 5(2)(o)	Application Document 2.11	002
Outline marine construction environmental management plan – Regulation 5(2)(o)	Application Document 6.5	001
Hedgerow and Tree Preservation Order Plans	Application Document 2.12	003
Outline landscape and biodiversity strategy – regulation 5(2)(o)	Application Document 6.10	004
Design and access statement – Regulation 5(2)(q)	Application Document 5.5	004
Surface water drainage and aquifer contamination mitigation strategy – Regulation 5(2)(o)	Application Document 6.3.3.6	003
Marine archaeology outline written scheme of investigation	Application Document 6.3.14.3	001

Framework traffic management strategy - Regulation 5(2)(o)	Application Document 6.3.22.1A	003
Framework construction traffic management plan – Regulation 5(2)(o)	Application Document 6.3.22.2	003
Flood risk assessment – Regulation 5(2)(o)	Application Document 6.3.20.4	001
Flood risk assessment addendum – Regulation 5(2)(o)	Application Document 6.8.18	001
Operational broadband and octave band noise criteria document – Regulation 5(2)(o)	Application Document 7.7.11	001
Employment and skills strategy -– Regulation 5(2)(q)	Application document 7.9.35	001
Source protection zones plans - Regulation 5(2)(o)	Application document 6.2.19.4	001

SCHEDULE 15

Article 37

Deemed marine licence under the 2009 Act

PART 1

Licensed marine activities

1.—(1) In this licence —

"the 2008 Act" means the Planning Act 2008;

"the 2009 Act" means the Marine and Coastal Access Act 2009;

"the 2011 Regulations" means the Marine Licensing (Licence Application Appeals) Regulations 2011;

"authorised deposits" means the substances and particles specified in paragraph 5 of Part 1 of this licence;

"authorised development" means Works No. 6 and 7 described in paragraph 3 of Part 1 of this licence or any part of that work and further associated development within the meaning of section 115(2) of the 2008 Act comprising other works as may be necessary or expedient for the purposes of or in connection with the relevant part of the authorised development and which fall within the scope of the work assessed by the environmental statement;

"cable circuit" means a number of electrical conductors necessary to transmit electricity between two points within the authorised development; this comprises in the case of a HVDC cable, two conductors;

"cable protection" means physical measures for the protection of cables including rock, rock bags and gravel placement, concrete or frond mattresses, tubular protection and grout bags;

"Cefas" means the Centre for Environment, Fisheries and Aquaculture Science or any successor body to its function;

"commence" means the first carrying out of any licensed marine activities authorised by this marine licence, save for pre-construction surveys approved under this licence and "commenced" and "commencement" is to be construed accordingly;

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"condition" means a condition under Part 2 of this licence;

"CrossChannel Fibre Cable crossings" means a crossing for a fibre optic cable;

"disposal" means the deposit of dredged material at the disposal sites with reference WI048 and WI049 within the extent of the Order limits seaward of MHWS and "dispose" and cognate expression is to be construed accordingly;

"enforcement officer" means a person authorised to carry out enforcement duties under Chapter 3 of the 2009 Act;

"environmental statement" means the document certified as the environmental statement by the Secretary of State for the purposes of this Order in accordance with article 43 (Certification of plans, etc.);

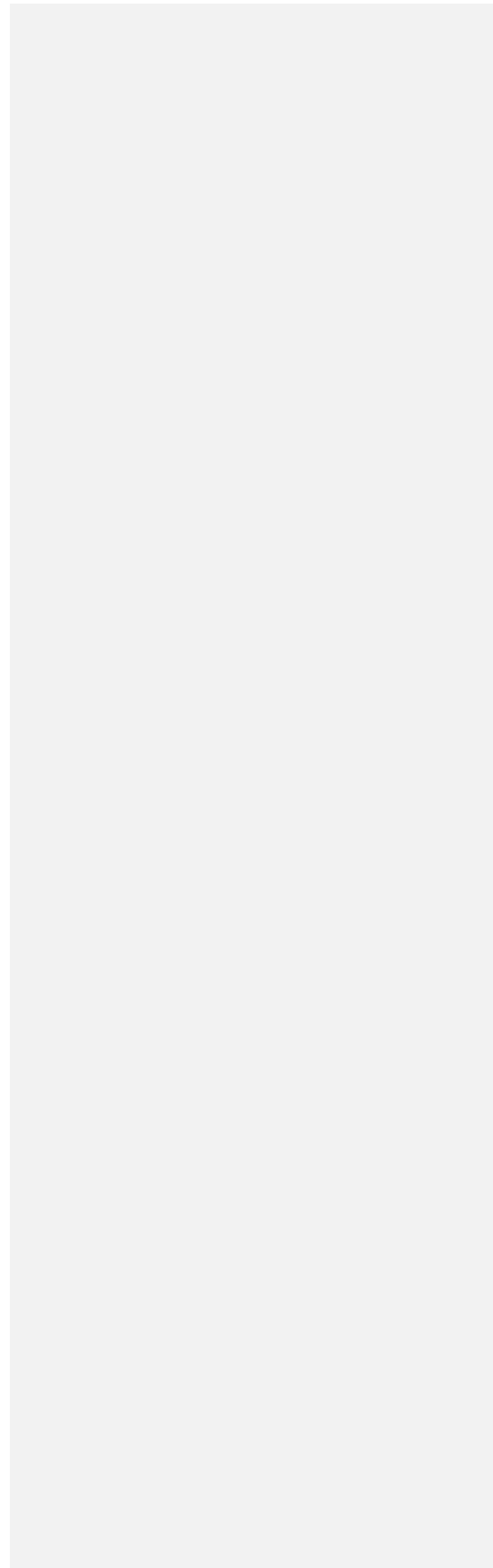
"fibre optic cable" means a cable for the purpose of control, monitoring, and protection of the HVDC cable circuits, and for telecommunications relating to the converter station;

"Health and Safety Executive" means the independent national regulator that aims to prevent work-related death, injury and ill-health and "HSE" is to be construed accordingly;

"horizontal directional drilling work area" means the area within which the temporary horizontal directional drilling entry/exit pits are to be located as identified within the outline marine construction environmental management plan;

"licensed activities" means the activities specified in Part 1 of this licence;

"maintain" includes inspect, upkeep, repair, adjust, alter, improve, preserve and further includes remove, reconstruct and replace any part of the authorised development, provided such works do not give rise to any materially new or materially different environmental effects



to those identified in the environmental statement and "maintenance" must be construed accordingly;

"Marine Management Organisation" means the body created under the 2009 Act which is responsible for the monitoring and enforcement of this licence or any successor of that function and "MMO" is to be construed accordingly;

"MCA" means the Maritime and Coastguard Agency;

"MCA safety guidance" means those aspects of MGN543 "Offshore Renewable Energy Installations (OREIs) – Guidance on UK Navigational Practice, Safety and Emergency Response Issues" and its annexes that are relevant to the authorised development;

"marine emergency action card" means the MCA bespoke emergency action card template that will be completed to inform emergency response actions during the construction of the authorised development;

"mean high water springs" or "MHWS" means the average throughout the year of two successive high waters during a 24-hour period in each month when the range of the tide is at its greatest;

"marine HVDC cables" means two 320 kilovolt HVDC cable circuits for the transmission of electricity which may be bundled as two pairs of cables or take the form of single cables ~~together~~ with i) for the purpose of control, monitoring, and protection of the HVDC cable circuits, and for telecommunications relating to the converter station, a fibre optic data transmission cables ~~for the purpose of control, monitoring, protection and commercial telecommunications uses~~ with each cable circuit, and ii) for such cables ~~including~~ one or more cable crossings;

"Order" means the AQUIND Interconnector Order 202[ ];

"Order limits" means the limits shown on the works plans within which the authorised development may be carried out, whose grid co-ordinates seaward of MHWS are set out in paragraph 6 of Part 1 of this licence;

"outline marine construction environmental management plan" means the document certified by the Secretary of State under article 43 (Certification of plans, etc.) of this Order as the outline marine construction environmental management plan;

"marine archaeology outline written scheme of investigation" means the document certified by the Secretary of State under article 43 (Certification of plans, etc.) of this Order as the marine archaeology outline written scheme of investigation;

"screened out" means to pass through grid screens no larger than 30cm;

"standard marking schedule" means UK Standard Marking Schedule for Offshore Installation (DECC 04/11);

"statutory historic body" means the Historic Buildings and Monuments Commission, otherwise known as Historic England or any successor of that function;

"statutory nature conservation body" means an organisation charged by the government with advising on nature conservation matters;

"Trinity House" means the Corporation of Trinity House of Deptford Strond;

"UK Hydrographic Office" means the UK Hydrographic Office of Admiralty Way, Taunton, Somerset TA1 2DN;

"undertaker" means AQUIND Limited (company number 06681477) or the person who has the benefit of this Order in accordance with article 6 (Benefit of Order) and 7 (Consent to transfer benefit of Order);

"vessel" means every description of vessel, however propelled or moved, and includes a non-displacement craft, a personal watercraft, a seaplane on the surface of the water, a hydrofoil vessel, a hovercraft or any other amphibious vehicle and any other thing constructed or adapted for movement through, in, on or over water and which is at the time in, on or over water;

"work plans" means the plans certified by the Secretary of State as Works Plans under article 43 (Certification of plans, etc.) for the purposes of the Order and identified in Part 2 of Schedule 5 of the Order (Works Plans); and

"working day" means Monday to Friday excluding bank holidays and other public holidays;

(2) A reference to any statue, order, regulation or similar instrument is to be construed as reference to a statute, order, regulation or similar instrument as amended by any subsequent statute, order, regulation or instrument or as contained in any subsequent re-enactment.

(3) Unless otherwise indicated –

(a) all time are taken to be Greenwich Mean Time (GMT);

(b) all co-ordinates are taken to be latitude and longitude degrees minutes and seconds to three decimal places.

(4) Except where otherwise notified in writing by the relevant organisation, the primary point of contact with the organisations listed below and address for returns of correspondence are –

(a) Marine Management Organisation (head office)
Offshore Marine Licensing
Lancaster House, Hampshire Court
Newcastle Business Park
Newcastle Upon Tyne
NE4 7YH
Tel: 0300 123 1032;

(b) Marine Management Organisation (local office)
Offshore Marine Licensing
Lynx House
1 Northern Road
Portsmouth
PO6 3XB
Tel: 02392 373435

(c) Trinity House
Tower Hill
London
EC3N 4DH
Tel: 020 7481 6900;

(d) The United Kingdom Hydrographic Office
Admiralty Way
Somerset
TA1 2DN
Tel: 01823 337 900;

(e) Maritime and Coastguard Agency
Technical Services Navigation
Bay 2/20, Spring Place
105 Commercial Road
Southampton
SO15 1EG
Tel: 020 3817 2000;

(f) Natural England
4th floor, Eastleigh House
Upper Market Street

Eastleigh
Hampshire
SO50 9YN
Tel: 0300 060 39000

(g) Historic England
Cannon Bridge House
25 Dowgate Hill
London
EC4R 2YA
Tel: 020 7973 370

(h) Centre for Environment, Fisheries and Aquaculture Science
Parkfield Road
Suffolk
NR33 0HT
Tel: 01502 562 244;

Details of Licensed Marine Activities

2. Subject to the licence conditions, this licence authorises the undertaker (and any agent or contractor acting on their behalf) to carry out the following licensable marine activities under section 66(1) of the 2009 Act –

(1) the deposit at sea of the authorised deposits from any vessel, any container floating in the sea or any structure on land constructed or adapted wholly or mainly for the purpose of depositing substances and articles in the sea;

(2) the construction of works in or over the sea and/or on the seabed;

(3) dredging including (but not limited to) mass flow excavation for the purposes of seabed preparation for the works;

(4) the removal of out of service cables, seabed debris and static fishing equipment;

(5) boulder clearance works either by displacement ploughing or subsea grab technique or another equivalent method;

(6) the removal of sediment samples for the purposes of informing environmental monitoring under this licence during pre-construction, construction and operation;

(7) the disposal of up to 1,754,000m^3 of inert material of natural origin produced during the Works comprised within Works Nos 6 and 7; and

(8) any other works comprised in the preparation of the seabed for the Works.

3. Such activities are authorised in relation to the construction, maintenance and operation of –

Work No. 6 – marine HVDC cable circuits and ducts within the Order limits seaward of MHWS and landward of MLWS between Work No. 5 and Work No. 7 including where required works to facilitate HDD.

Work No. 7 – marine HVDC cable works consisting of –

(a) marine HVDC cable circuits between the UK exclusive economic zone with France and Works No. 6;

(b) up to 4 temporary HDD entry/exit pits; and

(c) a temporary work area for vessels to carry out intrusive activities.

4. In connection with Works Nos. 6 and 7 and to the extent that they do not otherwise form part of any such work, further associated development within the meaning of section 115(2) of the 2008 Act comprising other works as may be necessary or expedient for the purposes of or in

connection with the relevant part of the authorised development and which fall within the scope of the work assessed by the environmental statement and the provisions of this licence, including but not limited to –

(1) cable protection, including cable protection at the Atlantic Cable and proposed CrossChannel Fibre Cable crossings (pre-lay berm, 100 m x 30 m and post-lay berms of approximately 600 m x 30 m for each crossing) covering a maximum footprint of 37,800 m^2 for each crossing;

(2) temporary cable burial equipment trials;

(3) the removal of material from the seabed required for the construction of Work Nos. 6 and 7 and the disposal of up to 1,754,000m^3 of inert material of natural origin produced during the Works; and

(4) the construction of crossing structures over in-service cables that are crossed by the marine HVDC cable.

5. The substances or articles authorised for deposit includes –

(1) Iron, steel, copper and aluminium;

(2) Stone, rock, and concrete;

(3) sand and gravel;

(4) plastic and synthetics;

(5) drilling liquids;

(6) material extracted from within the Order limits seawards of MHWS during construction, drilling and seabed preparation for the Works; and

(7) marine coatings and other chemicals:

(8) any other material of substance to the extent its effects have been considered within the environmental statement.

6. The grid coordinates for that part of the authorised development comprising Works Nos.6 and 7 are specified below and more particularly on the works plans –

Point ID	*Latitude (DMS)*	*Longitude (DMS)*	*Point ID*	*Latitude (DMS)*	*Longitude (DMS)*
1	50 47 8.146″N	1 2 20.857″W	135	50 42′0.397″N	0 54′1.872″W
2	50 47 8.216″N	1 2 20.480″W	136	50 41′55.699″N	0 53′35.726″W
3	50 47 8.268″N	1 2 20.179″W	137	50 41′33.679″N	0 52′58.934″W
4	50 47 8.339″N	1 2′19.690″W	138	50 40′20.249″N	0 51′13.974″W
5	50 47 8.386″N	1 2′19.364″W	139	50 39′59.881″N	0 50′52.430″W
6	50 47 8.451″N	1 2′18.889″W	140	50 39′42.599″N	0 50′29.607″W
7	50 47 8.508″N	1 2′18.470″W	141	50 39′36.524″N	0 50′11.733″W
8	50 47 8.553″N	1 2′18.104″W	142	50 39′12.728″N	0 48′58.524″W
9	50 47 8.628″N	1 2′17.588″W	143	50 38′30.615″N	0 46′2.020″W
10	50 47 8.690″N	1 2′17.204″W	144	50 37′46.726″N	0 43′23.708″W
11	50 47 8.771″N	1 2′16.708″W	145	50 37′36.508″N	0 42′41.575″W
12	50 47 8.826″N	1 2′16.349″W	146	50 37′15.582″N	0 41′15.354″W
13	50 47 8.931″N	1 2′15.812″W	147	50 37′15.513″N	0 39′46.232″W
14	50 47 8.992″N	1 2′15.489″W	148	50 36′41.713″N	0 34′22.448″W
15	50 47 9.096″N	1 2′14.962″W	149	50 36′14.831″N	0 32′37.009″W
16	50 47 9.166″N	1 2′14.555″W	150	50 36′7.973″N	0 31′7.231″W
17	50 47 9.231″N	1 2′14.186″W	151	50 36′0.215″N	0 30′36.542″W
18	50 47 9.328″N	1 2′13.628″W	152	50 35′54.791″N	0 30′15.095″W
19	50 47 9.426″N	1 2′13.061″W	153	50 35′23.567″N	0 29′13.075″W
20	50 47 9.490″N	1 2′12.710″W	154	50 34′29.494″N	0 26′42.742″W
21	50 47 9.587″N	1 2′12.132″W	155	50 32′41.551″N	0 23′38.096″W

22	50 47 9.639″N	1 2′11.857″W	156	50 30′3.541″N	0 17′33.192″W
23	50 47 9.789″N	1 2′11.023″W	157	50 28′42.521″N	0 15′42.064″W
24	50 47 9.878″N	1 2′10.527″W	158	50 28′4.707″N	0 14′50.247″W
25	50 47 9.983″N	1 2 9.954″W	159	50 27′43.034″N	0 14′20.562″W
26	50 47′10.053″N	1 2 9.496″W	160	50 26′55.786″N	0 13′15.884″W
27	50 47′10.093″N	1 2 9.212″W	161	50 26′56.222″N	0 13′14.495″W
28	50 47′10.142″N	1 2 8.960″W	162	50 26′57.457″N	0 13′4.676″W
29	50 47′10.205″N	1 2 8.572″W	163	50 26′57.027″N	0 12′54.690″W
30	50 47′10.259″N	1 2 8.304″W	164	50 26′54.961″N	0 12′45.218″W
31	50 47′10.327″N	1 2′7.966″W	165	50 26′51.400″N	0 12′36.908″W
32	50 47′10.374″N	1 2′7.740″W	166	50 26′46.587″N	0 12′30.324″W
33	50 47′10.456″N	1 2′7.347″W	167	50 26′40.850″N	0 12′25.916″W
34	50 47′10.514″N	1 2′7.079″W	168	50 26′34.580″N	0 12′23.983″W
35	50 47′10.587″N	1 2′6.756″W	169	50 26 28.204″N	0 12′24.658″W
36	50 47′10.648″N	1 2′6.496″W	170	50 26 22.156″N	0 12′27.894″W
37	50 47′10.741″N	1 2′6.131″W	171	50 26 21.336″N	0 12′28.756″W
38	50 47′10.822″N	1 2′5.803″W	172	50 26′10.359″N	0 12′13.745″W
39	50 47′10.862″N	1 2′5.617″W	173	50 24 8.032″N	0 9′25.526″W
40	50 47′10.921″N	1 2′5.371″W	174	50 24 2.766″N	0 9′16.501″W
41	50 47′10.939″N	1 2′5.284″W	175	50 23′57.213″N	0 9′5.200″W
42	50 47′10.978″N	1 2′5.099″W	176	50 23′51.251″N	0 8′52.570″W
43	50 47′11.045″N	1 2′4.740″W	177	50 23′46.360″N	0 8′39.092″W
44	50 47′11.107″N	1 2′4.474″W	178	50 21′32.398″N	0 2′15.439″W
45	50 47′11.167″N	1 2′4.178″W	179	50 21 29.076″N	0 2′5.945″W
46	50 47′11.222″N	1 2′3.897″W	180	50 21 28.324″N	0 2′3.795″W
47	50 47′11.281″N	1 2′3.598″W	181	50 21′6.855″N	0 1′12.898″W
48	50 47′11.337″N	1 2′3.294″W	182	50 20′46.163″N	0 0′32.608″W
49	50 47′11.366″N	1 2′3.150″W	183	50 20′34.684″N	0 0′15.657″W
50	50 47′11.403″N	1 2 2.966″W	184	50 20′32.670″N	0 0′12.683″W
51	50 47′11.423″N	1 2 2.845″W	185	50 20′16.756″N	0 0′10.817″E
52	50 47′11.460″N	1 2 2.657″W	186	50 17′36.424″N	0 5′11.894″E
53	50 47′11.492″N	1 2 2.498″W	187	50 16′31.253″N	0 9′3.799″E
54	50 47′11.540″N	1 2 2.249″W	188	50 16′10.086″N	0 11′24.856″E
55	50 47′11.573″N	1 2 2.089″W	189	50 16′7.791″N	0 11′36.422″E
56	50 47′11.617″N	1 2′1.860″W	190	50 16′6.240″N	0 11′43.952″E
57	50 47′11.654″N	1 2′1.683″W	191	50 16 2.500″N	0 12′0.714″E
58	50 47′11.704″N	1 2′1.424″W	192	50 15′56.441″N	0 12′17.698″E
59	50 47′11.767″N	1 2′1.116″W	193	50 15′53.389″N	0 12′23.459″E
60	50 47′11.802″N	1 2 0.862″W	194	50 15′53.179″N	0 12′23.855″E
61	50 47′11.807″N	1 2 0.827″W	195	50 15′53.678″N	0 12′24.498″E
62	50 47′11.827″N	1 2 0.809″W	196	50 15′50.634″N	0 12′30.244″E
63	50 47′11.877″N	1 2 0.444″W	197	50 15′50.355″N	0 12′30.769″E
64	50 47′11.901″N	1 2 0.405″W	198	50 15′44.773″N	0 11′56.429″E
65	50 47′11.904″N	1 2 0.370″W	199	50 15′47.089″N	0 11′49.938″E
66	50 47′11.863″N	1 2 0.317″W	200	50 15′50.773″N	0 11′33.424″E
67	50 47′11.847″N	1 2 0.307″W	201	50 15′53.839″N	0 11′17.971″E
68	50 47′11.847″N	1 2 0.307″W	202	50 16′15.223″N	0 8′55.462″E
69	50 47′11.847″N	1 2 0.307″W	203	50 17 21.968″N	0 4′57.948″E
70	50 47′11.895″N	1 1′59.868″W	204	50 20′4.461″N	0 0′7.202″W
71	50 47′11.912″N	1 1′59.866″W	205	50 20 21.112″N	0 0′31.792″W
72	50 47′11.939″N	1 1′59.841″W	206	50 20 23.127″N	0 0′34.767″W

73	50 47′11.965″N	1 1′59.584″W	207	50 20′33.765″N	0 0′50.477″W
74	50 47′11.966″N	1 1′59.512″W	208	50 20′53.239″N	0 1 28.399″W
75	50 47′11.965″N	1 1′59.496″W	209	50 21′13.893″N	0 2′17.366″W
76	50 47′11.964″N	1 1′59.435″W	210	50 23′31.655″N	0 8′51.889″W
77	50 47′11.965″N	1 1′59.415″W	211	50 23′37.115″N	0 9′6.938″W
78	50 47′11.953″N	1 1′59.406″W	212	50 23′43.773″N	0 9 21.043″W
79	50 47′11.953″N	1 1′59.406″W	213	50 23′49.858″N	0 9′33.428″W
80	50 47′11.953″N	1 1′59.406″W	214	50 23′56.230″N	0 9′44.349″W
81	50 47′11.962″N	1 1′59.198″W	215	50 25′59.269″N	0 12′33.560″W
82	50 47′11.971″N	1 1′59.095″W	216	50 26′10.266″N	0 12′48.600″W
83	50 47′11.985″N	1 1′58.947″W	217	50 26 9.831″N	0 12′49.988″W
84	50 47′11.992″N	1 1′58.887″W	218	50 26 8.596″N	0 12′59.805″W
85	50 47′12.008″N	1 1′58.758″W	219	50 26 9.026″N	0 13 9.789″W
86	50 47′12.020″N	1 1′58.658″W	220	50 26′11.091″N	0 13′19.258″W
87	50 47′12.029″N	1 1′58.582″W	221	50 26′14.651″N	0 13 27.567″W
88	50 47′12.031″N	1 1′58.566″W	222	50 26′19.463″N	0 13′34.151″W
89	50 47′12.040″N	1 1′58.493″W	223	50 26 25.200″N	0 13′38.561″W
90	50 47′12.049″N	1 1′58.409″W	224	50 26′31.470″N	0 13′40.497″W
91	50 47′12.060″N	1 1′58.316″W	225	50 26′37.846″N	0 13′39.825″W
92	50 47′12.079″N	1 1′58.149″W	226	50 26′43.894″N	0 13′36.591″W
93	50 47′12.110″N	1 1′57.942″W	227	50 26′44.714″N	0 13′35.729″W
94	50 47′12.123″N	1 1′57.869″W	228	50 28′31.442″N	0 16′1.912″W
95	50 47′12.141″N	1 1′57.733″W	229	50 29′50.837″N	0 17′50.820″W
96	50 47′12.158″N	1 1′57.645″W	230	50 32 28.318″N	0 23′54.527″W
97	50 47′12.175″N	1 1′57.550″W	231	50 34′15.790″N	0 26′58.375″W
98	50 47′12.189″N	1 1′57.467″W	232	50 35 9.556″N	0 29 27.862″W
99	50 47′12.212″N	1 1′57.339″W	233	50 35′40.062″N	0 30 28.457″W
100	50 47′12.228″N	1 1′57.251″W	234	50 35′44.745″N	0 30′46.976″W
101	50 47′12.250″N	1 1′57.145″W	235	50 35′51.526″N	0 31′13.797″W
102	50 47′12.272″N	1 1′57.028″W	236	50 35′58.386″N	0 32′43.614″W
103	50 47′12.291″N	1 1′56.926″W	237	50 36 25.406″N	0 34 29.597″W
104	50 47′12.310″N	1 1′56.838″W	238	50 36′50.593″N	0 38′30.650″W
105	50 47′12.339″N	1 1′56.698″W	239	50 36′54.547″N	0 39 8.625″W
106	50 47′12.356″N	1 1′56.579″W	240	50 36′58.685″N	0 39′48.398″W
107	50 47′12.319″N	1 1′56.560″W	241	50 36′58.756″N	0 41 20.244″W
108	50 47′12.319″N	1 1′56.560″W	242	50 37′31.141″N	0 43′33.714″W
109	50 47′12.319″N	1 1′56.560″W	243	50 38′15.012″N	0 46′11.964″W
110	50 47′12.377″N	1 1′56.330″W	244	50 38′57.306″N	0 49 9.233″W
111	50 47′12.390″N	1 1′56.270″W	245	50 39 21.609″N	0 50 24.001″W
112	50 47′12.406″N	1 1′56.188″W	246	50 39 29.289″N	0 50′46.600″W
113	50 47′12.425″N	1 1′56.105″W	247	50 39′49.747″N	0 51′13.619″W
114	50 47′12.443″N	1 1′56.031″W	248	50 40 9.842″N	0 51′34.878″W
115	50 47′12.460″N	1 1′55.963″W	249	50 41 21.878″N	0 53′17.854″W
116	50 47′11.065″N	1 1′55.703″W	250	50 41′40.626″N	0 53′49.178″W
117	50 45′45.014″N	1 1′39.017″W	251	50 41′45.252″N	0 54′14.928″W
118	50 45′33.952″N	1 1 29.392″W	252	50 43 22.501″N	0 57′7.513″W
119	50 45 23.239″N	1 1′14.438″W	253	50 43′31.132″N	0 57 27.942″W
120	50 45′13.571″N	1 0′56.514″W	254	50 43 29.651″N	0 57 29.496″W
121	50 45 2.494″N	1 0 25.147″W	255	50 43′40.579″N	0 57′55.368″W
122	50 44′50.712″N	0 59′52.953″W	256	50 43′42.061″N	0 57′53.814″W
123	50 44′39.281″N	0 59 22.406″W	257	50 43′43.756″N	0 57′57.828″W

124	50 44′2.379″N	0 57′54.977″W	258	50 43′44.075″N	0 57′57.664″W
125	50 44′0.123″N	0 57′49.635″W	259	50 43′48.906″N	0 58′9.102″W
126	50 44′0.446″N	0 57′49.479″W	260	50 44′25.563″N	0 59′35.955″W
127	50 43′56.072″N	0 57′39.124″W	261	50 44′36.732″N	1 0′5.805″W
128	50 43′54.590″N	0 57′40.678″W	262	50 44′48.414″N	1 0′37.724″W
129	50 43′43.661″N	0 57′14.804″W	263	50 45′0.207″N	1 1′11.121″W
130	50 43′45.143″N	0 57′13.250″W	264	50 45′11.652″N	1 1′32.340″W
131	50 43′35.866″N	0 56′51.292″W	265	50 45′24.564″N	1 1′50.365″W
132	50 42′27.974″N	0 54′50.779″W	266	50 45′39.934″N	1 2′3.740″W
133	50 42′23.228″N	0 54′42.359″W	267	50 47′8.146″N	1 2′20.857″W
134	50 42′18.988″N	0 54′34.839″W			

7. This licence remains in force until the authorised development has been decommissioned in accordance with a programme to be approved by the MMO and the completion of such programme has been confirmed by the MMO in writing.

8. The provisions of section 72 of the 2009 Act apply to this licence except that the provisions of section 72(7) relating to the transfer of the licence only apply to a transfer not falling within article 6 (Benefit of the Order).

9. With respect to any condition which requires the licensed activities to be carried out in accordance with the plans, protocols or statements approved under this Schedule, the plans, protocols or statements so approved are taken to include amendments that may be approved in writing by the MMO subsequent to the first approval of those plans, protocols or statements.

10. Any amendments to or variations from the approved plans, protocols or statements must be minor or immaterial and it must be demonstrated to the satisfaction of the MMO that they are unlikely to give rise to any materially new or materially different environmental effects from those assessed in the environmental statement.

PART 2

Conditions

Design Parameters

1. The total length of the marine HVDC cables from MHWS to the EEZ and cable protection and the cable protection area must not exceed the following –

Work	*Cable length*	*Cable protection length*	*Cable protection area*
Works No. 6 and 7	109km	23.5km	0.74km^2

Notifications and Inspections

2.—(1) The undertaker must ensure that –

(a) a copy of this licence (issued as part of the grant of the Order) and any subsequent amendments or revisions to it is provided to –

(i) all agents and contractors notified to the MMO in accordance with condition 4(c)(vi); and

(ii) the masters and transport managers responsible for the vessels notified to the MMO in accordance with condition 4(c)(vi).

(b) within 28 days of receipt of a copy of this licence those persons referred to in paragraph (a) above must provide a completed confirmation form to the MMO confirming receipt of this licence.

(2) Only those persons and vessels notified to the MMO pursuant to condition 4(1)(c)(vi) are permitted to carry out the licensed activities.

(3) Copies of this licence must also be available for inspection at the following locations –

(a) the undertakers registered address;

(b) any site office located at or adjacent to the construction site and used by the undertaker or its agents and contractors responsible for the loading, transportation or disposal of the authorised deposits; and

(c) on board each vessel or at the office of any transport manager with responsibility for vessels from which authorised deposits or removals are to be made.

(4) The documents referred to in sub-paragraphs (1)(a) must be available for inspection by an authorised enforcement officer at the locations set out in sub-paragraph (3)(b) above.

(5) The undertaker must provide access, and if necessary appropriate transportation, to the marine construction site or any other associated works or vessels to facilitate any inspection that the MMO considers necessary to inspect the works during the construction and operation of the authorised development.

(6) The undertaker must inform the MMO Local Office in writing at least five days prior to the commencement of the licensed activities or any part of them.

(7) The undertaker must inform the Kingfisher Information Service of Seafish by e-mail to kingfisher@seafish.co.uk of details regarding the vessel routes, timings and locations relating to the construction of the authorised development or relevant part –

(a) at least 14 days prior to the commencement of marine activities for inclusion in the Kingfisher Fortnightly Bulletin and marine hazard awareness data; and

(b) as soon as reasonably practicable and not later than 24 hours on completion of construction of all licensed marine activities'

and confirmation of notification in accordance with this paragraph (7) must be provided MMO within 5 days.

(8) A local notification to mariners must be issued at least 14 days prior to the commencement of the licensed activities or any part of them advising of the start date of Works No. 6 and Works No. 7 and the expected vessel routes from the construction ports to the relevant location. Copies of all notices must be provided to the MMO, the MCA and the UK Hydrographic Office within 5 days.

(9) The local notification to mariners must be updated and reissued at weekly intervals during construction activities and at least 5 days before any planned operations and maintenance works and supplemented with VHF radio broadcasts agreed with the MCA in accordance with the construction programme approved under condition 7(1)(b). Copies of all notices must be provided to the MMO and the UK Hydrographic Office within 5 days.

(10) The undertaker must notify the UK Hydrographic Office both of the commencement (within 14days), progress and completion of construction (within 14 days) of the licensed activities in order that all necessary amendments to the nautical charts are made and the undertaker must send a copy of such notifications to the MMO within 5 days.

(11) The undertaker must notify HM Coastguard at least 14 days prior to commencement of the licence activities or any part of them advising of the start date of Works No. 6 and Works No. 7 by e-mail to the relevant zone contacts (zone15@hmcg.gov.uk or zone16@hmcg.gov.uk) and a copy of that notice must be provided to the MMO within 5 days.

(12) The undertaker must notify the Environment Agency at least 14 days prior to the commencement of Works No. 6 and the temporary HDD entry/exit pits forming part of Work No.7.

(13) In case of damage to, or destruction or decay of, the authorised development or any part thereof the undertaker must as soon as possible and no later than 24 hours following the undertaker becoming aware of any such damage, destruction or decay, notify the MMO, the MCA, Trinity House, the Kingfisher Information Service of Seafish and the UK Hydrographic Office.

(14) In case of exposure of the marine HVDC cables on or above the seabed, the undertaker must within 3 days following identification of any exposure of the marine HVDC cables, issue a local notice to mariners and by informing Kingfisher Information Service of Seafish of the location and extent of the exposure. Copies of all notices must be provided to the MMO, the MCA, Trinity House and the UK Hydrographic Office within 5 days.

Pre-construction surveys

3.—(1) Surveys in relation to the pre-construction phase of the authorised development will include –

(a) a swath-bathymetry survey within the Order limits seaward of MHWS to:

(i) inform future navigation risk assessments as part of the cable specification and installation plan; and

(ii) determine the location, extent and composition of any biogenic and geogenic reef habitat within the Order limits seaward of MHWS identified in the environmental statement.

(2) The pre-construction surveys must not be carried out until details of the proposed pre-construction surveys, including methodologies and timings, and a proposed form and content for a pre-construction baseline report have been submitted to and approved by the MMO in consultation with the relevant statutory bodies.

(3) The MMO must determine an application for approval made under sub-paragraph (2) within a period of 8 weeks commencing on the date the application is received by the MMO, unless otherwise agreed in writing with the undertaker.

(4) Where the MMO is minded to refuse an application for consent made under sub-paragraph (2) and notifies the undertaker accordingly, or fails to determine the application for approval under this article within the period prescribed in sub-paragraph (2), the undertaker may appeal to the Secretary of State in accordance with the procedure in Part 3 of this licence.

(5) The undertaker must carry out the pre-construction surveys agreed under sub-paragraph (2) or approved following an appeal under sub-paragraph (4) and as may be updated from time to time and provide the baseline report to the MMO in the agreed format in accordance with the agreed timetable, unless otherwise agreed with the MMO in consultation with the relevant statutory nature conservation bodies.

Pre-construction plans and documentation

4.—(1) The licensed activities or any part of those activities must not commence until the following (as relevant to that part) have been submitted to and approved in writing by the MMO –

(a) A design plan at a scale of 1:25,000 and 1:50,000, including detailed representation of the most suitably scaled admiralty chart, to be agreed in writing with the MMO which shows –

(i) the length and arrangement of all cables comprised in Works No. 6 and 7;

(ii) the indicative location of the temporary horizontal directional drilling entry/exit pits within the horizontal direction drilling work area;

(iii) indicative location of cable crossings; and

to ensure compliance with the description of Works No. 6 and 7 and compliance with condition 1 above.

(b) a construction programme to include details of –

(i) the proposed construction start date; and

(ii) the proposed timings for mobilisation of plant, delivery of materials and installation works; and

(iii) an indicative construction programme for the carrying out of the works comprised in Works No. 6 and 7;

which may be amended from time to time subject to the approval in writing of the MMO.

(c) a cable burial and installation plan in accordance with the construction methods assessed in the environmental statement and including details of –

(i) marine HVDC cable installation methodology, including the methods for disposal;

(ii) technical specification of marine HVDC cables below MHWS and cable burial depths in accordance with industry good practice;

(iii) a detailed cable laying plan for the Order limits seaward of MHWS, incorporating a burial assessment which includes the identification of any part of the marine HVDC cables that exceeds 5% of navigable depth referenced to chart datum and, in the event of the identification of any area of cable protection that exceeds 5% of navigable depth, details of any steps (to be determined following consultation with Trinity House and the MCA) to be taken to ensure existing and future safe navigation is not compromised or such similar assessment to ascertain suitable burial depths and cable laying techniques, including cable protection,

(iv) proposals for monitoring the marine HVDC cables including cable protection during the operation of the authorised development which includes a risk based approach to the management of unburied or shallow buried cables;

(v) advisory safe passing distances for vessels around construction sites;

(vi) the name and function of any agent or contractor appointed to engage in the licensed activities vessels and vessel transit corridors and a completed Hydrographic Note H102 listing the vessels to be used in relation to the licensed activities;

(vii) codes of conduct for vessel operators;

(viii) details of any required micro-siting in relation to biogenic and geogenic reef habitat or archaeological construction exclusion zones within the Order limits seaward of MHWS; and

(ix) associated ancillary works.

(d) an environmental management plan (in accordance with the outline marine construction environmental management plan) covering the period of construction to include details of –

(i) a marine pollution contingency plan to address the risks, methods and procedures to deal with any spills and collision incidents of the authorised development in relation to all activities to be carried out;

(ii) a biosecurity plan detailing how risk of the introduction and spread of invasive non-native species will be minimised;

(iii) waste management and disposal arrangements;

(iv) the appointment and responsibilities of a fisheries liaison officer; and

(v) a fisheries liaison and coexistence plan to ensure relevant fishing fleets are notified of commencement of the licensed activities and to address the interaction of the licensed activities with fishing activities.

(2) The licensed activities or any part of the activities must not commence unless a written scheme of archaeological investigation has been submitted to and approved by the MMO, in accordance with the marine archaeology outline written scheme of investigation, and in accordance with industry good practice and in consultation with the statutory historic body to include –

(a) details of responsibilities of the undertaker, archaeological consultant and contractor;

(b) archaeological analysis of survey data, and timetable for reporting, which is to be submitted to the MMO;

(c) delivery of any mitigation including the use of archaeological construction exclusion zones in agreement with the MMO;

(d) a requirement for the undertaker to ensure that a copy of any agreed archaeological report is deposited with the National Record of the Historic Environment, by submitting a Historic England OASIS ('Online AccesS to the Index of archaeological InvestigationS') form with a digital copy of the relevant report within six months of completion of construction of the authorised development, and to notify the MMO that the OASIS form has been submitted to the National Record of the Historic Environment within two weeks of submission; and

(e) a reporting and recording protocol, including reporting of any wreck or wreck material during construction, operation and decommissioning of the authorised development.

(3) No part of the licensed activities may commence until a statement confirming how the undertaker has taken into account the MCA safety guidance in so far as is applicable to that part of the licensed activities has been submitted to and approved by the MMO, in consultation with the MCA.

5.–(1) Each programme, statement, plan, protocol or scheme required to be approved under condition 4 must be submitted for approval at least four months prior to the intended commencement of the licensed activities, except where otherwise stated or unless otherwise agreed in writing by the MMO.

(2) Save in respect of any plan which secures mitigation to avoid adversely affecting the integrity of a European Site, where the MMO fails to determine that application for approval under condition 4 within the period referred to in sub-paragraph (1), the programme, statement, plan, protocol or scheme is deemed to be approved by the MMO.

(3) The MMO must determine an application for approval made under condition 4 within a period of four months commencing on the date the application is received by the MMO, unless otherwise agreed in writing with the undertaker.

(4) Where the MMO is minded to refuse an application for approval made under condition 4 and notifies the undertaker accordingly, or the MMO fails to determine the application for consent under this article within the period prescribed in sub-paragraph (2), the undertaker may appeal to the Secretary of State in accordance with the procedure in Part 3 of this licence.

(5) The licensed activities must be carried out in accordance with the approved plans, protocols, statements, schemes and details approved under condition 4 or approved following an appeal under sub-paragraph (4) and as may be updated from time to time, unless otherwise agreed in writing by the MMO.

(6) Prior to the commencement of Work No. 6 and the temporary HDD entry/exit pits forming part of Work No. 7, the undertaker must provide the Environment Agency with a copy of any construction programme approved by the MMO pursuant to condition 4(1)(b) and any method statement relating to sediment mobilising activities relevant to the temporary HDD entry/exit pits forming part of Work No.7.

Reporting of engaged agents, contractors and vessels

6. Any change to the details supplied pursuant to condition 4(1)(c)(vi) must be notified to the MMO in writing prior to the agent, contractor, or vessel engaging in the licensed activities.

Aids to Navigation

7.—(1) Any vessels utilised during the licensed activities, when jacked up, must exhibit signals in accordance with the standard marking schedule;

(2) The undertaker must during the whole period from the commencement of the licensed activities to completion of decommissioning of the authorised development exhibit such lights,

marks, sounds, signals and other aids to navigation, and take such other steps for the prevention of danger to navigation as Trinity House may from time to time direct;

(3) The undertaker must during the period from the start of construction of the authorised development to completion of decommissioning of the authorised development keep Trinity House and the MMO informed of progress of the authorised development including the following –

(a) notice of commencement of construction of the authorised development within 24 hours of commencement having occurred;

(b) notice within 24 hours of any aids to navigation being established or relocated by the undertaker; and

(c) notice within 5days of completion of construction of the authorised development.

(4) In the event the provisions of condition 2(13) are invoked, the undertaker must lay down such buoys, exhibit such lights and take such other steps for preventing danger to navigation as directed by Trinity House.

Chemicals, drilling and debris

8.—(1) The Undertaker must ensure that any coatings/treatments are suitable for use in the marine environment and are used in accordance with guidelines approved by the Health and Safety Executive and guidance for pollution prevention issued by the government.

(2) The storage, handling, transport and use of fuels, lubricants, chemicals and other substances must be undertaken so as to prevent releases into the marine environment, including bunding of 110% of the total volume of all reservoirs and containers.

(3) The undertaker must ensure that only inert material of natural origin produced during dredging in connection with the carrying out of the Works is disposed of at the disposal sites with reference WI048 and WI049 within the extent of the Order limits seaward of MHWS and all other materials must be screened out before the disposal of inert material and disposed of to land.

(4) The undertaker must inform the MMO of the location of and quantities of material disposed of each month under the Order, by submission of a disposal return by 14 February each year for the months August to January inclusive, and by 15 August for the months February to July inclusive.

(5) The undertaker must ensure any rock material used in the construction of the authorised development is from a recognised source, free from contaminants and containing minimal fines.

(6) In the event that any rock material is misplaced or lost below MHWS, the undertaker must report the loss to the District Marine Office within 48 hours and if the MMO reasonably considers such material to constitute a navigation or environmental hazard (dependent on the size and nature of the material) the undertaker must endeavour to locate the material and recover it.

(7) The undertaker must ensure that any oil, fuel or chemical spill within the marine environment is reported to the MMO, Marine Pollution Response Team in accordance with the marine pollution contingency plan agreed under condition 4(1)(d)(i);

(8) All dropped objects must be reported to the MMO using the Dropped Object Procedure Form as soon as reasonably practicable and in any event within 24 hours of the undertaker becoming aware of an incident. On receipt of the Dropped Object Procedure Form, the MMO may require relevant surveys to be carried out by the undertaker (such as side scan sonar) if reasonable to do so and the MMO may require obstructions to be removed from the seabed at the undertakers expense if reasonable to do so.

Force majeure

9.—(1) If, due to stress of weather or any other cause the master of a vessel determines that it is necessary to deposit the authorised deposits outside of the Order limits seaward of MHWS or to dispose of dredged material within the Order limits seaward of MHWS but outside of the disposal sites with reference WI048 and WI049 because the safety of human life and/or the vessel is

threatened, within 48 hours full details of the circumstances of the disposal must be notified to the MMO.

(2) The unauthorised deposits must be removed at the expense of the undertaker unless written approval is obtained from the MMO.

Post-construction surveys

10.—(1) Within 6 months of the completion of the construction of the authorised development the undertaker is to submit to the MMO for approval a swath-bathymetry survey within the Order limits seaward of MHWS in order to:

(a) inform of any dropped objects or residual navigational risk; and

(b) to determine any change in the location, extent and composition of any biogenic or geogenic reef feature identified in the pre-construction survey in the parts of the Order limits seaward of MHWS in which construction works were carried out.

(2) Where requested by the MMO following the completion of construction of the authorised development the undertaker will produce an electromagnetic deviation survey to confirm that there must be no more than a 3 degree electromagnetic variation for 95% of the marine HVDC cables and no more than a 5 degree electromagnetic variation for the remaining 5% of the marine HVDC cables in water depths of 5m and deeper as a result of the operation of the authorised development.

(3) Within 3 months of completion of construction of the authorised development the undertaker must submit International Hydrographic Office (IHO Order 1A) approved Multi Beam Echo Sounder survey data and report to the MMO, the MCA, Trinity House and UK Hydrographic Office, meeting MGN 543 hydrographic survey guidelines and confirming the final clearance depths over the marine HVDC cables and the associated cable protection. If the MMO, the MCA, Trinity House or the UKHO identify any area as a possible danger to navigation to exhibit such lights, marks, sounds, signals and other aids to navigation as are reasonably required by the MMO, the MCA, Trinity House and/or UK Hydrographic Office unless otherwise agreed.

Cable burial management plan

11.—(1) Following the completion of construction of the authorised development the undertaker will submit a cable burial management plan including results of the post installation surveys to the MMO for its approval (in consultation with the statutory nature conservation body) which is to include:

(a) as built plans showing location of the marine HVDC cables and cable protection;

(b) details of the proposed frequency and extent of future cable burial surveys;

(c) details of scour/erosion around the Atlantic Cable and proposed CrossChannel Fibre Cable crossings described in paragraph 4(1) of Part 1; and

(d) proposals for maintaining marine cables including cable protection during the operational lifetime of the authorised development which includes a risk based approach to the management of unburied or shallow buried cables;

and which may be amended from time to time subject to the approval in writing of the MMO.

(2) Following the laying of any new cable protection following the completion of the construction in accordance with condition 12 the undertaker will submit an updated cable burial management plan including results of the post installation surveys to the MMO for its approval (in consultation with the statutory nature conservation body) which is to include as built plans showing location of the marine HVDC cables and the new cable protection;

(3) The cable burial management plan approved by the MMO as may be updated from to time must be implemented during the operational lifetime of the project and reviewed as specified within the plan, following cable burial surveys, installation of cable protection, or periodically as required.

Maintenance of the authorised development

12.—(1) The undertaker may at any time maintain the authorised development, except to the extent that this licence or an agreement made under this licence provides otherwise;

(2) No works of maintenance whose likely effect is not assessed in the environmental statement or which are likely to give rise to any materially new or materially different environmental effects from those assessed in the environmental statement may be carried out, unless otherwise approved by the MMO.

(3) Works of maintenance include but are not limited to –

(a) cable repairs, including but not limited to the removal of defective cable and sediment to undertake those repairs, and addition of sections of cable to replace defective cable and the removal and replacement of cable protection;

(b) remedial cable burial

(4) Where the MMO's approval is required under paragraph (2), such approval may be given only where it has been demonstrated to the satisfaction of the MMO that the approval sought is unlikely to give rise to any materially new or materially different environmental effects from those assessed in the environmental statement.

(5) The laying of new cable protection following the completion of construction must not extend for longer than 15 years from the date of the issue of the notification of the completion of the completion of construction to be issued pursuant to condition 2(10) unless otherwise agreed with the MMO.

(6) Prior to the laying of any new cable protection following the completion of the construction the undertaker must provide details of and justification for the deployment of new cable protection including a description of seabed habitat which is to be informed by survey data less than 5 years old, unless otherwise agreed with the MMO, in the location/s where the laying of additional cable protection is proposed for the approval of the MMO and must not lay any new cable protection until the MMO has approved its deployment.

(7) The undertaker must inform the MMO Local Office in writing at least 5 days prior to the commencement of the laying of any new cable protection following the completion of construction.

(8) The undertaker must issue a local notification to mariners at least 5 days prior to the laying of any new cable protection following the completion of construction and that notice must be forwarded to the MMO within 5 days of issue.

(9) The undertaker must issue a notice to the UK Hydrographic Office at least 5 days prior to the laying of any new cable protection following the completion of construction to permit the promulgation of maritime safety information and updating of nautical charts and publications

(10) The undertaker must notify the MMO Local Office of the completion of the laying of any new cable protection following the completion of construction no later than 14days after the completion of the laying of the new cable protection.

(11) Within 4 weeks of the completion of laying of any new cable protection following the completion of construction, unless otherwise agreed with the MMO, the undertaker must submit International Hydrographic Office (IHO Order 1A) approved Multi Beam Echo Sounder survey data and report to the MMO, the MCA and UKHO, meeting MGN 543 hydrographic survey guidelines and confirming the final clearance depths over the protected cables where the new cable protection has been laid. Once this data has been assessed, if any area is identified as a possible danger to navigation it may require marking with aids to navigation at the undertakers expense.

(12) The MMO must determine any application for approval made under this condition 13 within a period of 8 weeks commencing on the date the application is received by the MMO, unless otherwise agreed in writing with the undertaker.

Post-construction approvals

13.—(1) The MMO must determine any application for approval made under condition 10 or 11 within a period of four months commencing on the date the application is received by the MMO, unless otherwise agreed in writing with the undertaker.

(2) Where the MMO is minded to refuse an application for approval made under condition 10 or 11 and notifies the undertaker accordingly, or the MMO fails to determine the application for consent under this article within the period prescribed in sub-paragraph (1), the undertaker may appeal to the Secretary of State in accordance with the procedure in Schedule 16.

Herring mitigation

14. Unless otherwise agreed in writing with the MMO, no construction activities are to be undertaken between Kilometre Points 90 to 109 during the period of 15th December to 15th January inclusive.

SCHEDULE 16

Article 37

Deemed marine licence procedure for appeals

1. Where the MMO refuses an application for approval under conditions 3, 4, 10, 11 and 12 of the deemed marine licence and notifies the undertaker accordingly, or fails to determine the application for approval in accordance with any of those conditions the undertaker may by notice appeal against such a refusal or non-determination and the 2011 Regulations apply subject to the modifications set out in paragraph 2 below.

2. The 2011 Regulations are modified so as to read for the purposes of this Order only as follows –

(1) For regulation 4(1) (Appeal against marine licensing decisions) substitute –

"A person who has applied for approval under condition [x] of Part 2 of Schedule 20 to the AQUIND Interconnector Order 202[x] may by notice appeal against a decision to refuse such an application or a failure to determine such an application."

(2) For regulation 6(1) (Time limit for the notice of appeal) substitute –

"Notice of an appeal must be received by the Secretary of State within the period of four months beginning with the date of the decision to which the application relates or, in the case of non-determination, the date by which the application should have been determined."

(3) For regulation 7(2)(a) (Contents of the notice of appeal) substitute –

"a copy of the decision to which the appeal relates or, in the case of non-determination, the date by which the application should have been determined; and"

(4) In regulation 8(1) (Decision as to appeal procedure and start date) the words "as soon as practicable after" are substituted with the words "within the period of 2 weeks beginning on the date of".

(5) In regulation 10(3) (Representations and further comments) the word "At" is substituted with the words "By no later than".

(6) In regulation 10(5) (Representations and further comments) the words "as soon as is reasonably practicable after" are substituted with the words "by no later than the end of".

(7) In regulation 12(1) (Establishing the hearing or inquiry) after the words "("the relevant date")" the words "which must be within 14 weeks of the start date" are inserted.

(8) In regulation 13(2) (Pre-inquiry meeting) the words "4 weeks" are substituted with the words "2 weeks".

(9) In regulation 22(1) (Determining the appeal – general) after the words "against a decision" the words "or a non-determination" are inserted and for regulation 22(1)(b) and (c) substitute –

"(a) allow the appeal, and where the appeal is against a decision, quash the decision in whole or in part;

(b) where the appointed person allows the appeal, and in the case of an appeal against a decision quashes that decision in whole or in part, direct the Authority to approve the application for approval to which the appeal relates"

(10) In regulation 22(2) (Determining the appeal – general) after the words "in writing of the determination" insert the words "within the period of 12 weeks beginning with the start date where the appeal is to be determined by written representations or within the period of 12 weeks beginning on the day of the close of the hearing or inquiry where the appeal is to be determined by way of a hearing or inquiry.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order authorises AQUIND Limited (referred to in this Order as the undertaker) to construct, operate and maintain an electricity interconnector near Lovedean, Hampshire out to the EEZ boundary between UK and France waters, to be known as AQUIND Interconnector, as well associated development. The Order imposes requirements in connection with the electricity interconnector and the associated development, together the authorised development.

The Order permits the undertaker to acquire, compulsorily or by agreement, lands and rights in land and to use land for the purposes of the authorised development.

A copy of the plans and book of reference referred to in this Order and certified in accordance with article 43 (Certification of plans, etc.) of this Order may be inspected free of charge at [xx].

SCHEDULE 2

JUDGMENT IN *R(OAO SAVE STONEHENGE WORLD HERITAGE SITE LIMITED) v SECRETARY OF STATE FOR TRANSPORT [2021] EWHC 2161 (ADMIN)*

Neutral Citation Number: [2021] EWHC 2161 (Admin)

Case No: C0/4844/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before :

THE HON. MR JUSTICE HOLGATE

Between :

The Queen on the application of SAVE STONEHENGE WORLD HERITAGE SITE LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR TRANSPORT	**Defendant**
- and –	
(1) HIGHWAYS ENGLAND **(2) HISTORIC BUILDINGS AND MONUMENTS COMMISSION FOR ENGLAND ("HISTORIC ENGLAND")**	**Interested Parties**

\- -
\- -

David Wolfe QC and Victoria Hutton (instructed by **Leigh Day**) for the **Claimant**
James Strachan QC and Rose Grogan (instructed by the **Government Legal Department**) for the **Defendant**
Reuben Taylor QC (instructed by **Pinsent Masons**) for the **First Interested Party**
Richard Harwood QC and Christiaan Zwart (instructed by **Shoosmiths**) for the **Second Interested Party**

Hearing dates: 23rd, 24th and 25th June 2021

\- -

Approved Judgment

Covid-19 Protocol: This judgment will be handed down remotely by circulation to the parties or their representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down will be deemed to be 3:45pm on 30 July 2021.

Mr Justice Holgate:

Introduction

1. The claimant, Save Stonehenge World Heritage Site Limited, seeks to challenge by judicial review the decision dated 12 November 2020 of the defendant, the Secretary of State for Transport ("SST"), to grant a development consent order ("DCO") under s.114 of the Planning Act 2008 ("the PA 2008") for the construction of a new route 13 km long for the A303 between Amesbury and Berwick Down which would replace the existing surface route. The new road would have a dual instead of a single carriageway and would run in a tunnel 3.3 km long through the Stonehenge part of the Stonehenge, Avebury and Associated Sites World Heritage Site ("WHS").

2. The application for the order was made by the first interested party, Highways England ("IP1"), a strategic highways company established under the Infrastructure Act 2015 ("IA 2015").

3. The second interested party, Historic England ("IP2"), was a statutory consultee in relation to the application and is the government's statutory advisor on the historic environment. IP2 has long been involved in the management of Stonehenge and since 2014 with the current road proposals.

4. The claimant is a company formed by the supporters of the Stonehenge Alliance, which is an unincorporated, umbrella campaign group, which co-ordinated the objections of many of its supporters before the statutory examination into the application.

5. On 16 November 1972 the General Conference of UNESCO adopted the Convention Concerning the Protection of the World Cultural and Natural Heritage ("the World Heritage Convention" or "the Convention"). The UK ratified the Convention on 29 May 1984. In 1986 the World Heritage Committee ("WHC") inscribed Stonehenge and Avebury as a WHS having "Outstanding Universal Value" ("OUV") under article 11(2).

6. In June 2013 the WHC adopted a statement of the OUV for the WHS which included the following:-

> "The World Heritage property comprises two areas of chalkland in Southern Britain within which complexes of Neolithic and Bronze Age ceremonial and funerary monuments and associated sites were built. Each area contains a focal stone circle and henge and many other major monuments. At Stonehenge these include the Avenue, the Cursuses, Durrington Walls, Woodhenge, and the densest concentration of burial mounds in Britain. At Avebury, they include Windmill Hill, the West Kennet Long Barrow, the Sanctuary, Silbury Hill, the West Kennet and Beckhampton Avenues, the West Kennet Palisade Enclosures, and important barrows."

The WHS is said to be of OUV for qualities which include the following:-

> "● Stonehenge is one of the most impressive prehistoric megalithic monuments in the world on account of the sheer size of its megaliths, the sophistication of its concentric plan and architectural design, the shaping of the stones, uniquely using both Wiltshire Sarsen sandstone and Pembroke Bluestone, and the precision with which it was built.
>
> ● There is an exceptional survival of prehistoric monuments and sites within the World Heritage property including settlements, burial grounds, and large constructions of earth and stone. Today, together with their settings, they form landscapes without parallel. These complexes would have been of major significance to those who created them, as is apparent by the huge investment of time and effort they represent. They provide an insight into the mortuary and ceremonial practices of the period, and are evidence of prehistoric technology, architecture, and astronomy. The careful siting of monuments in relation to the landscape helps us to further understand the Neolithic and Bronze Age."

The phrase "landscapes without parallel" has featured prominently in the material before the court.

7. The Stonehenge part of the WHS occupies about 25 sq. km and contains over 700 known archaeological features of which 415 are protected as parts of 175 scheduled ancient monuments under the Ancient Monuments and Archaeological Areas Act 1979 (see para. 6.11.1 of the Environmental Statement ("ES") for the project). For the assessment of impacts on heritage assets, either directly or upon their setting, the ES relied upon a primary study area up to 500m from the boundary of the proposed development. To address impacts on the setting of other high value assets a secondary study area was used extending to 2 km from that boundary. There are 255 scheduled monuments within the 2 km area, of which 167 fall entirely or partly within the WHS. Within that area there are also:-

   6 Grade I listed buildings
   14 Grade II* listed buildings
   209 Grade II listed buildings
   8 conservation areas.

8. There are 1142 known, non-designated heritage assets within the 500m study area, of which 11 would be directly impacted by the scheme. These 11 are relevant to ground 1(i) of the challenge.

9. Paragraphs 11.1.14 to 11.1.17 of the World Heritage Site Management Plan adopted on 18 May 2015 describe the background to the problem concerning the existing A303. Paragraph 11.1.14 states:-

> "…….. the A303 continues to have a major impact on the integrity of the wider WHS, the setting of its monuments and the ability of visitors to explore the southern part of the Site. The A303 divides the Stonehenge part of the WHS landscape into northern and southern sections diminishing its integrity and

> severing links between monuments in the two parts. It has significant impacts on the setting of Stonehenge and its Avenue as well as many other monuments that are attributes of OUV including a number of barrow cemeteries. The road and traffic represent visual and aural intrusion and have a major impact on the tranquillity of the WHS. Access to the southern part of the WHS is made both difficult and potentially dangerous by the road. In addition to its impacts on the WHS, reports indicate that the heavy congestion at certain times has a negative impact on the economy in the South West and locally and on the amenity of local residents."

10. Proposals to improve the A303 date back to the 1990s when the process of identifying alternative routes began. In 2002 the then Highways Agency proposed a dual carriageway scheme with a tunnel 2.1 km long running past Stonehenge. A public inquiry was held in 2004 (para. 11.1.15). The Inspector's report in 2005 recommended in favour of the scheme proceeding. But in view of increased tunnelling costs, the government decided to review whether the scheme still represented the best option for improving the A303 and the setting of Stonehenge, as well as value for money. The government concluded that, because of significant environmental constraints across the whole of the WHS, there were no acceptable alternatives to the 2.1 km tunnel, but the scheme costs could not be justified at that time. The need to find a solution for the negative impacts of the A303 remained a key challenge (para. 11.1.16). In 2014 the SST adopted a Road Investment Strategy ("RIS") for the purposes of the IA 2015 which identified the A303 corridor for improvements (para. 11.1.17). This included the scheme which became the subject of the application for the DCO.

11. In summary, IP1's scheme comprises the following components, running from west to east:-

    - A northern bypass of Winterbourne Stoke
    - A new grade-separated junction with twin roundabouts between the A303 and A360 to the west of, and outside, the WHS replacing the existing Longbarrow roundabout
    - "The western cutting" – a new dual carriageway within the WHS in a cutting 1 km long connecting with the western portals of the tunnel
    - A tunnel 3.3 km long running past Stonehenge
    - A new dual carriageway from the eastern tunnel portals to join the existing A303 at a new grade-separated junction (with a flyover) between the A303 and A345 at the Countess roundabout, of which 1 km would be in cutting ("the eastern cutting").

    The scheme includes a number of "green bridges." One bridge (150 m in width) over the western cutting would be located 150 m inside the western boundary of the WHS (which follows the line of the A360).

12. The proposals for the western cutting, western tunnel portals and the Longbarrow junction have attracted much opposition. In the current design, the cutting is about 1 km long, 7-11m deep, about 35m wide between retaining walls and 60m wide between the edges of sloping grass embankments (PR 2.2.14 and 5.7.221).

13. In 2017 the WHC expressed concerns that the proposed tunnel (then 2.9 km long) and cuttings would adversely affect the OUV and asked the UK to consider a non-tunnel bypass to the south of the WHS ("route F10") or a longer tunnel (approximately 5 km in length) which would remove the need for cuttings within the WHS. In 2019 the WHC commended the increase in the length of the tunnel to 3.3 km and the green bridge over the western cutting. However, it still expressed concerns about the exposed dual carriageways within the WHS, particularly the western cutting. The WHC urged the UK to pursue a longer tunnel "so that the western portal is located outside" the WHS. But it no longer asked the UK to pursue the F10 option.

14. The application for a DCO was the subject of a statutory examination before a panel of five inspectors between 2 April and 2 October 2019. The report of the Panel was submitted to the Department ("DfT") on 2 January 2020.

15. During the Examination the option of a longer tunnel of 4.5 km was considered. This would omit the western cutting.

16. In its report the Panel made the following observation about the western cutting at PR 5.7.225, in contrast to the removal of a surface road such as the existing A303:-

> "On the other hand, the current proposal for a cutting would introduce a greater physical change to the Stonehenge landscape than has occurred in its 6,000 years as a place of widely acknowledged human significance. Moreover, the change would be permanent and irreversible."

17. The Panel recommended that the DCO should not be granted (PR 7.5.25). In its final conclusions the Panel said that the scheme would have a "significantly adverse effect" on the OUV of the WHS, including its integrity and authenticity. Taking this together with it impact upon the "significance of heritage assets through development within their settings", the scheme would result in "substantial harm" (PR 7.5.11). The Panel considered that the benefits of the scheme would not be substantial and, in any event, would not outweigh the harm to the WHS (PR 7.5.21). In addition, the totality of the adverse impacts of the proposed scheme would strongly outweigh its overall benefits (PR 7.5.22). Those impacts included "considerable harm to both landscape character and visual amenity" (PR 7.5.12). Nonetheless, in PR 7.5.26 the Panel said this:-

> "….. the ExA recognises that its conclusions in relation to cultural heritage, landscape and visual impact issues and the other harms identified, are ultimately matters of planning judgment on which there have been differing and informed opinions and evidence submitted to the Examination." ("ExA" referring to the Examining Authority or Panel)

The Panel acknowledged that the SST might reach a different conclusion on adverse impacts, or the weight to be attached to planning benefits, and consequently on the overall planning balance, which might result in a DCO being granted.

18. In his decision letter the SST preferred the views of IP2 on the level of harm to the spatial, visual relations and settings of designated assets, namely that the harm would be "less than substantial" rather than "substantial" (DL 34). In DL 43 the SST specifically noted the concerns raised by interested parties and the Panel about the adverse impacts from the western cutting and portals, the Longbarrow junction and, to a lesser extent, the eastern approach. However, on balance, and taking into account the views of IP2 and Wiltshire Council, the SST concluded that any harm caused to the WHS as a whole would be less than substantial. In DL 80 the SST accepted advice from IP2 that the harm to "heritage assets, including the OUV," would be less than substantial. In DL 81 the SST disagreed with the Panel's views that the level of harm to the landscape would conflict with the National Policy Statement for National Networks ("NPSNN") and concluded that that harm would be outweighed by beneficial impacts throughout most of the scheme, so that landscape and visual impacts had a neutral effect rather than "considerable" negative weight, as the Panel had found. Ultimately, after weighing all the other considerations, the SST decided that the need for the scheme, together with its other benefits outweighed any harm (DL 87).

19. Plainly, this is a scheme about which strongly divergent opinions are held. It is therefore necessary to refer to what was said by the Divisional Court in *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 553 at [6]:-

> "It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The Court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully."

20. The present judgment can only decide whether the decision to grant the DCO was lawful or unlawful. It would therefore be wrong for the outcome of this judgment to be treated as either approving or disapproving the project. That is not the court's function.

21. I would like to express my gratitude to counsel for their helpful written and oral submissions and to the legal teams for the assistance they have given. In particular, the parties are to be commended for having produced a very helpful and comprehensive statement of common ground ("SOCG").

22. The claimant raises 5 grounds of challenge which it has summarised in paragraph 7 of its skeleton:-

> **Ground 1**: By considering the impact on the 'historic environment' as a whole, rather than assessing the impact on individual assets (as the applicable policies required), the Secretary of State has unlawfully failed to comply with and apply the NPSNN and the applicable local development plan policies. The Secretary of State has, in any event, unlawfully failed to give adequate and intelligible reasons as to (1) the significance of each of the affected heritage assets (2) the impact upon each asset and (3) the weight to be given to that impact.
>
> **Ground 2:** The Secretary of State disagreed with the assessment of his Expert Panel, without - unlawfully - there being any proper evidential basis for so doing. That happened in part because the Secretary of State misconstrued the advice of Historic England. In any event, the Secretary of State's reasons for disagreeing with the advice of his Expert Panel were unlawfully inadequate and unintelligible.
>
> **Ground 3:** The Secretary of State adopted an unlawful approach to the consideration of heritage harm under paragraphs 5.131-5.134 of the NPSNN.
>
> **Ground 4:** The Secretary of State's approach to the World Heritage Convention was unlawful.
>
> **Ground 5:** The Secretary of State failed to consider mandatory material considerations, namely: (i) the breach of various local policies, (ii) the impact of his finding of heritage harm which undermined the business case for the proposal and (iii) the existence of at least one alternative.

23. On 16 February 2021 I ordered that the application for permission to apply for judicial review be adjourned to a "rolled up" hearing at which both the question of permission and substantive legal issues would be considered. A case management hearing took place on 23 February 2021 at which the parties successfully co-operated in putting forward directions to enable the court to handle the issues, and the potentially large amount of material, fairly and efficiently.

24. On 7 April 2020 the claimant made an application for permission to amend the Statement of Facts and Grounds to add ground 6, which alleged that the decision to grant the DCO had been vitiated by actual or apparent pre-determination and for an order for disclosure in relation to that ground. The application was opposed and on 18 May 2021 Waksman J refused it on the papers. The claimant renewed its application to an oral hearing and the matter came before me on 10 June 2021. Like Waksman J, I found the proposed new ground to be wholly unarguable and so dismissed the application. The judgment is at [2021] EWHC 1642 (Admin).

25. The remainder of this judgment is set out under the following headings:-

Subject	Paragraph Numbers
Planning legislation for nationally significant infrastructure projects	26-36
The National Policy Statement for National Networks	37-48
Development plan and other policies	49-55
The World Heritage Convention	56-59
Legal Principles	60-67
The Environmental Statement	68-77
Views of parties at the Examination	78-86
The Panel's report	87-121
The Secretary of State's decision letter	122-144
Ground 1: Impacts on individual assets (i) The 11 non-designated assets (ii) Failure to consider 14 scheduled ancient monuments (iii) Failure to consider effects on the settings of heritage assets (iv) Whether the Secretary of State took into account the impacts on all heritage assets	145-182 149-155 156-160 161-166 167-181
Ground 2: lack of evidence to support disagreement with the Panel	183-189
Ground 3: double-counting of heritage benefits	190-209
Ground 4: whether the proposal breached the World Heritage Convention	210-233
Ground 5 (i) Failure to take into account local policies (ii) Whether the business case ought to have taken into account the findings on heritage harm (iii) Alternatives to the proposed western cutting and portals	224-290 225-231 232-241 242-290
Conclusions	291-294
Appendix 1: Legal principles agreed between the parties	
Appendix 2: paragraphs 25 to 43 and 50 of the decision letter	

Planning legislation for nationally significant infrastructure projects

26. The proposed development is a nationally significant infrastructure project for the purposes of the PA 2008. Accordingly, development consent is required under that legislation (s.31). The requirements to obtain other approvals such as planning permission and scheduled ancient monument consent are disapplied by s.33.

27. The statutory framework for the designation of national policy statements and for obtaining a DCO has been summarised in a number of recent cases and need not be repeated here (see e.g. *R (Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787 at [5]-[8]; *R (Spurrier) v Secretary of State for Transport* at [21]-[40] and [91]-[112]; *R (Client Earth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] PTSR 1709 at [26]-[52] and [105]-[116]; [2021] EWCA Civ 43 at [67-68] and [104 - 105]); *R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [19]-[38]). None of the analysis in those passages was in dispute here.

28. Section 66(1) and 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 do not apply to the determination of applications for a DCO. But instead regulation 3 of the Infrastructure Planning (Decision) Regulations 2010 (SI 2010 No. 305) ("the 2010 Regulations") provides:-

> " (1) When deciding an application which affects a listed building or its setting, the Secretary of State must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.
>
> (2) When deciding an application relating to a conservation area, the Secretary of State must have regard to the desirability of preserving or enhancing the character or appearance of that area.
>
> (3) When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the Secretary of State must have regard to the desirability of preserving the scheduled monument or its setting."

29. The project constituted EIA development to which the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) ("the EIA Regulations 2017") applied.

30. Regulation 4(2) prohibits the granting of a DCO "unless an EIA has been carried out in respect of that application." Regulation 5(1) defines EIA as a process consisting of (a) the preparation of an ES, (b) compliance with publicity, notification and consultation requirements in the EIA Regulations 2017 on the application and the ES, and (c) compliance in this case with regulation 21.

31. Regulation 21(1) imposed the following obligations on the Secretary of State:-

> "When deciding whether to make an order granting development consent for EIA development the Secretary of State *must*—

> (a*)* examine the environmental information;
>
> (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary;
>
> (c) integrate that conclusion into the decision as to whether an order is to be granted; and
>
> (d) if an order is to be made, consider whether it is appropriate to impose monitoring measures."

"Environmental information" is defined by regulation 3(1) as including the ES, any further information added to the ES, and representations made by consultees or other persons about the effects of the development on the environment.

32. The EIA "must identify, describe and assess in an appropriate manner" "the direct and indirect significant effects of the proposed development" on *inter alia* "cultural heritage" (regulation 5(2)).

33. Regulation 14 defines what must be contained in an ES, including "the likely significant effect of the proposed development on the environment" (regulations 14(2)(b) and also:-

> "a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment" (regulation 14(2)(d))

This is repeated in paragraph 2 of schedule 4 (linked to regulation 14(2)(f)). Paragraph 3 of schedule 4 requires the ES to contain a description of the relevant aspects of the current state of the environment, the "baseline scenario." As we shall see, the effects of the current A303 on the environment, including heritage assets, formed an important part of the assessment of the changes in environmental impact resulting from the proposed scheme.

34. Regulation 5(5) provides

> "The Secretary of State or relevant authority, as the case may be, must ensure that they have, or have access as necessary to, sufficient expertise to examine the environmental statement or updated environmental statement, as appropriate."

This provision acknowledges that a Minister or relevant authority may not themselves have "sufficient expertise" to examine the ES, particularly as such a document may cover a wide range of specialist topics. It is sufficient that the decision-maker has "access" to sufficient expertise for that purpose. That expertise will include the officials within the Minister's department and also the Panel of Inspectors reporting on its

assessment of the environmental information and of the statutory examination of the application for a DCO.

35. Because in this case an NPS had taken effect, s.104 of the PA 2008 was applicable. Accordingly, by s.104(2) the SST was required to have regard to *inter alia* the NPSNN. Section 104(3) required the SST to "decide the application in accordance with" the NPSNN "except to the extent that one or more of subsections (4) to (8) applies." Section 104(4) to (8) provides:-

> "(4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.
>
> (5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.
>
> (6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.
>
> (7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.
>
> (8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met."

The legal issues in this case are particularly concerned with s.104(3),(4) and (7). It is common ground that the World Heritage Convention was an "international obligation" falling within s.104(4).

36. Section 116 of the PA 2008 imposes a duty on the SST to give reasons for a decision to grant or refuse a DCO.

National Policy Statement for National Networks

37. The NPSNN was published on 17 December 2014 and formally designated under s.5 of the PA 2008 on 14 January 2015 following consideration by Parliament in accordance with ss.5(4) and 9.

38. Paragraph 4.2 of the NPSNN sets out a presumption in favour of granting a DCO in these terms:-

> "Subject to the detailed policies and protections in this NPS, and the legal constraints set out in the Planning Act, there is a

presumption in favour of granting development consent for national networks NSIPs that fall within the need for infrastructure established in this NPS. The statutory framework for deciding NSIP applications where there is a relevant designated NPS is set out in Section 104 of the Planning Act."

39. Paragraph 4.3 provides:-

> "4.3 In considering any proposed development, and in particular, when weighing its adverse impacts against its benefits, the Examining Authority and the Secretary of State should take into account:
>
> - its potential benefits, including the facilitation of economic development, including job creation, housing and environmental improvement, and any long-term or wider benefits;
>
> - its potential adverse impacts, including any longer-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts."

40. Paragraph 4.5 lays down a requirement for a business case:-

> "Applications for road and rail projects (with the exception of those for SRFIs, for which the position is covered in paragraph 4.8 below) will normally be supported by a business case prepared in accordance with Treasury Green Book principles. This business case provides the basis for investment decisions on road and rail projects. The business case will normally be developed based on the Department's Transport Business Case guidance and WebTAG guidance. The economic case prepared for a transport business case will assess the economic, environmental and social impacts of a development. The information provided will be proportionate to the development. This information will be important for the Examining Authority and the Secretary of State's consideration of the adverse impacts and benefits of a proposed development……"

This paragraph is relevant to ground 5(ii).

41. Paragraphs 4.26 and 4.27 deal with alternatives to a proposal:-

> " 4.26 Applicants should comply with all legal requirements and any policy requirements set out in this NPS on the assessment of alternatives. In particular:
>
> - The EIA Directive requires projects with significant environmental effects to include an outline of the main alternatives studied by the applicant and an indication of the

> main reasons for the applicant's choice, taking into account the environmental effects.
>
> • There may also be other specific legal requirements for the consideration of alternatives, for example, under the Habitats and Water Framework Directives.
>
> • There may also be policy requirements in this NPS, for example the flood risk sequential test and the assessment of alternatives for developments in National Parks, the Broads and Areas of Outstanding Natural Beauty (AONB).
>
> 4.27 All projects should be subject to an options appraisal. The appraisal should consider viable modal alternatives and may also consider other options (in light of the paragraphs 3.23 to 3.27 of this NPS). Where projects have been subject to full options appraisal in achieving their status within Road or Rail Investment Strategies or other appropriate policies or investment plans, option testing need not be considered by the examining authority or the decision maker. For national road and rail schemes, proportionate option consideration of alternatives will have been undertaken as part of the investment decision making process. It is not necessary for the Examining Authority and the decision maker to reconsider this process, but they should be satisfied that this assessment has been undertaken."

42. Paragraphs 5.120 to 5.142 deal with the historic environment. Paragraph 5.122 explains the concepts of "heritage asset" and "significance":-

> "Those elements of the historic environment that hold value to this and future generations because of their historic, archaeological, architectural or artistic interest are called 'heritage assets'. Heritage assets may be buildings, monuments, sites, places, areas or landscapes. The sum of the heritage interests that a heritage asset holds is referred to as its significance. Significance derives not only from a heritage asset's physical presence, but also from its setting."

43. The categories of designated heritage assets include not only listed buildings and conservation areas but also world heritage sites and scheduled ancient monuments (para. 5.123). But paragraph 5.124 provides that certain non-designated assets of archaeological interest should be subject to the policies applied to designated assets:-

> "Non-designated heritage assets of archaeological interest that are demonstrably of equivalent significance to Scheduled Monuments, should be considered subject to the policies for designated heritage assets. The absence of designation for such heritage assets does not indicate lower significance."

This paragraph is relevant to ground 1(i).

44. Paragraphs 5.128 and 5.129 state that the Secretary of State should seek to identify and assess the significance of any heritage asset which, or the setting of which, may be affected by a proposed development, including the nature of that significance and the value of the asset. Paragraph 5.129 says:-

> "In considering the impact of a proposed development on any heritage assets, the Secretary of State should take into account the particular nature of the significance of the heritage asset and the value that they hold for this and future generations. This understanding should be used to avoid or minimise conflict between their conservation and any aspect of the proposal"

45. Para.5.130 states:-

> "The Secretary of State should take into account the desirability of sustaining and, where appropriate, enhancing the significance of heritage assets, the contribution of their settings and the positive contribution that their conservation can make to sustainable communities – including their economic vitality….."

46. Paragraphs 5.131 and 5.132 set out the following general principles:-

> "5.131 When considering the impact of a proposed development on the significance of a designated heritage asset, the Secretary of State should give great weight to the asset's conservation. The more important the asset, the greater the weight should be. Once lost, heritage assets cannot be replaced and their loss has a cultural, environmental, economic and social impact. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. Given that heritage assets are irreplaceable, harm or loss affecting any designated heritage asset should require clear and convincing justification. Substantial harm to or loss of a grade II Listed Building or a grade II Registered Park or Garden should be exceptional. Substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, Scheduled Monuments, grade I and II* Listed Buildings, Registered Battlefields, and grade I and II* Registered Parks and Gardens should be wholly exceptional.
>
> 5.132 Any harmful impact on the significance of a designated heritage asset should be weighed against the public benefit of development, recognising that the greater the harm to the significance of the heritage asset, the greater the justification that will be needed for any loss."

47. Paragraphs 5.133 and 5.134 lie at the heart of much of the claimant's case under grounds 1 to 3. They set out what was described in argument as a "fork in the road" in the decision-making process. The policy test to be applied is more strict where a proposal would cause "substantial harm" to, or total loss of, the significance of a designated heritage asset, as opposed to "less than substantial harm." In the former case,

"substantial public benefits" are required to outweigh the heritage loss or harm, which must also be shown to be necessary in order to deliver those benefits. In the latter case, the policy simply requires the heritage harm to be weighed against "public benefits":-

> "5.133 Where the proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, the Secretary of State should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm, …………
>
> 5.134 Where the proposed development will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

48. It is common ground for the purposes of this claim that there is no material difference between paragraphs 5.133 and 5.134 of the NPSNN and their counterparts in paragraphs 195 and 196 of the National Planning Policy Framework ("NPPF") (SOCG at paras. 63-4).

Development plan and other policies

Wiltshire Core Strategy

49. Wiltshire Council adopted the Wiltshire Core Strategy in January 2015 as part of the statutory development plan.

50. Core Policy 6 states:-

> "**Stonehenge**
> The World Heritage Site and its setting will be protected so as to sustain its Outstanding Universal Value in accordance with Core Policy 59. …………"

51. Core Policy 58 states:-

> "**Ensuring the conservation of the historic environment**
> Development should protect, conserve and where possible enhance the historic environment. Designated heritage assets and their settings will be conserved, and where appropriate enhanced in a manner appropriate to their significance, including:
>
> i. nationally significant archaeological remains
>
> ii. World Heritage Sites within and adjacent to Wiltshire
>
> iii. buildings and structures of special architectural or historic interest

iv. the special character or appearance of conservation areas

v. historic parks and gardens

vi. important landscapes, including registered battlefields and townscapes.

Distinctive elements of Wiltshire's historic environment, including non-designated heritage assets, which contribute to a sense of local character and identity will be conserved, and where possible enhanced. The potential contribution of these heritage assets towards wider social, cultural, economic and environmental benefits will also be utilised where this can be delivered in a sensitive and appropriate manner in accordance with Core Policy 57 (Ensuring High Quality Design and Place Shaping). ……………"

52. Core Policy 59 states:-

"**The Stonehenge, Avebury and associated sites World Heritage Site**
The Outstanding Universal Value (OUV) of the World Heritage Site will be sustained by:

i. giving precedence to the protection of the World Heritage Site and its setting

ii. development not adversely affecting the World Heritage Site and its attributes of OUV. This includes the physical fabric, character, appearance, setting or views into or out of the World Heritage Site

iii. seeking opportunities to support and maintain the positive management of the World Heritage Site through development that delivers improved conservation, presentation and interpretation and reduces the negative impacts of roads, traffic and visitor pressure

iv. requiring developments to demonstrate that full account has been taken of their impact upon the World Heritage Site and its setting. Proposals will need to demonstrate that the development will have no individual, cumulative or consequential adverse effect upon the site and its OUV. Consideration of opportunities for enhancing the World Heritage Site and sustaining its OUV should also be demonstrated. This will include proposals for climate change mitigation and renewable energy schemes."

The Stonehenge World Heritage Site Management Plan

53. This document contains a number of detailed policies. Policy 1d states:-

> "Development which would impact adversely on the WHS, its setting and its attributes of OUV should not be permitted"

54. Policy 3c states:-

> "Maintain and enhance the setting of monuments and sites in the landscape and their interrelationships and astronomical alignments with particular attention given to achieving an appropriate landscape setting for the monuments and the WHS itself."

55. Policy 6a states:-

> "Identify and implement measures to reduce the negative impacts of roads, traffic and parking on the WHS and to improve road safety and the ease and confidence with which residents and visitors can explore the WHS."

The World Heritage Convention

56. Article 1 defines "cultural heritage" in terms of monuments (including elements or structures of an archaeological nature), groups of buildings and sites which are of "outstanding universal value."

57. Article 3 provides that it is for each State Party to the Convention to identify properties within its territory falling within *inter alia* Article 1. Each State Party must submit to the WHC an inventory of all such properties (article 11(1)). From that inventory the WHC compiles and publishes a list of those properties which "it considers as having outstanding universal value" (article 11(2)).

58. Articles 4 and 5 lie at the heart of the claimant's ground 4. They state:-

> "**Article 4**
>
> Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.
>
> **Article 5**
>
> To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this

> Convention shall endeavour, in so far as possible, and as appropriate for each country:
>
> > (a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
> >
> > (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
> >
> > (c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;
> >
> > (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
> >
> > (e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field."

59. The WHC has issued "Operational Guidelines for the Implementation of the World Heritage Convention" (July 2019). Paragraphs 77 – 78 set out criteria for identifying whether an asset has OUV to merit inscription as a WHS. Paragraph 78 states that a property "must also meet the conditions of *integrity* and *authenticity* and must have an adequate protection and management system to ensure its safeguarding". The concepts of authenticity and integrity are explained respectively in paragraphs 79 to 86 and 87 to 95. Authenticity is concerned with the ability to understand the value attributable to a heritage asset (para. 80). Properties meet the conditions of authenticity if "their cultural values …. are truthfully and credibly expressed through a variety of attributes …." which include location and setting (para. 82). Integrity is "a measure of the wholeness and intactness of the natural and/or cultural heritage and its attributes" (para. 88). Paragraph 96 states that "Protection and management of World Heritage properties should ensure that their Outstanding Universal Value, including the conditions of integrity and/or authenticity at the time of inscription, are sustained or enhanced over time." The Panel summarised the concepts of integrity and authenticity in its report at PR 5.7.314 and 5.7.317-8.

Legal principles

60. The parties have helpfully agreed in the SOCG a number of legal principles which it is appropriate to record in Appendix 1 to this judgment.

61. With regard to paragraph 1e of the Appendix and the law on "obviously material considerations", *ClientEarth* [2020] PTSR 1709 at [99] has been approved by the Court of Appeal in *R (Oxton Farm) v Harrogate Borough Council* [2020] EWCA Civ 805 at [8]. The principles have been set out more fully by the Supreme Court in *R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [116-121].

62. On the issue of whether as a matter of fact a Minister did take into account a particular factor, it is well-established that a Minister only has regard to matters of which he knows or which are drawn to his attention, for example in briefing material or by a precis (see *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26-38] and *Revenue and Customs Commissioners v Tooth* [2021] 1WLR 2811 at [70]).

63. However, the mere fact that a Minister did not know about, or have his attention drawn to, a relevant consideration is insufficient by itself to vitiate his decision. A claimant needs to go further and demonstrate that relevant legislation mandated, expressly or by implication, that the consideration be taken into account. Otherwise, he must show that the consideration was so "obviously material" that a failure to take it into account would be irrational; it would not accord with the intention of the legislation. This is the familiar irrationality test in *Wednesbury* (see *National Association of Health Stores* at [62-3] and [73-5]; *Oxton Farm* at [8]; *Friends of the Earth* at [116-9]).

64. In *National Association of Health Stores* the Court of Appeal approved the following passages from the decision of the High Court of Australia in *Minister for Aboriginal Affairs v Peko-Wallsend* [1986] HCA 40; (1986) 162 CLR 24):- Gibbs CJ held at [3]:-

> "Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department. No complaint could be made if the departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law. "

Brennan J held at [18]:-

> "A decision-maker who is bound to have regard to a particular matter is not bound to bring to mind all the minutiae within his knowledge relating to the matter. The facts to be brought to mind are the salient facts which give shape and substance to the matter: the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered.
>
> and at [27]:-

> The Department does not have to draw the Minister's attention to every communication it receives and to every fact its officers know. Part of a Department's function is to undertake an analysis, evaluation and precis of material to which the Minister is bound to have regard or to which the Minister may wish to have regard in making decisions. The press of ministerial business necessitates efficient performance of that departmental function. The consequence of supplying a departmental analysis, evaluation and precis is, of course, that the Minister's appreciation of a case depends to a great extent upon the appreciation made by his Department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function. A Minister may retain his power to make a decision while relying on his Department to draw his attention to the salient facts. But if his Department fails to do so, and the validity of the Minister's decision depends upon his having had regard to the salient facts, his ignorance of the facts does not protect the decision. The Parliament can be taken to intend that the Minister will retain control of the process of decision-making while being assisted to make the decision by departmental analysis, evaluation and precis of the material relevant to that decision."

65. It is plain from these authorities that in considering the legal adequacy of the briefing provided to a Minister, it is necessary to have regard to the nature, scope and purpose of the legislation in question, including any matters expressly required to be taken into account, and the nature and extent of any matter which has not been addressed. It is also lawful for a ministerial decision to be reached following evaluation and analysis by experienced officials in the department and a briefing which provides a precis of material which the Minister is "bound to have regard to." To some extent, the preparation of a ministerial briefing involves judgment on the part of officials about the material to be included. In this respect, there is a broad analogy to be drawn with the approach taken by the courts to challenges to an officer's report prepared to brief the members of a local authority's committee on a planning application (see e.g. *R (Luton Borough Council) v Central Bedfordshire Council* [2014] EWHC 4325 (Admin) at [91]-[94]).

66. Regulation 5(5) of the EIA Regulations 2017 does not impinge upon the legal principles above on the extent of the matters which a Minister may be taken to have known about when he reaches a decision. The adequacy of the expertise of Inspectors or officials is not to be confused with the legal adequacy of the briefing materials made available to a Minister to inform him of all the matters which he is legally obliged to take into account.

67. In the present case it is common ground that the relevant briefing materials before the SST comprised the Panel's report and the draft decision letter prepared by officials, as well as the briefing notes they submitted from time to time. Mr Strachan QC said on instructions that there was no material difference between the draft decision letter which accompanied the final briefing note and the formal decision issued on 12 November 2020 following final Ministerial approval on 5 November. The claimant did not ask the

court to require the draft to be produced and did not take issue with that position. In effect, the parties have been content to proceed on the basis that Mr Strachan's statement is correct.

The Environmental Statement

68. As the Panel reported (PR 5.7.18.) chapter 6 of the ES with its appendices, assessed the effect of the proposed development on the significance of designated and non-designated heritage assets (including the WHS) within the two study areas, either through physical impact or by affecting their setting. A separate Heritage Impact Assessment ("HIA") was provided to deal with the impact of the scheme on the OUV of the WHS. It addressed both designated and non-designated assets, both within and without the WHS, relevant to its OUV, together with impacts on the character of the setting of the WHS (PR 5.7.22) in accordance with Guidance issued by the International Council on Monuments and Sites ("ICOMOS") (see ES paras. 6.3.1 to 6.3.2).

69. Chapter 3 of the ES dealt with IP1's assessment of alternative options to the proposed scheme.

70. The ES described in a conventional manner the significance of the scheme's effects on assets, using criteria to assess the significance or value of the asset, the "setting contribution" and the magnitude of the impact, whether adverse or beneficial (PR 5.7.20).

71. Paragraph 6.6.59 of the ES explains that for the assessment in the ES and HIA of both the baseline scenario (with the existing A303) and the impacts of the proposed scheme, the analysis identified some 39 "asset groupings" to reflect the disposition and significance of some of the monuments within the WHS and wider landscape. This was said to be an established approach endorsed in a joint mission report by the WHS and ICOMOS in 2015. IP2 agreed with this approach in the present case. "The consideration of related assets as part of groups allows for the potential of different levels and types of impact on individual components of individual asset groups extending over large areas to be assessed" (paras. 6.10.6 to 6.10.8 of IP2's representations to the Panel in May 2019). In addition, the ES and HIA made assessments of the impacts on certain individual assets and their settings.

72. The ES arrived at a range of impacts on different assets from different parts of the scheme, some adverse, some neutral and some beneficial. In particular, this was not a proposal for an entirely new road. The scheme would *remove* the existing A303 which, it is generally accepted, has its own detrimental impacts on heritage assets. Accordingly, it was unavoidable that in assessing the impacts of the proposal on any particular asset or grouping of assets, the judgments expressed in the ES and HIA had to compare the effects of the existing A303 as part of the baseline. To do otherwise would have been unrealistic. That approach was not criticised during the hearing. In some instances the ES state that the proposed scheme would improve the existing position by reducing the level of net harm or producing a net benefit, in others the end result is assessed as harmful *per se*.

73. IP1's overall assessment was that the proposed development would not cause substantial harm to any designated heritage asset, and for many the effects would be beneficial. It was then said that the substantial benefits of the scheme would outweigh

the less than substantial harm caused to the significance of some heritage assets (PR 5.7.21).

74. The HIA assessed the proposed scheme in relation to the 7 attributes of the OUV of the WHS:-

> “(1) Stonehenge itself as a globally famous and iconic monument.
>
> (2) The physical remains of the Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the landscape.
>
> (3) The siting of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the landscape.
>
> (4) The design of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to the skies and astronomy.
>
> (5) The siting of Neolithic and Bronze Age funerary and ceremonial sites and monuments in relation to each other.
>
> (6) The disposition, physical remains and settings of the key Neolithic and Bronze Age funerary, ceremonial and other monuments and sites of the period, which together form a landscape without parallel.
>
> (7) The influence of the remains of the Neolithic and Bronze Age funerary and ceremonial monuments and their landscape setting on architects, artists, historians, archaeologists and others.”

The HIA also assessed the effect of the development on the “authenticity” and the “integrity” of the WHS.

75. IP1 concluded that the scheme would have a slightly adverse effect on two OUV attributes but a beneficial effect on the remaining five. They also judged that the proposal would have a slightly beneficial effect on the authenticity and integrity of the WHS and thus, viewed overall, a slightly beneficial effect on all three criteria, OUV attributes, authenticity and integrity (PR 5.7.25).

76. Many of the impacts of the proposed development do not involve direct loss of assets. They are the subject of mitigation measures in the Outline Environmental Management Plan (“OEMP”) and the Detailed Archaeological Mitigation Strategy (“DAMS”). The former effectively provides a code of construction practice and the latter a detailed framework for the preparation, approval and implementation of plans for site-specific investigation and archaeological method statements (PR 5.7.33). The OEMP and DAMS are themselves important documents which gave rise to significant issues during the Examination (see the Panel’s “second main issue” at PR 5.7.151-5.7.205).

77. The Panel summarised IP1’s case on the *overall* heritage benefits of the scheme at PR 5.7.29:-

"• The removal of the A303 and its traffic will greatly improve the setting of the stone circle and numerous monuments and monument groups across the central part of the WHS. Visitors will be able to appreciate the stone circle and interrelationships with numerous monuments and monument groups without the sight and sound of traffic intruding on their experience. This will help to conserve and enhance the WHS and sustain its OUV.

• The Scheme will also remove the intrusion of vehicles and vehicle lights upon the mid-winter sunset solstitial alignment and restore the relationship between the stone circle and the Sun Barrow. It will also allow the removal of the lit junction at Longbarrow Roundabout, which currently results in night-time light spill and light pollution on the western edge of the WHS, contributing to improvements in the experience of dark skies.

• The removal of the A303 will reconnect the Avenue where it is currently severed by the existing road.

• The existing road as it passes through the WHS will be altered for use by NMUs allowing safer exploration of the WHS east to west.

• The Scheme would afford safer NMU connections using north-south Public Rights of Way, currently severed by the existing surface A303.

• Removal of Longbarrow Roundabout and the conversion of the A303 and part of the A360 to NMU routes, immediately adjacent to the Winterbourne Stoke Crossroads complex of burial mounds, will allow improvements to the immediate landscape context and setting of this important barrow group.

• The construction of the Scheme will improve visitor's enjoyment and experience of the WHS landscape as a whole and provide opportunities for improved interpretation and presentation of the WHS.

• The construction of the Scheme will require advanced archaeological works to record archaeological remains in advance of Proposed Development construction. This will present educational and community outreach opportunities working sensitively and in close collaboration with key heritage stakeholders."

Views of parties at the Examination

78. A number of parties strongly opposed the proposal. The claimant comprised a group of five NGOs, which included the British Archaeological Trust. They criticised the ES and HIA and supported the objections of the Consortium of Archaeologists ("COA") and the Council for British Archaeology ("CBA") (see e.g. PR at 5.7.105-5.7.128). The

concerns and objections of the WHC and ICOMOS were summarised at, for example, PR 5.7.73-5.7.79 and 5.7.84-5.7.98.

79. Wiltshire Council, as the local planning authority, provided a local impact report under s.60 of the PA 2008, addressing the impact of the scheme on the authority's area. The Council considered that the removal of the existing A303 would be beneficial to the setting of Stonehenge and many groups of monuments contributing to its OUV. The removal of the existing Longbarrow roundabout would also bring benefits to the Winterbourne Stoke group of barrows.

80. The Council considered that the most significant negative impact would be from the dual carriageway, cutting and portals in the western part of the WHS. There would be harmful visual effects, impacts on the settings of key monument groups expressing attributes of the OUV and spatial severance, which would be difficult to avoid with the length of tunnel proposed. The Council accepted that the principles and commitments in the OEMP would enable the detailed design to accord with the aims and objectives of the WHS Management Plan and sustain the OUV. But the Council remained concerned about the visual impact on monuments and their settings at the western end of the scheme. Although harm could be mitigated to some extent by the use of green infrastructure and other design solutions, the failure to reduce the impact by providing additional cover to the western cutting was a missed opportunity (PR 5.7.55-5.7.61).

81. A statement of common ground agreed between the Council and IP1 noted that there was general agreement as to the likely extent of the impacts of the scheme and that the Council agreed that there are no aspects which are likely to reach the level of "substantial harm" (DL 43). The Council considered the proposal to be "in accordance with the large majority of policies" in the development plan, subject to appropriate mitigation being carried out by IP1 of potential harmful effects identified in the ES. By the end of the Examination, the Council and IP1 agreed that there were no outstanding policy issues (PR 4.5.6 and 4.5.8).

82. The National Trust owns and manages 850 hectares of the Stonehenge landscape within the WHS. It welcomed the government's intention to invest in a bored tunnel to remove a large part of the existing A303. If well designed and delivered with the utmost care for archaeology and the landscape, it could provide an overall benefit to the WHS. The Trust was satisfied that design and delivery controls had been developed through the DAMS and OEMP to provide necessary reassurance and that other concerns had been overcome (PR 5.7.70-5.7.71).

83. The English Heritage Trust manages over 400 historic buildings, monuments and sites across the country, including the Stonehenge monument itself. In a statement of common ground agreed with IP1, the Trust said that it was supportive of the project, because it has the potential to transform the Stonehenge area of the WHS and make significant improvements to the setting of the Stonehenge monument (see SOCG in these proceedings at paras. 34-35).

84. The position of IP2 at the Examination has been summarised in paragraphs 24 to 27 of the SOCG agreed between the parties and by the Panel at PR 5.7.62 to 5.7.69.

85. In addition, I note that in its representations in May 2019, IP2 stated that it was supportive of the objectives of the scheme. It had been instrumental in securing the

government's commitment to invest in a bored tunnel at least 2.9 km long. But a number of matters needed to be addressed to ensure the delivery of those objectives and potential benefits for the OUV of the WHS (paras 1.16 to 1.17, 4.9.2, 6.10.12 *et seq* and 8.11). IP2 focused primarily on the WHS and on those scheduled monuments affected by the scheme, whether contributing to the OUV or not, and whether inside or outside the WHS (para.3.9). But it had considered all parts of the ES relevant to cultural heritage as well as the HIA (paras. 3.10 and 6.3). In November 2017 IP2 had specifically identified the need for the ES to address non-designated heritage assets (para 4.10.4). IP2's representations to the Examination identified those specific areas where it had concerns or further information was needed.

86. In PR 5.7.329 the Panel pinpointed the key difference between its overall assessment on the effect of the scheme on cultural-heritage and that of IP2, namely it considered the harm to be substantial whereas the latter considered it to be less than substantial. The Panel's explanation for this was the weight it placed on the effects of the western cutting and the Longbarrow junction (see PR 5.7.330).

The Panel's report

87. The Panel's report is over 500 pages long covering many topics and issues. However, the court was asked to focus primarily on sections dealing with heritage impact and the overall balance. Even so, the section dealing with heritage impact alone runs to over 50 pages. The Panel's conclusions on heritage matters occupy some 30 pages, running from PR 5.7.129 to 5.7.333. But it is only necessary for this judgment to focus on certain of the issues which affect the claimant's grounds of challenge.

88. At the outset of its assessment the Panel identified five "main issues":-

(1) Whether the analysis and assessment methodology is appropriate;

(2) Whether the mitigation strategy, and its effectiveness in the protection of WHS archaeology, is appropriate;

(3) The effects of the proposed development on spatial relations, visual relations, and settings;

(4) Cumulative and in-combination effects;

(5) Effects on WHS OUV and the historic environment as a whole.

89. It is primarily the Panel's conclusions on the third and fifth main issues which are relevant to grounds 1 to 3 of this challenge. However, it is convenient to summarise the Panel's conclusions on the other main issues first.

90. On the first main issue the Panel concluded at PR 5.7.150:-

> "The ExA considers the analysis and assessment methodology appropriate subject to the points of criticism set out. It does not necessarily agree with the Applicant's assessments. Particular

> points will be examined in the remainder of this section of the Report."

Although the second sentence in that paragraph is ambiguous, the defendant and IP1 say that the third sentence shows that the Panel accepted the analysis in the ES and HIA, save for where the contrary is expressly stated. The position taken in those documents was that the scheme would not cause "substantial harm" to any designated asset (see e.g. PR 5.7.21).

91. Under the first main issue, the Panel considered that, subject to a number of concerns identified in its report, the HIA was generally comprehensive and provided a sufficient level of detail (para 5.7.138). But the Panel said that the HIA should have given more consideration to the effect of the Longbarrow junction on the setting of the WHS as a whole (para.5.7.139). Furthermore, the assessment of impact on settings had largely been concerned with "static views" rather than "the less tangible aspects of setting that relate to the WHS as a whole", including the overall significance of the site and "the succession of impressions which lead cumulatively to an overall sensory and intellectual construct of the site" which is important (paras.5.7.143 to 5.7.145). This last point was linked to a paper by D Roberts *et al* (2018) on the distribution of long barrows within the Stonehenge landscape (PR 5.7.144). The Panel substantially relied upon the thinking in this paper when it came to express its conclusions on the third main issue (see below).

92. In relation to the second main issue, the Panel judged the proposed mitigation strategy to be adequate, provided that issues relating to the sampling strategy for the investigation of archaeological features together with other identified concerns were resolved. Such matters were addressed in post-examination consultation carried out by the SST as the Panel had envisaged at PR 5.7.328. There is no legal challenge that the SST failed to address those matters properly.

93. On the fourth main issue, and leaving to one side its criticisms under the third and fifth main issues, the Panel agreed with the ES's overall conclusions on cumulative and in-combination effects (para.5.7.305).

94. On the third main issue, part of the Panel's analysis was concerned with the effect of the proposal on listed buildings and conservation areas. The Panel concluded that the effects of the proposed development on the settings of assets lying beyond "three main elements" would be acceptable (PR 5.7.296). Those matters are not relevant, therefore, to the difference between the Panel and the SST as to whether the proposal would cause "substantial" or "less than substantial harm" to the heritage assets.

95. The "three main elements" were identified in PR 5.7.207 as:-

> (1) the western approach, cutting and portals;
>
> (2) the proposed Longbarrow junction;
>
> (3) "and to a lesser extent, the eastern approach and portal."

It will be recalled that it was the first two elements upon which the Panel relied when expressing its disagreement with IP2 that the harm would be "less than substantial" (PR 5.7.329-5.7.330).

96. In relation to each of these three elements the Panel set out its conclusions on its effects on the OUV of the WHS and on the settings of heritage assets. But before embarking upon that exercise, the Panel returned in PR 5.7.212 to 5.7.215 to the paper by D Roberts *et al*. The landscape setting of long barrows is important to such matters as their alignment, intervisibility, relationship with other Early Neolithic monuments and evidence of routes for movement. The Panel subsequently referred to this very specific landscape concept as "the landscape settings of monuments" (similarly the reference to "an unparalleled historic landscape"), which should not be confused with the typical assessment of landscape and visual impact as part of a general planning appraisal.

97. Dealing with the western cutting and portals, the Panel concluded that, in particular, attributes (3), (5), and (6) of the OUV of the WHS would be greatly harmed or would suffer major harm (PR 5.7.226-5.7.230). In relation to settings, the Panel emphasised the need to consider not only visual aspects, but also contextual relationships, including the presence of archaeological features in the landscape; these aspects being similar to those considered when assessing the effect on the OUV of the WHS. Having regard to its earlier findings, the Panel considered that the western cutting and portals would cause "substantial harm" to the settings of designated assets (PR 5.7.233 to 5.7.236). Much of the Panel's reasoning concerned the visual effects of this part of the scheme and the impact on the landscape in which the archaeological features are set (see e.g. PR 5.7.219 to 5.7.224, 5.7.227, 5.7.229 and 5.7.232 to 5.7.234).

98. The Panel described the second element, the new Longbarrow junction, as being of motorway scale, albeit sunk into the ground with substantial earthworks. The pattern of the junction's landform would be at odds with the surrounding smaller scale morphology of small rectilinear fields and small groupings of traditional buildings. The junction, together with the western cutting and portals, would represent a single, very large, and continuous civil engineering work spanning the western boundary of the WHS. The effects of the junction on the OUV of the WHS would be similar to those of the western cutting and portal (PR 5.7.242 to 5.7.245). As with that first element, a good deal of the Panel's reasoning concerned the visual impacts of the junction and the impact on the landscape in which the archaeological features are set (see e.g. PR 5.7.243 to 5.7.245 and 5.7.247). At PR 5.7.247 the Panel concluded:-

> "………….. Also, the harm to the overall assembly of monuments, sites, and landscape through major excavations and civil engineering works, of a scale not seen before at Stonehenge. Whilst the existing roads could be removed at any time, should a satisfactory scheme be put forward, leaving little permanent effect on the cultural heritage of the Stonehenge landscape, the effects of the proposed junction would be irreversible."

They also found that the proposal would cause substantial harm as regards the OUV and settings (PR 5.7.248).

99. The Panel considered that the effect of the eastern cutting would be very much less severe than the western cutting (PR 5.7.254 to 5.7.255). The Panel found that there

would be harm to the landscape values of the OUV, but neutral or slightly positive effects for attribute (3) and for attribute (6) (PR 5.7.256 to 5.7.257). At PR 5.7.258 to 5.7.279 the Panel assessed harm caused to a number of heritage assets, ranging from negligible, slight or small to moderate in one instance (PR 5.7.259) and great harm from the flyover at the Countess Road junction (PR 5.7.274). The overall conclusion for the eastern approaches, including the Countess Road junction, was given at PR 5.7.280:-

> "The effects of this element of the Proposed Development on OUV would be neutral or slightly positive. The effects on settings, taken as a whole, would be moderately adverse. Overall, a small degree of harm would arise."

100. It is therefore plain that the Panel's conclusion under the third main issue that "substantial harm" would be caused related solely to the western cutting and portals and to the Longbarrow junction. This is borne out by the Panel's overall conclusion at PR 5.7.297 read in context:-

> "The ExA concludes overall on this issue that substantial harm would arise with regard to the effects of the Proposed Development on spatial relations, visual relations and settings. This is despite the assessment of more moderate effects with regard to the eastern approaches and settings of assets beyond the main three elements considered."

101. The Panel addressed the fifth main issue at PR 5.7.306 to 5.7.326. First, it found that the proposal would harm attributes (1) to (3) and (5) to (7) of the OUV (PR 5.7.306 to PR 5.7.313). Under the third main issue the Panel had found that the western cutting and Longbarrow junction would only harm attributes (3), (5) and (6) (see [97-98] above). So it is plain that the judgment here was based upon the Panel's assessment of the scheme as a whole, and was not driven simply by the effects of the works in the western section. For example, PR 5.7.308 referred to the tunnel and the potentially serious loss of assets through excavation works and PR 5.7.313 referred to the profound and irreversible aesthetic and spiritual damage that would be caused, even after allowing for the removal of the existing A303. By contrast, IP1's HIA had claimed a large or very large beneficial effect for attributes (1) and (4), slight beneficial effects for attributes (5), (6) and (7) and only slight adverse effects for attributes (2) and (3).

102. The Panel then concluded that the scheme would substantially and permanently harm the integrity of the WHS, pointing to the impacts of the Longbarrow junction and the western cutting (PR 5.7.315 to PR 5.7.316). The Panel reached the view that the development would seriously harm the authenticity of the WHS (PR 5.7.317 to PR 5.7.320).

103. The Panel's overall conclusion on the fifth main issue was that the benefits *to the OUV* resulting from the scheme were outweighed by the harm caused and so "the overall effect on the WHS OUV would be significantly adverse" (PR 5.7.321). Because of this impact, the proposal did not accord with Core Policies 58 and 59 of the Wiltshire Core Strategy nor with Policy 1d of the WHS Management Plan (PR 5.7.324 to PR 5.7.325). It is important to note the Panel's overall conclusion at PR 5.7.326:-

> "The ExA concludes that the effects of the Proposed Development on WHS OUV and the historic environment as a whole would be significantly adverse. *Irreversible harm would occur, affecting the criteria for which the Stonehenge, Avebury and Associated World Heritage Site was inscribed on the World Heritage List*." (emphasis added)

As IP2 has explained (paragraph 42 of skeleton), the assessment in an HIA of impact on a WHS is not expressed using NPSNN terminology of "substantial" or "less than substantial harm".

104. At PR 5.7.327 to PR 5.7.332 the Panel summarised its conclusions on the five main heritage issues. It said that it regarded the views of ICOMOS and the WHC as important, but not of such weight as to be determinative in themselves (PR 5.7.331). The Panel then summarised its view, in terms of paragraph 5.133 of the NPSNN, that the effect of the scheme on the OUV of the WHS and on "the significance of heritage assets through development within their settings," taken as whole, would lead to "substantial harm" for the purposes of the "fork in the road" decision (PR 5.7.333 and see also PR 7.2.33). However, the Panel left the application of that policy test to its overall conclusions later on in the report.

105. In the light of a submission in relation to ground 2 made by Mr James Strachan QC (who together with Ms Rose Grogan appeared on behalf of the defendant), it is necessary to summarise how the Panel dealt separately with landscape and visual impacts in section 5.12 of its report. They did so from a general planning perspective. Paragraph 5.12.1 explains:

> "The integrity of the cultural heritage landscape was examined in a previous section of the Report. This section covers the potential impacts of the Proposed Development on existing landscape features and landscape and townscape character, together with potential impacts on visual receptors, including residents, visitors, and users of [public rights of way]"

As is common for a general assessment of this kind, the method used by IP1 was based on the Guidelines for Landscape and Visual Impact Assessment (3rd Edition) published by the Landscape Institute and the Institute of Environmental Management and Assessment (PR 5.12.14).

106. The Panel dealt with the landscape and visual impacts of the western cutting and Longbarrow junction once completed at PR 5.12.112 to 5.12.119. The assessment in this part of the report focused on the effects of the proposal on landscape character and visual amenity, and not on cultural heritage which had already been dealt with in section 5.7 of the report. The overall impact of this part of the scheme was described as being "significantly harmful". These paragraphs formed but a small part of the assessment made by the Panel of each part of the scheme in paragraphs 5.12.79 to 5.12.147. The assessment took into account broader planning considerations including effects on tranquillity, connectivity, light pollution and the night sky.

107. The Panel set out its overall conclusions on the impact of the whole scheme on landscape and visual amenity at PR 5.12.148 to 5.12.152. They concluded that it "would

cause considerable harm in the ways identified, and therefore it conflicts with the aims of the NPSNN".

108. At PR 5.17.121 to 5.17.128 the Panel set out its overall conclusions on traffic and transport which, in summary were:-

(i) Public transport would be incapable of delivering a decisive shift from private car transport for the majority of trips in the corridor;

(ii) The development would contribute to meeting the government's objective of a high quality route between the southeast and the southwest, meeting also the future needs of traffic;

(iii) Journey times would be reduced, with the benefits being greater in the summer months and other times of high demand;

(iv) The road would be safer helping to reduce collisions and casualties;

(v) There would be a significant reduction in traffic through rural settlements helping to relieve traffic and related environmental issues;

(vi) Transportation costs for users and businesses would be reduced;

(vii) The scheme would help to enable growth in jobs and housing.

109. In section 7.2 of its report the Panel summarised its findings on the matters for and against the proposal which would be taken into account in the overall balance. As part of its conclusions on cultural heritage issues the Panel said at paragraphs 7.2.32 to 7.2.33:-

> "7.2.32. The ExA recognises that the Proposed Development would benefit the OUV in certain valuable respects. However, it considers that the effects of the Proposed Development would substantially and permanently harm the integrity of the WHS. In addition, it would seriously harm the authenticity of the WHS. The ExA finds that permanent, irreversible harm, critical to the OUV would occur, affecting not only our own, but future generations. The fundamental nature of that harm would be such that it would not be offset by the benefits to the OUV. The overall effect on the WHS OUV would be significantly adverse. The Proposed Development would not therefore accord with Core Policies 58 and 59 of the Wiltshire Core Strategy or Policy 1d of the WHS Management Plan.

> 7.2.33. Assessed in accordance with the NPSNN, the effect of the Proposed Development on the OUV of the WHS, and the significance of heritage assets through development within their settings, taken as a whole, would lead to substantial harm. This harmful impact on the significance of the WHS designated heritage asset shall be weighed against the public benefits in the ExA's overall conclusions."

110. It is important to note the careful distinction drawn by the Panel between these two paragraphs. PR 7.2.33 expressly made the "fork in the road" decision applying paragraph 5.133 of the NPSNN. PR 7.2.32 dealt separately with the Panel's conclusion about the effect on the OUV of the WHS. In that paragraph the Panel reiterated that the integrity of the WHS would be permanently and substantially harmed and its authenticity would be seriously harmed and that the benefits of the proposal to the OUV would not outweigh the harm caused. The Panel weighed the benefits of the proposal to the OUV for the specific purpose of deciding what the net heritage effect would be on the WHS as a designated asset itself, just as they had previously done in PR 5.7.321 (see [103] above). This should not be confused with the separate exercise carried out under paragraph 5.133 or paragraph 5.134 of the NPSNN.

111. The Panel considered landscape and visual impacts from a general planning perspective separately at PR 7.2.53 to 7.2.55.

112. At PR 7.3.1 to 7.3.43 of its report the Panel considered whether the proposed scheme would result in a breach of the Convention and thus engage s.104(4) of PA 2008, so as to displace the requirement in s.104(3) to decide the application for the DCO in accordance with the NPSNN. The argument during the Examination centred on articles 4 and 5 and is the subject of ground 4 in this challenge. Certain parties contended at the Examination that "any harm" to a WHS could breach those provisions. Others, including IP1 and IP2, argued that if a scheme complies with the policy tests in paras.5.132 to 5.134 of the NPSNN there would be no breach of the Convention. The Panel followed the latter approach (PR 7.3.40 to 7.3.43).

113. At PR 7.3.65 the Panel concluded that the ES was fully compliant with the EIA Regulations 2017. The SST accepted that conclusion at DL 67. There is no challenge to that part of the decision. But, by definition, it was impossible for the Panel to deal with the separate issue of whether the SST subsequently complied with regulation 21(1) of the EIA Regulations 2017 at the decision-making stage.

114. The Panel struck the overall balance in section 7.5 of its report. The Panel first set out its views on the benefits of the proposal (PR 7.5.5 to PR 7.5.9). It then did the same for the scheme's adverse impacts (PR 7.5.10 to 7.5.17).

115. The Panel regarded a number of factors as having limited or very limited weight, that is agriculture, the loss of a view of the Stones for people passing on the A303 (moderate weight), impact on users of byways open to all traffic, and impacts on businesses and individuals (PR 7.5.13 to 7.5.17).

116. The Panel gave substantial or considerable weight to only two sets of adverse impact (PR 7.5.11 to 7.5.12):-

(1) Substantial weight for the effects of the proposal on the WHS OUV and on the significance of heritage assets through development within their settings (drawn from section 5.7 of the report); and

(2) Considerable weight to the considerable harm to both landscape character and visual amenity (drawn from section 5.12 of the report).

117. On impact to the cultural heritage the Panel said at PR 7.5.11:-

> "The ExA considers that the effects of the Proposed Development would substantially and permanently harm the *integrity* of the WHS, now and in the future. In addition, it would seriously harm the *authenticity* of the WHS. The overall effect on the WHS OUV would be *significantly adverse.* The effect of the Proposed Development on the OUV of the WHS, and the significance of heritage assets through development within their settings, taken as a whole, would lead to *substantial harm*. The Proposed Development would not therefore be in accordance with Core Policies 58 and 59 of the Wiltshire Core Strategy or Policy 1d of the WHS Management Plan. This is a factor to which substantial weight can be attributed." (emphasis added)

This reflects the approach taken by the Panel in its conclusions in 7.2.32 to 7.2.33 (see [109-110] above).

118. On impact to landscape and visual impact the Panel said at PR7.5.12:-

> "In addition, there would be considerable harm to both landscape character and visual amenity, notwithstanding the mitigation proposed. There would therefore be conflict with the Wiltshire Core Strategy, Core Policy 51. The harms to landscape character and visual amenity are factors to which considerable weight can be attributed."

119. The Panel's striking of the overall planning balance was set out in PR 7.5.19 to 7.5.22:-

> "7.5.19. Since the ExA has identified that there would be substantial harm to the WHS, paragraph 5.131 of the NPSNN applies to the determination of the application. This requires the SoS to give great weight to the conservation of a designated heritage asset. Furthermore, substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, should be wholly exceptional.
>
> 7.5.20. In addition, paragraph 5.133 of the NPSNN provides that where the proposed development would lead to substantial harm to the significance of a designated heritage asset, the SoS should refuse consent unless it can be demonstrated that the substantial

> harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm.
>
> 7.5.21. The ExA disagrees with the Applicant as to the extent of the public benefits that would be delivered. In totality, it does not consider that substantial public benefit would result from the Proposed Development. In reaching that view, the ExA has had regard to all potential benefits including any long-term or wider benefits. In any event, those public benefits which have been identified, even if they could be regarded as substantial, would not outweigh the substantial harm to the designated heritage asset. In the light of NPSNN, paragraph 5.133, the substantial harm that would result to the WHS cannot therefore be justified.
>
> 7.5.22. In applying the NPSNN, paragraph 4.3, the ExA concludes that the totality of the adverse impacts of the Proposed Development would strongly outweigh its overall benefits. S104(7) PA 2008 applies and the NPSNN presumption in favour of the grant of development consent cannot therefore be sustained."

120. Thus, in PR 7.5.19 to 7.5.21 the Panel concluded that the proposal failed to meet the test in paragraph 5.133 of the NPSNN simply on the basis that the benefits of the scheme, even if assumed to be substantial, did not outweigh its harm. They did not go any further and apply the necessity test. It is to be noted that in striking the balance required by paragraph 5.133 of the NPSNN the Panel did not, of course, put into the disbenefits side of the balance any harm other than harm to cultural heritage. For example, harm to landscape and visual amenity was rightly not taken into account until the separate *overall* balance was struck in PR 7.5.22.

121. In Section 10 of its report the Panel summarised its overall findings and conclusions. In PR 10.2.6 the Panel summarised its separate conclusions on impacts to cultural heritage and to landscape and visual amenity. In PR 10.2.10 to 10.2.12 it repeated the separate balancing exercises carried out under paragraph 5.133 of the NPSNN and under paragraph 4.3 of the NPSNN and s.104 of the PA 2008. The Panel recommended that the SST should not make an order granting development consent for the application. On the other hand if the SST were to disagree and to grant a DCO, the Panel recommended that he should seek clarification on a number of additional points, mainly relating to the OEMP and DAMS as set out in Appendix E to the report.

The Secretary of State's decision letter

The process leading to the decision letter

122. The process has been described by Mr David Buttery, the senior official responsible for the handling of the application in the department.

123. On 27 March 2020 officials submitted a briefing note to the SST and the relevant Minister responsible for determining the application for a DCO. Officials said that there were two options. First, the SST could accept the Panel's recommendation and refuse the application for a DCO. Second, officials could explore whether there was evidence

to support the case for rejecting the recommendation and granting a DCO, on the basis, for example, that the development would result in less than substantial harm to the heritage assets. Officials drew attention to the Panel's statement that its views on cultural heritage, landscape and visual impacts were matters of judgment and were not shared by all consultees. Consequently, it might be possible to take a different view on the weight to be attached to the benefits and disbenefits of the scheme if there was sufficient justification to do so. Officials said that at that stage they had not yet identified sufficient evidence to justify an approval. In that context, they said that they would assess in detail the evidence provided by bodies such as IP2 to see whether it contained sufficient evidence to conclude that less than substantial harm would be caused. They also advised that if this second option were to be chosen, a consultation letter should be sent on the points raised in Appendix E to the Panel's report (see [119] above).

124. The SST and the Minister chose the second option. The consultation letter was sent on 4 May 2020.

125. On 6 July 2020 officials submitted a further memorandum to the Ministers recommending that a further consultation be carried out on a recent archaeological find at the WHS. Ministers agreed and a consultation letter was sent on 16 July 2020. A third and final consultation letter dated 20 August 2020 was sent allowing representations on the responses which had been received by the DfT.

126. On 28 October 2020 officials provided a further briefing note to the SST and the Minister advising that they considered that there was sufficient evidence to justify a decision that a DCO be granted and attaching a draft decision letter to that effect.

127. On 5 November 2020 the Ministers responded that they approved the grant of a DCO. The decision letter was issued on 12 November 2020.

128. I note that at paragraph 78 of its skeleton the claimant said that none of the consultation responses provided any material which could have supported the defendant's decision to reject the Panel's recommendation and to grant the DCO. This is one of several points that were not pursued, but for the record I note that it is not strictly correct. The responses to the consultation letter dated 4 May 2020 provided clarification on the issues set out in Appendix E to the Panel's report, which arose from its second main heritage issue, to do with the mitigation strategy, and were relied upon by the SST. He accepted the views of IP2 on the important subject of "artefact sampling" and concluded that the updated OEMP and DAMS submitted on 18 May 2020 "would help minimise harm to the WHS" (DL 39, 48, 50 and 80).

The decision letter

129. DL 10 explained the approach taken in the decision letter to the Panel's report:-

> "Where not otherwise stated, the Secretary of State can be taken to agree with the ExA's findings, conclusions and recommendations as set out in the ExA's Report and the reasons given for the Secretary of State's decision are those given by the ExA in support of the conclusions and recommendations."

130. At DL 12 to DL 22 the SST addressed the need for the scheme and the benefits it would bring, either in isolation or in conjunction with other improvements to the A303 corridor. The SST said that he was satisfied that there was a clear need case for the proposed development and that the benefits weighed significantly in its favour.

131. Turning to the adverse impacts of the scheme, the SST agreed with the Panel's views on issues relating to agriculture, views from the existing A303, public rights of way and harm to businesses and individuals (DL 23-24 and 57-60). He also agreed with the Panel that climate change was not a matter weighing in the balance against the proposal (DL 61) and that the matters listed in DL 63 were of neutral weight. He agreed with the Panel's assessment that granting consent by applying the heritage policies in the NPSNN would not involve a breach of the World Heritage Convention and would not engage s.104(4) (see DL 64-66).

132. The two issues on which the SST disagreed with the Panel were (a) landscape and visual impact and (b) cultural heritage impact (DL 25 to 56).

133. In relation to landscape and visual effects the SST noted the identification of various benefits and disbenefits by the Panel (DL 53) and adverse impacts by some interested parties (DL 54). He noted the views of Wiltshire Council on the permanent beneficial effects of the scheme for landscape and visual amenity and that overall it would deliver "beneficial effects through the reconnection of the landscape within the WHS and avoiding the severance of communities" (DL 54.) He then referred to the positive effects of the proposal identified by IP2 (significant reduction in sight and sound of traffic benefiting the experience of the Stonehenge monument and wider access to the landscape), English Heritage Trust and National Trust (DL 55). Drawing on that material, the SST considered that the design of the scheme accorded with principles in the NPSNN and that "the beneficial impacts throughout most of the WHS outweigh the harm caused at specific locations." Disagreeing with the Panel's judgment, the SST considered the landscape and visual impacts to be of neutral weight in the overall planning balance (DL 56). It is plain that the SST's treatment of this subject, like that of the Panel, did not address the landscape setting of monuments, or the historic landscape, which had so influenced the Panel when dealing with the impact on cultural heritage.

134. DL 25 to DL 43 and DL 50 dealing with heritage issues are annexed to this judgment in Appendix 2.

135. The SST began his consideration of heritage issues by referring to the Panel's assessment together with the differing views of a number of different parties at the Examination (DL 25).

136. At DL 26 the SST recognised the importance of the Panel's conclusion that the proposal would cause "substantial harm" to the OUV of WHS, how that would lead to the application of the test in paragraph 5.133 of the NPSNN and that substantial harm to a WHS should be "wholly exceptional."

137. The structure of the relevant part of the SST's reasoning is as follows:-

(i) In DL 28 the SST summarised the views of the Panel on its fifth main issue, namely the effects of the scheme on

the OUV of the WHS. There would be "permanent irreversible harm, critical to the OUV" affecting not only present but future generations. The benefits of the scheme to the OUV would be incapable of offsetting this harm and the overall effect would be "significantly adverse";

(ii) In DL 29 the Secretary of State summarised the views of the Panel on the first and second main issues;

(iii) The SST then referred at DL 30 to the third main issue, effects on spatial relations, visual relations and settings. He took into account the Panel's judgment that the proposal would cause substantial harm, and their recognition that that view differed from IP2 (PR 5.7.329). He identified the great weight placed by the Panel on the effects of the spatial division of the western cutting in combination with the Longbarrow junction, on the physical connectivity between monuments and the significance they derive from their settings (PR 5.7.330);

(iv) At DL 32 the SST summarised the Panel's conclusion on the fourth main issue;

(v) At DL 33 the SST summarised the Panel's overall conclusion (in PR 5.7.333) applying the NSPNN, that is the effects of the scheme on the OUV of the WHS *and* on "the significance of heritage assets through development within their settings". The Panel's judgment, drawing on what they had already concluded under the third main issue (see DL 30), was that taken as a whole there would be "substantial harm";

(vi) The SST then relied in DL 33 upon the Panel's acceptance that this was a matter of judgment upon which differing and informed opinions and evidence had been given to the Examination;

(vii) Still in DL 33, the SST drew upon the views of IP1, IP2, Wiltshire Council, the National Trust, English Heritage Trust and DCMS placing greater weight on the benefits of the scheme to the WHS from the removal of the existing A303 compared to any harmful effects of the scheme elsewhere in the WHS. Those bodies did not agree that the level of harm would be substantial. Some said that there would or could be scope for a net benefit overall to the WHS (see e.g. the cross-references to PR 5.7.70, 5.7.72 and 5.7.83);

(viii) In DL 34 the SST referred to the third main issue again. He preferred the view of IP2 on the effect of the scheme

on spatial and visual relations and settings, judging that it would be less than substantial rather than substantial;

(ix) The SST then drew upon the views of a number of parties at the Examination who, to varying degrees, were supportive of the proposal: IP2, National Trust, English Heritage Trust and Wiltshire Council (DL 35 to DL 42);

(x) In DL 43 the SST said that he had carefully considered the Panel's concerns and those of other interested parties, including ICOMOS-UK, the claimant, the COA and the CBA in relation to both the effects of the proposal on the OUV of the WHS and also the cultural heritage and the historic environment of the wider area. He took into account, in particular, the concerns expressed by some interested parties and the Panel regarding the adverse impact from the western cutting and portal, the Longbarrow junction and, to a lesser extent, the eastern approach and portal. He accepted that there would be adverse impacts from those parts of the development. But the SST concluded on balance, taking into account the views of IP2 and Wiltshire Council, that any harm to the WHS as a whole would be less than substantial.

138. The judgments expressed at DL 34 and DL 43 involved the SST taking the "fork in the road" decision with the consequence that paragraph 5.134 of the NPSNN applied, rather than, as the Panel had concluded, paragraph 5.133.

139. In DL 50 the SST stated that he had placed great importance on the views of IP2. He agreed with IP2 that the harm caused would not be substantial and accepted its view that the proposed approach to artefact sampling was acceptable, disagreeing with the judgment of the Panel on those matters. It is plain from DL 34, DL 43, DL 50 and DL 80 that the SST understood IP2 to have said that there would be "less than substantial" harm and he agreed with that view. It follows that the SST did not agree with those interested parties who had gone further by suggesting that the scheme would result in a net *benefit* to the OUV of the WHS. Accordingly, the SST did not depart from the Panel's view that the benefits of the scheme to the OUV of the WHS did not outweigh the harm that would be caused to OUV attributes, the integrity and the authenticity of the WHS (see [101 to 103] above).

140. In DL 80-87 the SST summarised his overall conclusions on the application for a DCO. He dealt with heritage issues and visual and landscape impacts at DL 80-81:-

> " 80. For the reasons above, the Secretary of State is satisfied that there is a clear need for the Development and considers that there are a number of benefits that weigh significantly in favour of the Development (paragraphs 12-22). He considers that the harm that would arise to agriculture should be given limited weight in the overall planning balance (paragraphs 23-24). In respect of cultural heritage and the historic environment, the Secretary of State recognises that, in accordance with the

> NPSNN, he must give great weight to the conservation of a designated heritage asset in considering the planning balance and that substantial harm to or loss of designated assets of the highest importance, including WHSs, should be wholly exceptional. He accepts there will be harm as a result of the Development in relation to cultural heritage and the historic environment and that this should carry great weight. Whilst also recognising the counter arguments put forward by some Interested Parties both during and since the examination on this important matter, on balance the Secretary of State accepts the advice from his statutory advisor, Historic England, and is satisfied that the harm to heritage assets, including the OUV, is less than substantial and that the mitigation measures in the DCO, OEMP and DAMS will minimise the harm to the WHS (paragraphs 25-51).
>
> 81. The Secretary of State accepts there will be adverse and beneficial visual and landscape impacts resulting from the Development and recognises that the extent of landscape and visual effects is also a matter of planning judgment. He is satisfied the Development has been designed to accord with the NPSNN and that reasonable mitigation has been included to minimise harm to the landscape. He disagrees that the level of harm on landscape impacts conflicts with the aims of the NPSNN. Whilst he recognises the adverse harm caused, he considers that the beneficial impacts throughout most of the WHS outweigh the harm caused at specific locations and therefore considers that there is no conflict with the aims of the NPSNN. For these reasons, he considers landscape and visual effects to be of neutral weight in the overall planning balance (paragraphs 52-56)."

141. In DL 87 the SST concluded that the need case for the development together with the other identified benefits outweighed any harm.

142. One potential issue was whether the SST's disagreement with the Panel that there would be substantial harm to heritage assets meant that he was also disagreeing with its specific findings on the impacts of the scheme upon which that conclusion had been based. Mr Strachan QC put it neatly in his oral submissions: the SST did not disagree with the Panel's findings on specific impacts on heritage assets but he did disagree with the Panel's categorisation of those impacts as involving substantial harm. I accept that submission.

143. In my judgment there is nothing in the decision letter to indicate that the SST dissented from any of the Panel's specific findings on impact. The Panel's view that there would be substantial harm to designated assets related only to the effects of the western cutting and portals together with the Longbarrow junction. The SST's decision letter simply decided that that level of harm would be lower without expressing any disagreement or doubts about the more detailed assessments made by the Panel (see eg. PR 5.7.229 to 5.7.330 and DL 34, 43 and 50). It has to be borne in mind that the SST did not have the ES or HIA and he did not have any detailed briefing from officials about impacts on individual assets or groupings of assets. The Panel's report of IP2's views did not

provide that information because IP2 had stated that they were not setting out for the Examination an assessment of that nature, albeit that they disagreed with IP1's appraisal of some impacts (which were not identified). Indeed, if it had been submitted by the defendant, IP1 or IP2 that the decision letter should be read as if the SST had disagreed with the Panel's specific findings, and that submission had been arguable, I would have decided that the reasons given in the letter on such an important matter were legally inadequate and quashed the decision on that ground.

144. For similar reasons, I do not consider that the SST disagreed with the Panel on its conclusions that the proposal would harm attributes (1) to (3) and (5) to (7) of the OUV, as well as the integrity and authenticity of the WHS, or the specific findings on impact from which the Panel drew those conclusions. Similarly, he did not disagree with its view that benefits to the OUV of the WHS would not outweigh harm to OUV attributes, authenticity and integrity of the WHS. There is simply no reasoning in the decision letter to indicate that the SST took that course. On an issue of such importance, both nationally and internationally, the SST would have been legally obliged to state clearly that those were his conclusions. As in paragraph [143] above, if it had been submitted that the decision letter should be read as if the SST had rejected those specific findings, and that submission had been arguable, I would have decided that the reasoning was legally inadequate. The SST simply dealt with the question posed by the NPSNN of "substantial" or "less than substantial" harm which, as both he and the Panel made clear, was a judgment bringing together the overall effect of the proposal on designated assets as well as the WHS (see e.g. PR 5.7.333, PR 7.2.33 and DL 33 to 34 and 50).

Ground 1

145. The claimant raises 4 issues under ground 1 which it is convenient to take in the following order:-

(i) The SST failed to apply paragraph 5.124 of the NPSNN (see [43] above) to 11 non-designated heritage assets;

(ii) The SST failed to consider the effect of the proposal on 14 scheduled ancient monuments (i.e. designated heritage assets);

(iii) The SST failed to consider the effect of the proposal on the setting of the heritage assets, as opposed to its effect on the OUV of the WHS as a whole;

(iv) The SST's judgment that the proposal would cause less than substantial harm improperly involved the application of a "blanket discount" to the harm caused to individual heritage assets.

146. Underlying much of the claimant's case under ground 1 was the proposition that a decision-maker is obliged to consider in respect of *each* heritage asset its significance, the impact of the proposal and the weight to be given to that impact (see e.g. paras. 93 to 121 of the claimant's skeleton). The claimant relies upon regulation 3 of the 2010 Regulations (see [27] above), paragraphs 5.128 to 5.133 of the NPSNN (see [41] to [43] above) and the decision of the Court of Appeal in *City and Country Bramshill Limited*

v Secretary of State for Housing, Communities and Local Government [2021] EWCA Civ 320, in particular the passage in the judgment of Lindblom LJ where he stated at [79] that in the overall balancing exercise:-

> "….. every element of harm and benefit must be given due weight by the decision-maker as material considerations…."

147. However, the court also added that the decision-maker has to adopt "a sensible approach" ([80]). The legislation on heritage assets does not prescribe any single, correct approach to the balancing of harm to those assets against any likely benefits of a proposal or other material considerations weighing in favour of the grant of consent ([72]). The same applies to policies in the NPSNN subject, of course, to applying any specific policy test which is relevant. Requirements in the NPSNN that "great weight" be given to the conservation of an asset and "the more important the asset, the greater the weight should be" are matters left to the planning judgment of the decision-maker to resolve ([73]). The same applies to the application of the tests in paragraphs 195-6 of the NPPF and paragraphs 5.133-5.134 of the NPSNN. The policies do not direct the decision-maker to adopt any specific approach as to *how* harm should be assessed or what should be taken into account or excluded in that exercise. "There is no one approach." (see ([74]).

148. In the present case, the ES upon which the planning assessments by the Panel and ultimately the SST were based, had to address a large number of heritage assets over a substantial area. The assessment for some individual assets was expressed separately for each one. But in addition a number of assets were collected together in groupings, an approach endorsed by the WHC, ICOMOS and IP2 (see [71] above). The Panel made no criticism of that approach in its report. Indeed, it adopted it at various points in its reasoning, and the same is true of the decision letter. The presentation of an assessment by the use of groupings does not mean that assets have not been individually assessed. Instead, the technique enables such assessments to be collected together and expressed in relation to an appropriate grouping. Mr. David Wolfe QC, who together with Ms. Victoria Hutton appeared on behalf of the claimant, confirmed that the claimant makes no criticism of this approach.

(i) The 11 non-designated heritage assets

149. The claimant accepts that an assessment was made of the 11 non-designated heritage assets in the western section of the scheme. They are listed in table 6.11 of chapter 6 of the ES. They are not located in the WHS. Some of the assets would be lost because of the scheme. But others would not. For example, it was said that one asset might suffer damage from compression by overlaying of material. Another could not be found when a survey was carried out, or had ceased to exist because of plough-damage.

150. The point taken by the claimant is that the Panel and the SST failed to apply paragraph 5.124 of the NPSNN by considering whether these 11 assets should be treated as having equivalent significance to scheduled ancient monuments, so that policies such as paragraphs 5.133 to 5.134 of the NPSNN might be applied.

151. With respect, there is nothing in this point. Mr. James Strachan QC, supported by Mr. Reuben Taylor QC for IP1 and Mr. Richard Harwood QC for IP2, pointed to the test which has to be satisfied for paragraph 5.124 to apply. A non-designated asset must be

"demonstrably of equivalent significance to Scheduled Monuments." Accordingly, such a monument must be considered to be of national importance (s. 1(3) of the Ancient Monuments and Archaeological Areas Act 1979). Decisions on national importance are guided by Principles of Selection laid down by the Secretary of State for Digital, Culture, Media and Sport. IP2 has published a number of scheduling selection guides on eligibility under s.1(3).

152. Table 6.1 of the ES stated that paragraph 5.124 of the NPSNN had been applied in the work carried out and cross-referred to table 6.2. The latter set out the criteria applied in the ES for determining the value of a heritage asset. A non-designated asset contributing to *regional* research objectives was assessed as having a "medium" value. A non-designated asset of comparable quality to a scheduled monument, that is one of *national* importance, was assessed as having a "high" value. None of the non-designated assets in Table 6.11 were given a high value. All were treated as having a medium value. They were therefore treated by IP1 as not falling within para. 5.124 of the NPSNN. Appendix 6.3 to the ES gave detailed references to the source material, including surveys, relied upon for this evaluation. I therefore accept the defendant's submission that this exercise was carried out transparently and in such a way that any interested party who wished to disagree, by demonstrating that any asset should be treated as equivalent to a scheduled monument, could do so.

153. The short point is that no objecting party attempted to carry out any such exercise. Accordingly, this was not an issue in the Examination, let alone a "principal important controversial issue", which the Panel was required to address in its report to the SST, or which had to be addressed in the decision letter (*South Bucks District Council v Secretary of State* [2004] 1 WLR 1953 at [36]). I should also add that the Panel's report refers to paragraph 5.124 of the NPSNN and shows that it was applied to other assets, where judged appropriate (see PR 5.7.28 and 5.7.49). The Panel approved of the approach taken in the ES, save for where it explicitly identified any disagreement (see [90] above). It did not criticise the handling of this part of the NPSNN.

154. The claimant relied upon some very brief passages in representations made to the Examination about non-designated heritage assets. These passages were of a generalised nature. They did not pick out any item from Table 6.11 of the ES to attempt to demonstrate that such a feature is of national importance, applying relevant criteria and drawing upon any source material.

155. The criticism made under ground 1(i) must be rejected.

(ii) *Failure to consider 14 scheduled ancient monuments*

156. Originally the claimant suggested in its "First Reply" that the impact on 15 scheduled monuments had not been assessed by the Panel in its report and likewise had not been assessed by the SST in his decision letter. During oral argument the number of assets was said to be 14. It was submitted that the effect of the proposal on the *setting* of these assets had not been addressed. The HIA had simply considered the effect on the OUV of the WHS. Ms. Hutton told the court that these assets are located in the vicinity of the proposed Longbarrow Junction.

157. However, as Mr. Strachan QC pointed out, the 14 designated assets were also dealt with in the "Setting Assessment", Appendix 6.9 to the ES. There the effect on the settings of

each of the assets was addressed. The defendant provided a detailed schedule showing where each asset was considered in the documentation. This has not been disputed by the claimant. The ES assessed the effects of the scheme on the settings as ranging from neutral, through slight beneficial to moderate beneficial. In no case did the ES identify any substantial harm.

158. Here again, the claimant has relied upon a few brief passages from representations made in the Examination. These passages do not contain anything like the level of detail or referencing contained in the ES or HIA, although it would appear that the document would have been prepared by expert archaeologists. The claimant has not shown that they gave rise to a principal important controversial issue which has not been addressed by the Panel in its report, for example, in its criticisms of the Longbarrow junction and its continuation of the western cutting.

159. Under its third main issue the Panel expressed its concern about the adverse impact of the western cutting and portals on the Wilsford/Normanton dry valley and the relationship between monuments on either side (see PR 5.7.227 and 5.7.229) which formed part of its finding of "substantial harm". In relation to the proposed Longbarrow junction, the Panel noted its effect on *inter alia* the Winterbourne Stoke Downs barrows, two individual scheduled monuments on Winterbourne Stoke Down and the Diamond Group (PR 5.7.239). The SST agreed with the Panel's report on these matters (see DL 10).

160. Accordingly, the criticisms made under ground 1(ii) must be rejected.

(iii) Failure to consider effect on the settings of heritage assets

161. It is plain from the review carried out above that the ES and HIA considered the effects of the scheme on both the OUV of the WHS and on the settings of heritage assets. It is also plain from its report that the Panel addressed under its third and fifth main issues the effect of the proposal on spatial relations, visual relations and settings in relation to the WHS and also heritage assets ([88] and [96-100] above). It then went on to consider effects on the OUV of the WHS and the historic environment as a whole.

162. However, the claimant submits that in his decision letter the SST failed to consider the effect of the proposal on the settings of heritage assets as well as on the WHS overall. It is said that he only considered the latter issue.

163. This criticism is untenable. It comes from a misreading of the decision letter and to some extent the Panel's report. The third and fifth main issues were not treated by the Panel as being in hermetically sealed compartments. Conclusions drawn under the third main issue on the project's effects upon the settings of assets, and upon the landscape containing these assets, also influenced the Panel's reasoning on the fifth main issue. This is plain not only from the Panel's report but also the decision letter (see [137] above). Mr. Wolfe QC is incorrect to suggest that DL 34 did not refer to the third main issue and only considered the effect on the OUV as a whole. The language of DL 34 cannot be read in that way, particularly when it is considered in the context of the preceding parts of the decision letter and the Panel's report to which it responds.

164. There is equally no merit in the submission that IP2 had only addressed the impact of the proposal on the OUV of the WHS and, therefore, because DL 34 relied upon the

opinion of IP2 that paragraph must be read as addressing only the WHS and not heritage assets. DL 30 had already referred to PR 5.7.329 to 5.7.330. From those paragraphs it was clear to the SST that the Panel understood IP2 to disagree with its view on substantial harm, in the context of the third main issue, which dealt with the effect of the development on spatial and visual relations and settings of *heritage assets*.

165. The decision letter was prepared by officials for consideration by the SST following their review of the representations which had been made in the Examination by IP2 and others. DL 33 reflects that exercise. IP2's representations in May 2019 (paras. 3.9 to 3.10 and 6.3) made it plain that it had addressed scheduled monuments (and other assets), whether contributing to the OUV or not, and whether inside the WHS or not, and had considered all parts of the ES relating to cultural heritage issues as well as the HIA (see [85] above).

166. Accordingly, the criticisms made under ground 1(iii) must be rejected.

(iv) Whether the Secretary of State took into account the impacts on all heritage assets

167. This is a challenge to the SST's judgment that the harm identified by the Panel as substantial should be treated as less than substantial. It has been put in more than one way.

168. First, it is said that that reduction in the level of harm was an improper "blanket discount" because the judgment is said to have been applied to a "significant number of designated and undesignated heritage assets" and yet the impact of the scheme was not the same for all the assets affected. Mr. Wolfe QC also described the error of law here as a "composite approach," whereas, in accordance with *Bramshill* [79] and the NPSNN (paragraph 5.129), a separate assessment of the impact on each individual heritage asset was required.

169. To some extent, the argument has moved on since the claimant's pleadings and skeleton were prepared. The claimant accepts that the requirement for individual assessment can properly be addressed by an approach based on groupings (see [129] above).

170. But what appears clearly from paragraph 76 of the Statement of Common Ground, is that, by whatever means he employs, the decision-maker must ensure that he has taken into account (a) the significance of each designated heritage asset affected by the proposed development and (b) the impact of the proposal on that significance.

171. Mr Strachan QC submitted, supported by IP1 and IP2, that the SST complied with the principle in [170] above. This is because, first, the ES addressed all relevant heritage assets. Second, the Panel identified in its report those impacts where it disagreed with the assessment in IP1's ES and must be taken as having agreed with the remainder (PR 5.7.150). Third, the SST stated in DL 10 that he is to be taken as having agreed with the findings and conclusions in the Panel's report save for where the contrary is stated. It is submitted that the SST must therefore be treated as having agreed with those parts of the ES and HIA with which the Panel did not expressly disagree.

172. The defendant's argument essentially relies upon the starting point that all relevant assets were assessed in the ES (and HIA). So the question arises whether the defendant's analysis is correct, given that neither the ES nor the HIA were before the

SST at any stage. In this context, regulation 21(1) of the EIA Regulations 2017 is relevant (see [31] above). The SST was obliged to take into account the environmental information for the proposal, which included the ES and DL11 states that he did this.

173. The ES concluded that no part of the scheme would result in substantial harm to any designated heritage asset. The Panel disagreed with that view in relation to the effects of the western cutting and portals and the Longbarrow junction. Nonetheless, the Panel recognised that that was a matter of judgment on which the SST might differ and that there had been differing opinions submitted to the Examination, not least that of IP 2 (PR 7.5.26).

174. As I have said in [137] above, the SST disagreed with the Panel's judgment that "substantial harm" would be caused by those parts of the scheme. It follows that he disagreed with the conclusions in PR 5.7.236, 5.7.248, 5.7.297, 5.7.329, 5.7.333, 7.5.11, 7.5.19, 7.5.21 and 10.2.10 that that level of harm would be substantial. However, the SST did not disagree with the more specific findings of the Panel upon which its "substantial harm" conclusion was based. The effect of DL 10 is that he agreed with those findings (see [142 to 144] above).

175. The agreed principle in [170] above does not lay down a rubric as to how an assessment should be made or how reasoning should be expressed. It does not indicate that something akin to the analysis in an environmental statement is required. It is open to a decision-maker to accept the findings of an Inspector or Panel about the specific impacts that would be caused by a proposed development, or a part thereof, and then to say as a matter of judgment that those effects should be treated as less than substantial harm rather than substantial harm, particularly where that view is supported by the evidence and opinion of a specialist adviser such as IP2 in this case. It was not suggested that the judgment in the present case should be treated as irrational. That is hardly surprising given what the Panel had said at PR 5.7.26. So that part of ground 1(iv) which seeks to attack what is described as a "blanket discount" does not assist the claimant.

176. But the real issue remains whether the principle in [170] above has been satisfied in the decision letter in the light of the explanation of the decision-making process given in [171].

177. Notwithstanding regulation 21(1) of the EIA Regulations 2017 and the contents of DL11, the defendant's legal team informed the court that the ES and HIA were not before Ministers when they were considering the Panel's report and the determination of the application for development consent. It is said that "the ES and HIA were considered by officials in providing their advice and the ES and HIA formed part of the examination library accessible from the examination website". However, as is clear from the case law cited in [62] to [65] above, what was within the knowledge of officials is not to be treated on that account as having been within the Minister's knowledge, unless it was drawn to his attention in a briefing or precis.

178. That same case law suggests that in the real world a Minister cannot be expected to read every line of an environmental statement and all the environmental information generated during an examination or inquiry process. But nevertheless, an adequate precis and briefing is required. Depending on the circumstances, that requirement may be met, wholly or in part, by the report of a Panel or an Inspector (for example, where the Secretary of State agrees with the relevant parts of that report). It may also be

provided in the draft decision letter which is submitted to the decision-maker for his consideration or in any additional briefing. That would be necessary in a typical case where only one or a small number of heritage assets are impacted. The requirement *to take into account* the impact on the significance of each relevant asset still applies in an atypical case, such as the present one, where a very large number of heritage assets is involved. It will be noted, however, that although regulation 21(1) requires the decision-maker to take into account the environmental information in a case, it does not require him to give his own separate assessment in relation to each effect or asset.

179. Here, the SST did receive a precis of the ES and HIA in so far as the Panel addressed those documents in its report. But the SST did not receive a precis of, or any briefing on, the parts of those documents relating to impacts on heritage assets which the Panel accepted but did not summarise in its reports. This gap is not filled by relying upon the views of IP2 in the Examination because, understandably, they did not see it as being necessary for them to provide a precis of the work on heritage impacts in the ES and in the HIA. Mr Wolfe QC is therefore right to say that the SST did not take into account the appraisal in the ES and HIA of those additional assets, and therefore did not form any conclusion upon the impacts upon their significance, whether in agreement or disagreement.

180. In my judgment this involved a material error of law. The precise number of assets involved has not been given, but it is undoubtedly large. Mr Wolfe QC pointed to some significant matters. To take one example, IP1 assessed some of the impacts on assets and asset groupings not mentioned by the Panel as slight adverse and others as neutral or beneficial. We have no evidence as to what officials thought about those assessments. More pertinently, the decision letter drafted by officials (which was not materially different from the final document – see [67] above) was completely silent about those assessments. The draft decision letter did not say that they had been considered and were accepted, or otherwise. The court was not shown anything in the decision letter, or the briefing, which could be said to summarise such matters. In these circumstances, the SST was not given legally sufficient material to be able lawfully to carry out the "heritage" balancing exercise required by paragraph 5.134 of the NPSNN and the overall balancing exercise required by s.104 of the PA 2008. In those balancing exercises the SST was obliged to take into account the impacts on the significance of all designated heritage assets affected so that they were weighed, without, of course, having to give reasons which went through all of them one by one.

181. Accordingly, I uphold ground 1(iv) of the challenge.

Conclusion

182. For these reasons, I uphold ground 1(iv) of the challenge and reject grounds 1(i), (ii) and (iii).

Ground 2 – lack of evidence to support disagreement with the Panel

183. The claimant submits that the SST disagreed with the Panel on the substantial harm issue without there being any proper evidential basis for doing so. Mr. Wolfe QC advances this ground by reference to the SST's acceptance of the views of IP2 in DL 34, 43, 50 and 80. He submitted that IP2's representations did not provide the SST with evidence to support his disagreement with the Panel on "substantial harm" in two

respects. First, he said that HE only addressed the spatial aspect of the third main issue and did not address harm to individual assets or groups of assets. Second, he submitted that SST had misunderstood IP2's position: it had never said that the harm would be less than substantial.

184. It should be noted that although the claimant had raised other more detailed criticisms, Mr. Wolfe QC did not pursue them in oral submissions or invite the court to deal with them. No doubt he considered that ground 2 should stand or fall on the points that he chose to advance as set out above.

185. The short answer is to be found in PR 5.7.329 to 5.7.330. The Panel understood that IP2 took the view that no substantial harm would be caused to any asset and that the reasons for the difference of view between the Panel and IP2 were concerned with the effects of the western cutting and portals and the new Longbarrow junction. Those passages would have reflected what took place during the hearings in which IP2 took part, as well as its written representations. IP2 has confirmed that the Panel's report at PR 5.7.329 to 5.7.330 accurately set out its position in the Examination (para. 28 of Detailed Grounds of Defence). There is no proper basis for the court to go behind what was said by the Panel in its report on this subject. The SST was plainly entitled to rely upon that part of the report.

186. It is also apparent from PR 5.7.329 to 5.7.330 that the Panel was dealing with its overall finding of substantial harm under the third main issue. The claimant's attempt to confine the effect of those passages to effects on "spatial relations, visual relations and settings" overlooks the fact that PR 5.7.329 simply repeated the heading given for the third main issue when it was introduced in PR 5.7.129. It is plain from the section of the report devoted to the third main issue that the Panel considered both the spatial aspect and the harm to heritage assets and their setting. There is no reason to think that the shorthand they used in PR 5.7.329 was meant to suggest that IP2 had only considered the spatial aspect. This is a forensic, excessively legalistic argument of the kind which should not be advanced in the Planning Court.

187. In any event, on a fair reading of IP2's representations, it is plain that it did consider those parts of the ES and HIA which assessed impacts on individual heritage assets or groups of assets.

188. For these reasons, ground 2 must be rejected.

189. For completeness, I would add that I do not accept the submission of Mr Strachan QC that the SST's disagreement on the level of harm resulting from the western section of the scheme was supported by his conclusions in DL 52 to 56 on landscape and visual amenity impacts from a general planning perspective. Both the Panel and the SST treated those issues separately from the historic landscape matters which arose under the cultural heritage sections of their respective assessments. However, Mr Strachan's submission is not necessary for the court to reject ground 2.

Ground 3 – double-counting of heritage benefits

190. The claimant submits that the SST not only took into account the heritage benefits of the scheme as part of the overall balancing exercise required by para. 5.134 of the NPSNN, but also took those matters into account as tempering the level of heritage

disbenefit. It is said that this was impermissible double-counting because those heritage benefits were placed in both scales of the same balance.

191. But the claimant also made a further submission which is rather different. It was said that the SST relied upon heritage benefits in DL 34 and DL 43 as reducing the level of heritage harm when deciding whether less than substantial harm would be caused (ie. whether paragraph 5.133 or 5.134 of the NPSNN should be applied), and then also took those heritage benefits into account when deciding whether the balance pointed in favour or against the scheme.

192. It is necessary to be clear about how the policies in the NPSNN operate, the process which was followed in the ES and HIA, and the chain of reasoning in the decision letter.

193. Paragraphs 5.133 and 5.134 of the NPSNN lay down the criteria which determine which of the policy tests is to be applied for dealing with harm to heritage assets (the "fork in the road decision" - see [47] above). In the light of *Bramshill* at [71] it is common ground that in reaching this judgment, the decision-maker *may* take into account benefits to the heritage asset itself (referred to as an "internal balance") but he is not obliged to do so (and see [74]).

194. In *Bramshill* at [78] Lindblom LJ stated:-

> "Cases will vary. There might, for example, be benefits to the heritage asset itself exceeding any adverse effects to it, so that there would be no "harm" of the kind envisaged in paragraph 196 [of the NPPF]. There might be benefits to other heritage assets that would not prevent "harm" being sustained by the heritage asset in question but are enough to outweigh that "harm" when the balance is struck. And there might be planning benefits of a quite different kind, which have no implications for any heritage asset but are weighty enough to outbalance the harm to the heritage asset the decision-maker is dealing with."

For the purposes of the present case, two points may be drawn from that passage.

195. First, when assessing the impact of a project on a heritage asset it is permissible to combine both the beneficial and the adverse effects *on that asset*. That is not so much a balancing exercise as a realistic appraisal of what would be the net impact of the project on the asset, viewed as a whole and not partially. That approach was followed in the ES in this case. It was necessary to take into account the A303 as part of the existing baseline and to take into account the beneficial impact on an individual asset of removing that road as well as any harmful impact on that asset from the new scheme. The net outcome might be positive, neutral or negative.

196. Second, if a scheme would cause harm to one asset and benefit to another, that does not alter the judgment that the first asset will be harmed. Instead, the benefit to the other is a matter to be weighed in whichever balance falls to be applied under the NPSNN, or indeed paragraphs 195 or 196 of the NPPF. Here again we see the distinction between deciding which of the two policy tests in those paragraphs is to be applied and the carrying out of the balancing exercise itself.

197. There is a tendency to use the term "double-counting" imprecisely as if to say that it is necessarily objectionable whenever a particular factor is taken into account in a decision on a planning application more than once. That is too sweeping a proposition. Well-known planning policies contain examples where legitimately the same factor may have to be taken into account more than once. For example, in Green Belt policy some types of development are regarded as inappropriate if they would harm the openness of the Green Belt and/or conflict with the purposes of including land within it (paras. 145 and 146 of the NPPF). In those circumstances, the application of the "very special circumstances test" will also require that harm to the Green Belt to be included in the overall planning balance. There is no improper double-counting. The same factor is being assessed twice for two different and permissible purposes.

198. Paragraph 11(d) of the NPPF provides another example. If, for example the presumption in favour of granting permission is engaged (e.g. because the supply of housing land is less than 5 years) the "tilted balance" in sub-paragraph (ii) may be applicable. If so, the extent to which the proposal complies with or breaches development plan policies may be taken into account in the balance required to be struck under paragraph 11(d)(ii). But it is also necessary to take into account those polices when striking the balance required by s.38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004"). Those two balances may either be struck separately or taken together. Either way, there is no impermissible double-counting. Taking into account the same factor more than once is simply the consequence of having to apply more than one test (see *Gladman Developments Limited v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 104 at [62]-[67] and [2020] PTSR 993 at [110]). The same considerations may apply where paragraph 11(d)(i) falls to be applied.

199. The policies in paragraphs 5.133 to 5.134 of the NPSNN are similar in nature to the first of those examples. These paragraphs determine which of the two tests for decision-making on heritage policy are to be applied, before arriving at the overall planning balance. A beneficial impact on a heritage asset may appropriately be taken into account in determining the net level of harm which that asset would sustain and therefore which policy test is engaged, and then again in the balancing exercise required by that test when *all* public benefits are weighed against all harm to heritage assets. The same factor is taken into account at two different stages for different and permissible purposes. There is no question of improper double-counting. Ultimately, in his reply Mr. Wolfe QC accepted this analysis.

200. Accordingly, the real issue under ground 3 has come down to whether the SST, when striking the balance, put the same benefits in both scales, for and against the proposal (see [190] above).

201. The ES and HIA assessed the impacts of the proposal on individual assets and groups of assets and arrived at the conclusion that no asset would be substantially harmed. On that basis the test in paragraph 5.134 would fall to be applied. I accept the submission of the defendant and IP1 that that series of separate judgments did not involve any off-setting of net benefit to one asset against net harm to another. The claimant did not identify any material to the contrary.

202. The Panel disagreed with that assessment in relation to the impacts of two elements of the scheme, the western cutting and portals and the Longbarrow junction. They judged

that there would be substantial harm to assets or groups of assets and to the OUV of the WHS in certain locations (see e.g. PR 5.7.219, 5.7.224, 5.7.228 to 5.7.229, 5.7.231 to 5.7.232, 5.7.239, 5.7.241, 5.7.245 and 5.7.247). The Panel's judgment was based upon its assessment of the scale and design of the civil engineering works together with the mitigation proposed, and their effect upon the setting of assets and the landscape in which they feature. In reaching its judgments the Panel appropriately took into account the removal of the A303 because that in itself affects the impact on relevant assets, as well as the mitigation proposed for those elements of the scheme (see e.g. PR 5.7.236 and 5.7.248). There is no evidence that when it made its judgment on the "fork in the road" between paragraphs 5.133 and 5.134 of the NSPSNN, the Panel introduced off-setting between different assets or had regard to the broader (or generic) heritage benefits of the entire scheme (e.g. as set out in PR 5.7.29 – see [70] above). The Panel performed the overall balancing exercise separately in section 7.5.

203. In DL 34 and DL 43 the SST set out his conclusion on which of the policy tests in paragraph 5.133 or paragraph 5.134 of the NPSNN should be applied. Having decided in favour of paragraph 5.134, the SST then applied that test in DL 51. There, the SST simply weighed benefits from the overall scheme ("the public benefits") against the harm he had already identified. They included the overall or generic scheme benefits for cultural heritage identified at PR 5.7.29. The benefits in PR 5.7.29 were put into the correct scale. There is no indication that the SST put the positive effects on each *individual* asset or asset grouping attributable to the western section of the proposed scheme in both sides of the balance.

204. In DL 80 the SST drew upon his earlier conclusions in DL 34 and DL 43 that the proposal would cause less than substantial harm, but there is no suggestion in DL 80 that that judgment was tainted by improperly taking into account heritage benefits from the scheme overall rather than the way in which the contentious elements of the western section of the scheme affected relevant assets. That judgment had previously been reached in DL 34 and DL 43.

205. Ultimately, ground 3 came down to an attack on the way in which the SST reached his conclusions on less than substantial harm in DL 34 and DL 43. In my judgment, they contain no indication that the SST took into account *overall* benefits of the scheme rather than effects of the scheme on *individual* relevant assets, so that this resulted in improper double-counting either in DL 51 or in DL 80 to DL 87.

206. The claimant's submission was also advanced on the basis that the SST had relied upon the views of IP2 and that the latter had taken that broader approach. I reject that submission. In PR 5.7.229 to 5.7.330 the Panel stated that IP2 had taken the view that less than substantial harm would be caused to assets affected by the western cutting and Longbarrow junction. The Panel gave no indication that that involved a different and broader approach to the assessment of that harm, one which took into account overall or generic scheme benefits, as compared with its own approach. Instead, the Panel said that it was simply a difference of professional judgment on the evidence. The claimant's submission on this point is not supported by any of the documents shown to the court

207. The claimant sought to criticise the relationship between DL 33 and DL 34 in order to suggest that impermissible double-counting was introduced into DL 34. I disagree. Part of DL 33 addressed the Panel's conclusion on the effect of the overall scheme on the WHS. It was in that context that the SST referred to the views of IP2 and others that

greater weight should be given to the beneficial effects of removing the existing A303 from the WHS rather than the harmful effects of part of the new scheme on part of the WHS. Indeed, some contended that there would be a net benefit overall. This approach was entirely proper because, it was necessary to consider the WHS as a whole and, correctly, it involved treating the WHS as a designated heritage asset in itself. Thus the benefits relevant to that asset would necessarily relate to the scheme as a whole. That approach is entirely consistent with the second and third sentences of [78] in *Bramshill* (see [194 to 196] above).

208. But in DL 34 the SST also brought in the third main issue and did so in the context of what he had already said in DL 30. The difference between IP2 and the Panel related to the effect of the western cutting and the Longbarrow junction on heritage assets and also the OUV of the WHS. Here, there is no reason to think that the SST, relying upon the views of IP2, took into account a wider range of heritage benefits than was permissible for the purposes of deciding whether paragraph 5.133 or 5.134 of the NPSNN applied (see [206] above).

209. For these reasons, ground 3 must be rejected.

Ground 4 – whether the proposal breached the World Heritage Convention

210. The claimant contends that the SST's acceptance that the scheme would cause harm, that is less than substantial harm, to the WHS involved a breach of articles 4 and 5 of the Convention and therefore the SST erred in law in concluding that s.104(4) of PA 2008 was not engaged. It was engaged and so, it is submitted, the presumption in s.104(3) should not have been applied in the decision letter.

211. The claimant's case as set out in its skeleton (see e.g. para. 242) appeared to be that any harm, or at least any significant harm, to the WHS would, if allowed, involve a breach of articles 4 and 5 of the Convention, irrespective of whether the benefits of the scheme were judged to have greater weight. That appears to have been the case presented in the Examination and which IP1 successfully persuaded the Panel to reject. In his oral submissions Mr. Wolfe QC shifted the case significantly. He accepted that the Convention allows for a balance to be struck between harm to the WHS and benefits, but contended that only heritage benefits, in particular benefits to the WHS, its OUV and attributes, could be taken into account in that balance. Thus, he submitted, the balance required to be struck by either paragraph 5.133 or paragraph 5.134 of the NPSNN conflicts with the Convention.

212. The first issue is whether the Convention has been incorporated into UK law, or the law applicable in England and Wales, so that its construction is a matter of law directly for this court. Although the Convention had been ratified by the UK, it is common ground that it has not been incorporated into our domestic law by legislation. Instead, Mr. Wolfe QC submitted that an international treaty may be treated by the court "as for all practical purposes as incorporated into domestic law," citing Lord Steyn in *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1 at [40] et seq. However, that decision does not assist the claimant. Lord Steyn was not prepared to treat a provision in the Immigration Rules not requiring any action to be taken contrary to the Refugee Convention as incorporating that Convention into English law. The Rules were insufficient for that purpose. But because the same principle was later enacted in

primary legislation, it was that measure which was held to have been sufficient to achieve incorporation (see [41] to [42]).

213. In the present case the claimant merely points to s.104(4) of the PA 2008. But that refers to international obligations generally and not specifically to the World Heritage Convention. As Mr. Taylor QC pointed out, on the claimant's argument s.104(4) would have the effect of incorporating *any* international obligation into our domestic law, but *only* for the purposes of determining an application for a DCO. There is nothing in the language used by Parliament to indicate that it intended to achieve such a strange result.

214. Instead, all that s.104(4) does is to make a breach of an international obligation one of the grounds for not applying s.104(3). But as Mr. Wolfe QC accepted, where s.104(4) is met, that does not automatically result in the refusal of an application for a DCO. Accordingly, Mr. Wolfe QC accepted that the highest that he could put the incorporation argument is that s.104(4) treats the issue of whether a proposal would comply with the Convention as a mandatory material consideration, and not that Parliament requires a proposal to comply with the Convention as a matter of law.

215. I am not persuaded that Mr Wolfe's revised analysis provides a sufficient justification for concluding that an international obligation has been incorporated into domestic law. Mr. Wolfe QC has not shown the court any authority where that has been accepted. Indeed, if the Convention is simply being treated as a material consideration, rather than as an instrument with which a proposal must comply, the issue of whether a proposal is in conflict with the Convention is essentially a matter of judgment for the decision-maker, subject to review on the grounds of irrationality. That is especially so given the very broad, open-textured nature of the language used in articles 4 and 5. The position would not be materially different from the second authority cited by Mr. Wolfe QC, *R v Secretary of State for the Home Department ex parte Launder* [1997] 1WLR 839, where the Secretary of State took the ECHR into account and the grounds of challenge were dealt with under the law on irrationality (see pp.867E to 869B).

216. On the basis that the Convention has not been incorporated into domestic law, the relevant principles on the interpretation of that instrument were set out by Lord Brown in *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756 at [67] to [68]. The court should allow the executive a margin of appreciation on the meaning of the Convention and only interfere if the view taken is not "tenable" or is "unreasonable." This approach allows for the possibility that, so far as the domestic courts are concerned, more than one interpretation, indeed a range, may be treated as "tenable." The issue is simply whether the decision-maker has adopted an interpretation falling within that range.

217. I have no hesitation in concluding that the SST was entitled to decide that the policy approach in paragraphs 5.133 and 5.134 of the NPSNN (read together with the surrounding paragraphs) is compliant with the Convention. That is a tenable view. If I had to decide the point of construction for myself, I would still conclude that those policies are compliant with the Convention.

218. Although Articles 4 and 5 refer to matters of great importance, they are expressed in very broad terms. By article 4 each State Party has recognised that the duty of protecting and conserving a WHS belongs primarily to that State, which "will do all it can to this end, to the utmost of its own resources." Resources are, of course, finite and they are

the subject of competing social, economic and environmental needs. The Convention does not further explain the meaning and scope of the language used in article 4. This must be a matter left to individual Party States.

219. In any event, article 4 has to be read in conjunction with the slightly more specific provisions in Article 5, and not in isolation. There the obligation on each State is to endeavour "as far as possible", and "as appropriate" for that country, to comply with paragraphs (a) to (e). They include the taking of the "appropriate" legal measures necessary to protect and conserve the heritage referred to in articles 1 and 2.

220. The broad language of these Articles is compatible with a State adopting a regime whereby a balance may be drawn between the protection against harm of a WHS or its assets and other objectives and benefits and, if judged appropriate, to give preference to the latter. The Convention does not prescribe an absolute requirement of protection which can never be outweighed by other factors in a particular case. Nor does the Convention use language which would limit such other factors to heritage benefits or benefits for the WHS in question. I also note that in its Guidance on Heritage Impact Assessments for Cultural World Heritage Properties, ICOMOS accepts that a balance may be drawn between the "public benefit" of a proposed change and adverse impacts on a WHS (para. 2-1-5).

221. The Australian authorities cited (*Commonwealth of Australia v State of Tasmania* (1983) 46 ALR 625; *Australian Convention Foundation Incorporated v Minister for the Environment* [2016] FCA 1042) need to be read carefully. Those cases were concerned with circumstances in which the Convention had been incorporated into Australian law by legislation and any observations on interpretation should be understood in the context to which the decisions were addressed. Having said that, I do not see my conclusion as conflicting with any of the observations in those decisions. They do not lend any support for the interpretation which Mr. Wolfe QC said must be given to the Convention. Indeed, the observations in the High Court of Australia in the Tasmanian Dam case upon which Mr Wolfe QC principally relied, emphasise the discretion left to individual State Parties as to the steps each will take and the resources it will commit (see e.g. Brennan J at p.776).

222. For these reasons, ground 4 must be rejected.

223. Although it is not necessary for my decision on ground 4, I would add one further point. As I have noted, it is common ground that there is no material difference between paragraphs 5.133 to 5.134 of the NPSNN and paragraphs 195 to 196 of the NPPF. The antecedent policy in Planning Policy Statement 5 (PPS5) was to the same effect and contained a statement that the government considered the policies it contained to be consistent with the UK's obligations under the Convention. No legal challenge has been brought to the policies in question, for example, on the basis that they adopted an interpretation of the Convention which is incorrect *on any tenable view*. A legal challenge to the NPSNN would now be precluded by s.13(1) of the PA 2008. Under s.106(1) a representation relating to the merits of a policy set out in a NPS may be disregarded by the SST (see also *Spurrier* and *ClientEarth*).

Ground 5

224. The claimant raises three contentions under ground 5:-

(i) The SST failed to take into account any conflict with Core Policies 58 and 59 of the Wiltshire Plan and with policy 1d of the WHS Management Plan;

(ii) The SST failed to take into account the effect of his conclusion that the proposal would cause less than substantial harm to heritage assets on the business case advanced for the scheme;

(iii) The SST failed to consider alternative schemes in accordance with the World Heritage Convention and common law.

(i) Failure to take into account local policies

225. It is plain from, for example, DL11 and DL27 that the SST had regard to the Wiltshire Core Strategy and the WHS Management Plan.

226. In PR 5.7.322 to 5.7.325 of its report the Panel stated in a section devoted to its fifth main issue that in view of its conclusions on the impact of the scheme on the OUV of the WHS, the proposal would not accord with Core Policies 58 and 59 of the Core Strategy, nor with policy 1d of the WHS Management Plan. The Panel clearly thought that the language used in PR 5.7.324 was apt to cover impact upon the settings of designated heritage assets, the subject of Core Policy 58. The Panel carried that conclusion regarding conflict with those three policies through to its summary of the adverse impacts of the scheme within section 7.2 dealing with the planning balance. At PR 7.2.32 the Panel restated the conflict they perceived with the three local policies in terms of harm to the WHS and its OUV. There is no reason to think that in that paragraph the Panel excluded the broader consideration addressed in PR 7.2.33. In any event, at PR 7.5.11 the Panel restated its conclusion on breach of the three policies in terms of both harm to the OUV of the WHS and harm to "the significance of heritage assets through development within their settings." Plainly the Panel did not think these differences in wording were important for a true understanding of their reasoning on local policies.

227. In DL28 the SST stated:-

> "The ExA concludes the Development would benefit the OUV in certain valuable respects, especially relevant to the present generation. However, permanent irreversible harm, critical to the OUV would also occur, affecting not only present, but future generations. It considers the benefits to the OUV would not be capable of offsetting this harm and that the overall effect on the WHS OUV would be significantly adverse [ER 5.7.321]. The ExA considers the Development's impact on OUV does not accord with the Wiltshire Core Strategy Core Policies 59 and 58, which aim to sustain the OUV of the WHS and ensure the conservation of the historic environment [ER 5.7.322 – 5.7.324], and that the Development is also not consistent with Policy 1d of the WHS Management Plan [ER 5.7.325]. It considers this is

a factor to which substantial weight can be attributed [ER 7.5.11]."

228. The claimant complains that this failed to address the breach of Core Policy 58 as a result of harm caused to the settings of a number of designated assets (para. 262 of skeleton). But the SST's summary in DL28 accurately and fairly reflects the language used by the Panel themselves to cover the issues raised by both Core Policies 58 and 59. The criticism is wholly untenable.

229. The second complaint is that the SST disagreed with the Panel on the level of harm that would be caused to heritage assets (i.e. from the western cutting and from the Longbarrow junction) and so cannot be taken to have accepted, in accordance with DL 10, that that lesser degree of harm still involved conflict with the three local policies. But the language used in those policies does not indicate that "less than substantial" harm could not involve any conflict therewith and the SST said nothing to the contrary. The only rational inference is that the SST accepted that there remained a conflict with those policies. The second criticism is no better than the first.

230. There is nothing in the decision letter to indicate that the conflict with local policies was disregarded by the SST. In any event, and as Mr. Strachan QC submitted, the local policies do not refer to any balancing of harm against the benefits of a proposal, as required by the NPSNN. The NPSNN was the primary policy document to be applied under the PA 2008 according to s.104(3), which may be contrasted with s.38(6) of PCPA 2004 Act (see also para. 91 of the defendant's skeleton and *Bramshill* at [87]).

231. For these reasons ground 5(i) must be rejected.

(*ii) The alleged error regarding the business case for the scheme*

232. This complaint arises from paragraph 4.5 of the NPSNN (see [40] above). An application is normally to be supported by a business case prepared in accordance with Treasury Green Book principles. It provides the basis for investment decisions and will also be important for the consideration by the Examining Authority or by the Secretary of State of the adverse impacts and benefits of a proposal. However, the NPSNN does not suggest that such a business case should put a monetary value on every factor which goes into a planning balance or a balance carried out under paragraphs 5.133 or 5.134 of the NPSNN.

233. Nonetheless, the claimant submits that the SST's decision was flawed because he did not take into account his conclusion that two elements in the western section of the scheme would result in less than substantial harm to heritage assets.

234. The point is said to arise in this way. The cost benefit analysis for the scheme placed a monetary value of £955m on the benefit of removing the existing A303 from the WHS. This was by far the greatest monetary benefit ascribed to the scheme, being approximately ¾ of its overall benefits. The costs of the scheme were said to be between £1.15bn and £1.2bn (Table 5-6 of IP1's "Case for the scheme and NPS accordance"). So without the sum attributed to the removal of the A303 the analysis would be heavily negative. That is hardly surprising. The construction of a 3.3 km tunnel, the cuttings and the junctions are expensive works.

235. The figure of £955m was arrived at by a public attitude survey which asked people to put a monetary value on their willingness to pay for the perceived benefit of removing the existing A303 and its traffic from the immediate vicinity of Stonehenge; or to put a monetary value on their willingness to accept a payment as compensation for the loss of amenity to travellers on the existing A303 through no longer being able to see Stonehenge while travelling. The survey was targeted at three groups: visitors to Stonehenge, road users and the general population (PR 5.17.94).

236. A number of criticisms were made of this approach during the Examination (see e.g. PR 5.17.96 to 5.17.99). IP1 accepted that it was unusual for cultural heritage assets to be given a monetary value in the appraisal of a transport scheme, but here the enhancement of the cultural heritage was so significant that it formed an integral part of the objectives of the scheme and it was therefore considered appropriate to make an attempt at quantification of that factor (PR 5.17.100). However, it is plain that the exercise did not attempt to monetise all positive or negative impacts upon cultural heritage or all factors going into the planning balance. IP1 submitted at the Examination that the two should not be confused (PR 5.17.112). The cost benefit analysis formed part of a value for money exercise. It was relevant, for example, that funding was in place, given that compulsory purchase powers needed to be granted as part of the DCO.

237. The National Audit Office pointed out that although IP1 had used approved methodologies to arrive at the figure of £955m, calculating benefits in that way was inherently uncertain and decision-makers were advised to treat them cautiously (PR 5.17.108).

238. The Panel took a realistic attitude to this debate (PR 5.17.117):-

> "The ExA makes no specific criticism of the manner in which the study has been undertaken, or the methodology adopted. It appears to the ExA a genuine attempt undertaken to put a value on heritage benefits as described in the survey material. However, the ExA recognises that this is hedged with uncertainty and endorses the cautious approach advocated by the NAO and the DfT itself. The ExA notes the concerns of SA and others that the visual information provided to survey participants did not fully represent the impact of the Proposed Development on the WHS and recognises that participants could not be expected to have the detailed knowledge of impacts that the Examination process has allowed. The ExA also understands that participants might, if presented with choices about what their taxes would be spent on, adjust the priority given to otherwise desirable heritage outcomes."

239. The whole of the Panel's report was before the SST. The Panel accepted that respondents to the survey could not be expected to have detailed knowledge about impacts on cultural heritage that had been discussed in the Examination. It did not suggest that this component of the economic or investment analysis should be adjusted, in some way, whether quantitatively or otherwise, according to the judgments reached on heritage impacts, for example, from the western section of the scheme.

240. The SST did not disagree with the Panel's approach. Given the nature and purpose of the cost benefit analysis, the view taken on the level of heritage benefits or disbenefits attributable to parts of the scheme was not an "obviously material consideration" which the SST was obliged to take into account as altering the business case.

241. Accordingly, ground 5(ii) must be rejected.

(iii) Alternatives to the proposed western cutting and portals

242. The focus of the claimant's oral submissions was that the defendant failed to consider the relative merits of two alternative schemes for addressing the harm resulting from the western cutting and portal, firstly, to cover approximately 800m of the cutting and secondly, to extend the bored tunnel so that the two portals are located outside the western boundary of the WHS.

243. The Panel dealt with the issue of alternatives in section 5.4 of its report, before it came to deal with impacts on the cultural heritage in section 5.7. On a fair reading of the report as a whole, there is no indication that the substantial harm it identified in section 5.7 influenced the approach it had previously taken to alternatives. The same is true of section 7.2 of the report which brought together in the planning balance the various factors which had previously been considered. Paragraph 7.2.25 summarised the Panel's overall conclusion on the treatment of alternatives in section 7.4. After dealing with biodiversity and climate change the Panel summarised its conclusions on cultural heritage issues at paragraphs 7.2.31 to 7.2.33. The reason for this would appear to be the way in which the Panel applied the NSPNN.

244. It is important to see how the Panel approached the issue of alternatives in section 5.4. They directed themselves at the outset by reference to paragraphs 4.26 and 4.27 of the NPSNN (see [41] above) (see PR 5.4 to 5.4.2). Those policies framed the Panel's conclusions at PR 5.4.56 to 5.4.75.

245. IP1's case, applying paragraph 4.26 to 4.27 of the NPSNN, was that the only consideration of alternatives relevant to the Examination were:

(i) "to be satisfied that an options appraisal has taken place,"

(ii) compliance with the EIA Regulations 2017 in relation to the main alternatives studied by the applicant and the main reasons for the applicant's decision to choose the scheme, and

(iii) alternatives to the compulsory acquisition of land (PR 5.4.3 and 5.4.60).

246. At PR 5.4.56 the Panel stated that IP1 had correctly identified all legal and policy requirements relating to the assessment of alternatives. It accepted that alternatives did not have to be assessed under The Conservation of Habitats and Species Regulations 2017 (SI 2017 No 1012) ("the Habitats Regulations 2017") or the Water Framework Directive (PR 5.4.57 to 5.4.58). In relation to policy requirements, the Panel accepted that IP1 had satisfied the sequential and exception tests for flood risk and that no part of the scheme fell within a National Park or an Area of Outstanding Natural Beauty (PR 5.4.59). However the Panel did not consider any policy requirements relating to cultural heritage impacts which might make it appropriate or even necessary to reach a

conclusion on the relative merits of IP1's scheme and alternatives to it. That is all the more surprising given that a significant part of the Panel's report was devoted to the representations of interested parties about alternatives to avoid or reduce the harm to the WHS and heritage assets that would result from IP1's scheme (see PR 5.4.35 to 5.4.55).

247. The Panel summarised IP1's case on options for a longer tunnel at PR 5.4.16 to 5.4.27 and the representations of interested parties on that issue at PR 5.4.45 to 5.4.49. As a result of the concerns expressed by the WHC about the western section of the project, IP1 had studied two longer tunnel options: first, the provision of a cut and cover section to the west of the proposed bored tunnel and second, an extension of that bored tunnel to the west so that its portals would be located outside the WHS. The former would increase project costs by £264m and the latter by £578m (PR 5.4.18 to 5.4.19). In the HIA IP1 stated that the options involving 4.5km tunnels were assessed as having "significantly higher estimated scheme costs that were considered to be unaffordable and were not considered further in the assessment" (para. 7.3.12) However, in the Examination IP1 said, in addition, that it had rejected both of these options not purely on the grounds of cost but also because they would provide "minimal benefit in heritage terms" (PR 5.4.20).

248. It is important to see IP1's case in context. First, it did not consider that any of the elements of the western section of its proposal would cause substantial harm to designated heritage assets ([73] above). Second, it considered that there would be a beneficial effect on five attributes of the OUV, only a slightly adverse effect on two attributes and a slightly beneficial effect looking at the OUV, authenticity and integrity of the WHS overall ([75] above).

249. The Panel recorded the position of IP2 as having been satisfied that IP1 had undertaken "an options appraisal in relation to the alternatives to the route of a highway in place of the A303…." (PR 5.4.55). Once again "options appraisal" referred to the term used in paragraph 4.27 of the NPSNN. IP1 also asks the court to note PR 5.4.54 and 5.4.63 where the Panel recorded that IP2 had said that they were satisfied that the EIA had addressed alternatives, relying also upon the HIA, including the text quoted in [247] above from paragraph 7.3.12. However, it was not suggested that IP2 addressed the issue whether the relative merits of alternatives needed to be considered by the SST in order to meet common law or policy requirements under the NPSNN for the protection of heritage assets and their settings. Nor has the court been shown any assessment by IP2, which was before the Panel or SST, agreeing with IP1's additional contention that the extended tunnel options would bring only minimal benefits in heritage terms.

250. In its conclusions the Panel said that it was satisfied that IP1 had carried out a "full options appraisal" for the project in achieving its selection for inclusion in the RIS[1] as referred to in paragraph 4.27 of the NPSNN. The Panel also relied upon IP2's view that "the EIA has addressed alternatives" and that IP1 had carried out an options appraisal on alternatives for the route of a highway to replace the A303 as it passes through the WHS (PR 5.4.63). The Panel stated that the criticisms made by interested parties of the appraisal process and public consultation did not alter its view that a full options appraisal had been carried out by IP1 (PR 5.4.67). Importantly, the Panel referred

[1] For a discussion of the statutory regime under which Road Investment Strategies are set see *R (Transport Action Network v Secretary of State for Transport* [2021] EWHC 2095 (Admin)

expressly to IP1's case that because the scheme retained its status in the RIS, "further option testing need not be considered by the [Panel] or by the [SST]" (PR 5.4.68). The Panel also referred to the "full response" which IP1 had given on the alternatives referred to by interested parties, noting that IP1 had "explained" its reasons for their rejection and the selection of the scheme route. The Panel said that it found "no reason to question the method and approach of the appraisal process that led to that outcome" (PR 5.4.69).

251. After noting the views of the WHC (PR 5.4.70), the Panel then reached this highly important conclusion at PR 5.4.71:-

> "However, insofar as the options appraisal is concerned, the ExA is content that the Applicant's approach to the consideration of alternatives is in accordance with the NPSNN. It is satisfied that the Applicant has undertaken a proportionate consideration of alternatives as part of the investment decision making process. *Since that exercise has been carried out, it is not necessary for this process to be reconsidered by the ExA or the decision maker*." (emphasis added)

This simply restated paragraph 4.27 of the NPSNN.

252. The Panel addressed the EIA requirement for assessment of alternatives in PR 5.4.72 to 5.4.73. Its conclusions focused on the adequacy of the description in the ES of IP1's study of alternatives. Consistent with what it had just said in PR 5.4.71, the Panel did not make its own appraisal of the relative merits of the proposed scheme and alternatives, in particular the longer tunnel option, despite the fact that subsequently in section 5.7 of its report, the Panel went on to make a number of strong criticisms of the proposed western section which subsequently drove its recommendation that the application for development consent be refused.

253. In PR 5.4.74 the Panel addressed alternatives in the context of compulsory acquisition. But it is not suggested that that addressed alternatives to, for example, the western cutting. Instead, the Panel referred to land required for the deposit of tunnel arisings.

254. The Panel's overall conclusions at PR 5.4.75 was:-

> "The ExA concludes that there are no policy or legal requirements that would lead it to recommend that development consent be refused for the Proposed Development in favour of another alternative."

255. Similarly at PR 7.2.28 the Panel concluded:-

> "The ExA is satisfied that the Applicant has carried out a proportionate option consideration of alternatives as part of the investment decision making process which led to the inclusion of the scheme within RIS1. It concludes that the Applicant has complied with the NPSNN, paragraphs 4.26 and 4.27. There are no policy, or legal requirements that would lead the ExA to

recommend that consent be refused for the Proposed Development in favour of another alternative."

256. In his decision letter the SST merely stated that the impacts of a number of factors, including alternatives, were neutral (DL 63). In relation to alternatives, the SST relied upon section 5.4 of the Panel's report and PR 7.2.28. He said that he saw "no reason to disagree with the [Panel's] reasoning and conclusions on these matters."

257. Accordingly, both the Panel and the SST considered alternatives on the same basis as IP1, in that it was necessary to consider alternatives, but only in relation to whether an options appraisal had been carried out, whether the ES produced by IP1 had complied with the EIA Regulations 2017 and whether compulsory acquisition of land was justified. Although regulation 21(1) of the EIA Regulations 2017 required the SST to take into account the "environmental information", which included the representations made on the ES (see [31] above), the Panel and the SST did not go beyond assessing the adequacy of the assessment of alternatives in the ES for the purposes of compliance with that legislation. Neither the Panel nor the SST expressed any conclusions about whether the provision of a longer tunnel would achieve only "minimal benefits" as claimed by IP1 in its evidence to the Examination (PR 5.4.20), taking into account not only the costs of the alternatives but also the level of harm to heritage assets which would result from the proposed scheme.

258. Accordingly, the approach taken by the Panel and by the SST under the EIA Regulations 2017 did not go beyond that set out in PR 5.4.71. Yet these were vitally important issues raised in relation to a heritage asset of international importance by WHC, ICOMOS and many interested parties, including archaeological experts. It is also necessary to keep in mind the nature of the western section of the proposal which had given rise to so much controversy. The Panel pithily described it as the greatest physical change to the Stonehenge landscape in 6000 years and a change which would be permanent and irreversible, unlike a road constructed on the surface of the land (PR 5.7.224 to 5.7.225 and 5.7.247). Does the approach taken by the Panel and adopted by the SST disclose an error of law?

259. It is necessary to return to the NPSNN. Paragraph 4.26 begins by stating a general principle, that an applicant should comply with "all legal requirements" and "any policy requirements set out in this NPS" on the assessment of alternatives. The NPSNN goes on to set out requirements which should be considered "in particular," namely the EIA Directive and the Water Framework Directive and "policy requirements in the NPS for the consideration of alternatives." But those instances are not exhaustive. "Legal requirements" include any arising from judicial principles set out in case law as well as the Habitats Regulations 2017. Similarly, the references in paragraph 4.26 to developments in National Parks, the Norfolk Broads and AONBs and flood risk assessment are given only as examples of policy requirements for the assessment of alternatives.

260. But the Panel, and by the same token, the SST, applied paragraph 4.27 of the NPSNN, which states that where a project has been subject to full options testing for the purposes of inclusion in a RIS under the IA 2015 it is *not necessary* for the Panel or the decision-maker to reconsider this process; instead, they should be satisfied that the assessment has been carried out. On a proper interpretation of the NPSNN, I do not consider that where paragraph 4.27 is satisfied (i.e. there has been full options testing for the purposes

of a RIS) the applicant does not need to meet any requirements arising from paragraph 4.26. As the NPSNN states, a RIS is an "investment decision-making process". For example, page 91 of the current RIS, "Road Investment Strategy 2: 2020-2025", explains that the document makes an investment commitment to the projects listed on the assumption that they can "secure the necessary planning consents." "Nothing in the RIS interferes with the normal planning consent process."[2]

261. A few examples suffice to illustrate why paragraph 4.27 of the NPSNN cannot be treated as overriding paragraph 4.26. First, a scheme may require appropriate assessment under the Habitats Regulations 2017 and the consideration of alternatives by the competent authority, following any necessary consultations (regulations 63 and 64). Those obligations on the competent authority (which are addressed in para. 4.24 of the NPSNN) cannot be circumvented by reliance upon paragraph 4.27 of the NPSNN.

262. Second, even if a full options appraisal has been carried out for the purposes of including a project in a RIS, that may not have involved all the considerations which are required to be taken into account under the development consent process, or there may have been a change in circumstance since that exercise was carried out. In the present case page 3-3 of chapter 3 of the ES stated that the options involving a 4.5 km tunnel (i.e. a western extension) all involved costs significantly in excess of the available budget and so had not been considered further. During the Examination IP1 stated in a response to questions from the Panel that it also considered that extending the tunnel to the west would provide only "minimal benefit" in heritage terms (PR 5.4.20). That was an additional and controversial issue in the Examination which fell to be considered by the Panel.

263. Third, the options testing for a RIS may rely upon a judgment by IP1 with which the Panel disagrees and which therefore undermines reliance upon that exercise and paragraph 4.27 of the NPSNN. In the present case IP1's assessment that the extended tunnel options would bring minimal benefit in heritage terms cannot be divorced from its judgments that (i) no part of its proposed scheme would cause substantial harm to any designated heritage asset ([71] above) and (ii) there would be a beneficial effect on five attributes of the OUV, only a slightly adverse effect on two attributes and a slightly beneficial effect looking at the OUV, authenticity and integrity of the WHS overall ([75] above). By contrast, the Panel explained why it considered that (i) the western section of the proposal would cause substantial harm to the settings of assets ([97-98] above) and (ii) there would be harm to six attributes of the OUV (including great or major harm to three attributes), the integrity and authenticity of the WHS would be substantially and permanently harmed, and its authenticity seriously harmed ([101 to 103] above). In such circumstances, it was irrational for the Panel to treat the options testing carried out by IP1 as making it unnecessary to assess the relative merits of the tunnel alternatives for themselves, *a fortiori* if there was a policy or legal requirement for that matter to be considered by the decision-maker.

264. The Panel's finding that substantial harm would be caused to a WHS, an asset of the "highest significance" meant that paragraph 5.131 of the NPSNN was engaged (see [46]

[2] See *R (Transport Action Network v Secretary of State for Transport* [2021] EWHC 2095 (Admin) at [28]-[37] and [96(vii)].

above). On that basis it would have been "wholly exceptional" to treat that level of harm as acceptable.

265. Furthermore, on the Panel's view paragraph 5.133 of the NPSNN was engaged. It would follow that the application for consent was to be refused unless it was demonstrated that the substantial harm was "necessary" in order to deliver substantial public benefits outweighing that harm. It is relevant to note that this policy also applies to the complete loss of a heritage asset. In such circumstances, it is obviously material for the decision-maker (and any reporting Inspector or Panel) to consider whether it was unnecessary for that loss or harm to occur in order to deliver those benefits. The test is not merely a balancing exercise between harm and benefit. Accordingly, relevant alternatives for achieving those benefits are an obviously material consideration. However, although in the present case the Panel made its vitally important finding of substantial harm, it simply carried out a balancing exercise without also applying the necessity test. In the Panel's judgment the proposal failed simply on the balance of benefits and harm, even without considering whether any alternatives would be preferable (see [120]). Because the Panel approached the matter in that way, the SST did not have the benefit of the Panel's views on the relative merits of the extended tunnel options compared to the proposed scheme.

266. The SST differed from the Panel in that he considered the western section of the scheme would cause less than substantial harm. Consequently, paragraph 5.134 of the NPSNN was engaged. That only required the balancing of heritage harm against the public benefits of the proposal without also imposing a necessity test. However, when it came to striking the overall planning balance, the SST relied upon the need for the scheme and the benefits it would bring (see [130] and [140-141] above).

267. Furthermore, the SST did not differ from the Panel in relation to the effect of the western section on attributes of the OUV and the integrity and authenticity of the WHS. He also accepted the Panel's view that the beneficial effects of the scheme on the OUV did not outweigh the harm caused (see [139] and [142 to 144] above).

268. The principles on whether alternative sites or options may permissibly be taken into account or whether, going further, they are an "obviously material consideration" which must be taken into account, are well-established and need only be summarised here.

269. The analysis by Simon Brown J (as he then was) in *Trusthouse Forte v Secretary of State for the Environment* (1987) 53 P & CR 293 at 299-300 has subsequently been endorsed in several authorities. First, land may be developed in any way which is acceptable for planning purposes. The fact that other land exists upon which the development proposed would be yet more acceptable for such purposes would not justify the refusal of planning permission for that proposal. But, secondly, where there are clear planning objections to development upon a particular site then "it may well be relevant and indeed necessary" to consider where there is a more appropriate site elsewhere. "This is particularly so where the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it." Examples of this second situation may include infrastructure projects of national importance. The judge added that even in some cases which have these characteristics, it may not be necessary to consider alternatives if the environmental impact is relatively slight and the objections not especially strong.

270. The Court of Appeal approved a similar set of principles in *R (Mount Cook Land Limited) v Westminster City Council* [2017] PTSR 116 at [30]. Thus, in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant. In those "exceptional circumstances" where alternatives might be relevant, vague or inchoate schemes, or which have no real possibility of coming about, are either irrelevant, or where relevant, should be given little or no weight.

271. Essentially the same approach was set out by the Court of Appeal in *R (Jones) v North Warwickshire Borough Council* [2001] PLCR 31 at [22] to [30]. At [30] Laws LJ stated:-

> "……. it seems to me that all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking—and I lay down no fixed rule, any more than did Oliver L.J. or Simon Brown J.—such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question."

272. In *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P&CR 19 Carnwath LJ emphasised the need to draw a distinction between two categories of legal error: first, where it is said that the decision-maker erred by taking alternatives into account and second, where it is said that he had erred by failing to take them into account ([17] and [35]). In the second category an error of law cannot arise unless there was a legal or policy requirement to take alternatives into account, or such alternatives were an "obviously material" consideration in the case so that it was irrational not to take them into account ([16] to [28]).

273. In *R (Langley Park School for Girls Governing Body) v Bromley London Borough Council* [2009] EWCA Civ 734 the Court of Appeal was concerned with alternative options within the same area of land as the application site, rather than alternative sites for the same development. In that case it was necessary for the decision-maker to consider whether the openness and visual amenity of Metropolitan Open Land ("MOL") would be harmed by a proposal to erect new school buildings. MOL policy is very similar to that applied within a Green Belt. The local planning authority did not take into account the claimant's contention that the proposed buildings could be located in a less open part of the application site resulting in less harm to the MOL. Sullivan LJ referred to the second principle in *Trusthouse Forte* and said that it must apply with equal, if not greater, force where the alternative suggested relates to different siting within the same application site rather than a different site altogether ([45 to 46]). He added that no "exceptional circumstances" had to be shown in such a case ([40]).

274. At [52-53] Sullivan LJ stated:-

> "52. It does not follow that in every case the "mere" possibility that an alternative scheme might do less harm must be given no

weight. In the Trusthouse Forte case the Secretary of State was entitled to conclude that the normal forces of supply and demand would operate to meet the need for hotel accommodation on another site in the Bristol area even though no specific alternative site had been identified. There is no "one size fits all" rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc.) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.

53.Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. In the present case the members were not asked to make that judgment. They were effectively told at the onset that they could ignore Point (b), and did so simply because the application for planning permission did not include the alternative siting for which the objectors were contending, and the members were considering the merits of that application."

275. The decision cited by Mr Taylor QC in *First Secretary of State v Sainsbury's Supermarkets Limited* [2007] EWCA Civ 1083 is entirely consistent with the principles set out above. In that case, the Secretary of State did in fact take the alternative scheme promoted by Sainsbury's into account. He did not treat it as irrelevant. He decided that it should be given little weight, which was a matter of judgment and not irrational ([30 and 32]). Accordingly, that was not a case, like the present one[3], where the error of law under consideration fell within the second of the two categories identified by Carnwath LJ in *Derbyshire Dales District Council* (see [272] above).

276. The wider issue which the Court of Appeal went on to address at [33] to [38] of the *Sainsbury's* case does not arise in our case, namely must *planning permission be refused* for a proposal which is judged to be "acceptable" because there is an alternative scheme which is considered to be more acceptable. True enough, the decision on acceptability in that case was a balanced judgment which had regard to harm to heritage assets, but that was undoubtedly an example of the first principle stated in *Trusthouse*

[3]Which is to do with a failure to assess the relative merits of identified alternatives.

Forte (see [269] above). The court did not have to consider the second principle, which is concerned with whether a decision-maker may be obliged to take an alternative *into account.* Indeed, in the present case, there is no issue about whether alternatives for the western cutting should have been taken into account. As I have said, the issue here is narrower and case-specific. Was the SST entitled to go no further, in substance, than the approach set out in paragraph 4.27 of the NPSNN and PR 5.4.71?

277. In my judgment the clear and firm answer to that question is no. The relevant circumstances of the present case are wholly exceptional. In this case the relative merits of the alternative tunnel options compared to the western cutting and portals were an obviously material consideration which the SST was required to assess. It was irrational not to do so. This was not merely a relevant consideration which the SST could choose whether or not to take into account[4]. I reach this conclusion for a number of reasons, the cumulative effect of which I judge to be overwhelming.

278. First, the designation of the WHS is a declaration that the asset has "outstanding universal value" for the cultural heritage of the world as well as the UK. There is a duty to protect and conserve the asset (article 4 of the Convention) and there is the objective *inter alia* to take effective and active measures for its "protection, conservation, presentation and rehabilitation" (article 5). The NPSNN treats a World Heritage Site as an asset of "the highest significance" (para. 5.131).

279. Second, the SST accepted the specific findings of the Panel on the harm to the settings of designated heritage assets (e.g. scheduled ancient monuments) that would be caused by the western cutting in the proposed scheme. He also accepted the Panel's specific findings that OUV attributes, integrity and authenticity of the WHS would be harmed by that proposal. The Panel concluded that that overall impact would be "significantly adverse", the SST repeated that (DL 28) and did not disagree (see [137], [139] and [144] above).

280. Third, the western cutting involves large scale civil engineering works, as described by the Panel. The harm described by the Panel would be permanent and irreversible.

281. Fourth, the western cutting has attracted strong criticism from the WHC and interested parties at the Examination, as well as in findings by the Panel which the SST has accepted. These criticisms are reinforced by the protection given to the WHS by the objectives of Articles 4 and 5 of the Convention, the more specific heritage policies contained in the NPSNN and by regulation 3 of the 2010 Regulations.

282. Fifth, this is not a case where no harm would be caused to heritage assets (see *Bramshill* at [78]). The SST proceeded on the basis that the heritage benefits of the scheme, in particular the benefits to the OUV of the WHS, did not outweigh the harm that would be caused to heritage assets. The scheme would not produce an overall net benefit for the WHS. In that sense, it is not acceptable *per se*. The acceptability of the scheme depended upon the SST deciding that the heritage harm (and in the overall balancing exercise *all* disbenefits) were outweighed by the need for the new road and *all* its other benefits. This case fell fairly and squarely within the exceptional category of cases

[4] It should be recorded that neither the Panel nor the SST considered exercising any discretion to consider the relative merits of alternative options for extending the proposed tunnel to the west, given PR 5.4.71 and their reliance upon para. 4.27 of the NPSNN.

identified in, for example, *Trusthouse Forte*, where an assessment of relevant alternatives to the western cutting was required (see [269] above).

283. The submission of Mr. Strachan QC that the SST has decided that the proposed scheme is "acceptable" so that the general principle applies that alternatives are irrelevant is untenable. The case law makes it clear that that principle does not apply where the scheme proposed would cause significant planning harm, as here, and the grant of consent *depends* upon its adverse impacts being outweighed by need and other benefits (as in para. 5.134 of the NPSNN).

284. I reach that conclusion without having to rely upon the points on which the claimant has succeeded under ground 1(iv). But the additional effect of that legal error is that the planning balance was not struck lawfully and so, for that separate reason, the basis upon which Mr. Strachan QC says that the SST found the scheme to be acceptable collapses.

285. Sixth, it has been accepted in this case that alternatives should be considered in accordance with paragraphs 4.26 and 4.27 of the NPSNN. But the Panel and the SST misdirected themselves in concluding that the carrying out of the options appraisal for the purposes of the RIS made it unnecessary for them to consider the merits of alternatives for themselves. IP1's view that the tunnel alternatives would provide only "minimal benefit" in heritage terms was predicated on its assessments that no substantial harm would be caused to any designated heritage asset and that the scheme would have slightly *beneficial* (not adverse) effects on the OUV attributes, integrity and authenticity of the WHS. The fact that the SST accepted that there would be net harm to the OUV attributes, integrity and authenticity of the WHS (see [139] and [144] above) made it irrational or logically impossible for him to treat IP1's options appraisal as making it unnecessary for him to consider the relative merits of the tunnel alternatives. The options testing by IP1 dealt with those heritage impacts on a basis which is inconsistent with that adopted by the SST.

286. Seventh, there is no dispute that the tunnel alternatives are located within the application site for the DCO. They involve the use of essentially the same route and certainly not a completely different site or route. Accordingly, as Sullivan LJ pointed out in *Langley Park* (see [246] above), the second principle in *Trusthouse Forte* applies with equal, if not greater force.

287. Eighth, it is no answer for the defendant to say that DL 11 records that the SST has had regard to the "environmental information" as defined in regulation 3(1) of the EIA Regulations 2017. Compliance with a requirement to take information into account does not address the specific obligation in the circumstances of this case to compare the relative merits of the alternative tunnel options.

288. Ninth, it is no answer for the defendant to say that in DL 85 the SST found that the proposed scheme was in accordance with the NPSNN and so s.104(7) of the PA 2008 may not be used as a "back door" for challenging the policy in paragraph 4.27 of the NPSNN. I have previously explained why paragraph 4.27 does not override paragraph 4.26 of the NPSNN, and does not disapply the common law principles on when alternatives are an obviously material consideration. But in addition the SST's finding that the proposal accords with the NPSNN for the purposes of s.104(3) of the PA 2008 is vitiated (a) by the legal error upheld under ground 1(iv) and, in any event, (b) by the

legal impossibility of the SST deciding the application in accordance with paragraph 4.27 of the NPSNN.

289. I should add for completeness that neither the Panel nor the SST suggested that the extended tunnel options need not be considered because they were too vague or inchoate. That suggestion has not been raised in submissions.

290. For all these reasons, I uphold ground 5(iii) of this challenge.

Conclusions

291. The court upholds two freestanding grounds of challenge, 1(iv) and 5(iii). Permission is granted to the claimant to apply for judicial review in relation to those grounds.

292. Permission is refused to apply for judicial review in respect of all other grounds on the basis that each of them is unarguable.

293. There is no basis for the court to hold that relief should be withheld under s.31(2A) of the Senior Courts Act 1981. It is self-evident from the nature of each of the grounds I have upheld that it cannot be said that it is highly likely that the application for development consent would still have been granted if neither error had been made.

294. The claim for judicial review succeeds to the extent I have indicated. The claimant is entitled to an order quashing the SST's decision to grant development consent and the DCO itself.

Appendix 1 – Legal principles agreed between the parties

1. The general legal principles applicable to a judicial review of this kind are well-established. Amongst other things:

    a. There is a clear and basic distinction between questions of interpretation of policy and the application of policy and matters of planning judgment. The Court will not interfere with matters of planning judgment other than on legitimate public law grounds: see for example *Client Earth* at [101] and [103] [4/9/203- 204], applying *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221 and *St Modwen Developments v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643; [2017] PTSR 476 at [7].

    b. Decision Letters should be read (1) fairly and in good faith, and as a whole; (2) in a straightforward and down-to-earth manner, without excessive legalism or criticism; and (3) as if by a well-informed reader who understands the principal controversial issues in the case: see *St Modwen* above and the principles *in Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153, 164E-G).

    c. Reasons given for a decision must be intelligible, adequate and enable the reader to understand why the matter was decided as it was: see for example *South Bucks DC v Porter* (No 2) [2004] 1 WLR 1953. The question is whether the reasons given leave room for genuine, as opposed to forensic, doubt as to what was decided and why (*R (CPRE Kent) v Dover District Council* [2017] UKSC 79 at [42]). Reasons can be briefly stated and there is no requirement to address each and every point made, provided that the reasons explain the decision maker's conclusions on the principal important controversial issues. In circumstances where the Secretary of State disagrees with a recommendation from a planning inspector, there is no different standard of reasons: see *Client Earth* High Court judgment at [146] and *Secretary of State for Communities and Local Government v Allen* [2016] EWCA Civ 767 at [19]. However, 'if disagreeing with an inspector's recommendation the Secretary of State is…required to explain why he rejects the inspector's view' see *Horada v SSCLG* [2016] EWCA Civ 169, at [40]. Similarly, in the heritage context, the need to give considerable importance and weight to listed building preservation does not change the standard of legally adequate reasons for granting planning permission: see *Mordue v Secretary of State for Communities and Local Government* [2015] EWCA Civ 29434 1243 at [24]-[26]. Reasons do not need to be given for the way in which every material consideration has been dealt with (*HJ Banks & Co Ltd v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 668).

    d. The judgment of Lewis J. in *R (Mars Jones) v Secretary of State for Business, Energy and Industrial Strategy* [2017] EWHC 1111 (Admin) has applied the South Bucks standard of reasons to development consent decisions (at [47]).

    e. Where it is alleged that a decision-maker has failed to take into account a material consideration, it is insufficient for a claimant simply to say that the decision-maker has failed to take into account a material consideration. A legally relevant consideration is only something that is not irrelevant or immaterial, and therefore something which the decision-maker is empowered or entitled to take into

account. But a decision-maker does not fail to take a relevant consideration into account unless he was under an obligation to do so. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account: see *Client Earth* at [99] applying *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221

f. The interpretation of planning policy is a matter for the court. In *R (Scarisbrick v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787, the Court of Appeal considered the interpretation of national policy statement for nationally significant hazardous waste infrastructure under the Planning Act 2008. See paragraphs 5-8. Lindblom LJ (with whom the other Lord Justices agreed) held:

> “19. The court's general approach to the interpretation of planning policy is well established and clear (see the decision of the *Supreme Court in Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13 , in particular the judgment of Lord Reed at paragraphs 17 to 19). The same approach applies both to development plan policy and statements of government policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd* . and *Richborough Estates Partnership LLP v Cheshire East Borough Council* [2017] UKSC 37 , at paragraphs 22 to 26). Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context (see paragraph 18 of Lord Reed's judgment in *Tesco Stores v Dundee City Council*). The author of a planning policy is not free to interpret the policy so as to give it whatever meaning he might choose in a particular case. The interpretation of planning policy is, in the end, a matter for the court (see paragraph 18 of Lord Reed's judgment in *Tesco v Dundee City Council*). But the role of the court should not be overstated. Even when dispute arises over the interpretation of policy, it may not be decisive in the outcome of the proceedings. It is always important to distinguish issues of the interpretation of policy, which are appropriate for judicial analysis, from issues of planning judgment in the application of that policy, which are for the decision-maker, whose exercise of planning judgment is subject only to review on public law grounds (see paragraphs 24 to 26 of Lord Carnwath's judgment in *Suffolk Coastal District Council*). It is not suggested that those basic principles are inapplicable to the NPS – notwithstanding the particular statutory framework within which it was prepared and is to be used in decision making.”

Heritage Assessment - The Statutory Duty

2. Regulation 3 of the 2010 Regulations states:

> (1) When deciding an application which affects a listed building or its setting, the Secretary of State must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.
>
> (2) When deciding an application relating to a conservation area, the Secretary of State must have regard to the desirability of preserving or enhancing the character or appearance of that area.
>
> (3) When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the Secretary of State must have regard to the desirability of preserving the scheduled monument or its setting.

3. The 2010 Regulations do not address World Heritage Sites, although they do address individual scheduled monuments, listed buildings etc. within a World Heritage Site.

4. The equivalent sections applying to listed buildings and conservation areas in relation to planning decisions are in s66(1) and s72(1) Planning (Listed Buildings and Conservation Areas) Act 1990 ('the Listed Buildings Act'). These state:

> "66(1) In considering whether to grant planning permission…for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."
>
> "72(1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

5. The case law concerning the wording of the statutory duties in the Listed Buildings Act refers to the decision maker being required to give 'considerable importance and weight' to the desirability of: (a) preserving listed buildings or their settings, (b) preserving or enhancing the character or appearance of a conservation area, (c) preserving scheduled monuments or their settings (see *East Northamptonshire District Council v SSCLG* [2015] 1 WLR 45 the Court of Appeal (following *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141 and *The Bath Society v SSE* [1991] 1 W.L.R.1303)).

6. In *Forge Field v Sevenoaks DC* [2014] EWHC 1895 Lindblom J (as he then was) stated in respect of duties in the Listed Buildings Act that:

> "There is a statutory presumption, and a strong one, against granting planning permission for any development which would fail to preserve the setting of a listed building or the character or appearance of a conservation area" (at [45]).

The Judge went on [49]:

> "…an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering."

7. The case of South Lakeland (above) confirmed that the concept of 'preserving' under the Listed Buildings Act means 'doing no harm' (per Lord Bridge of Harwich at pp 149- 50).

8. Lindblom LJ provided further guidance in relation to the duty in relation to the settings of listed buildings under the Listed Buildings Act in Catesby Estates v Steer [2018] EWCA Civ 1697. He highlighted that:

> a. 'the s. 66(1) duty, where it relates to the effect of a proposed development on the setting of a listed building, makes it necessary for the decision-maker to understand what that setting is—even if its extent is difficult or impossible to delineate exactly—and whether the site of the proposed development will be within it or in some way related to it. Otherwise, the decision-maker may find it hard to assess whether and how the proposed development "affects" the setting of the listed building, and to perform the statutory obligation to "have special regard to the desirability of preserving … its setting …"' [28]
>
> b. '…though this is never a purely subjective exercise, none of the relevant policy guidance and advice prescribes for all cases a single approach to identifying the extent of a listed building's setting. Nor could it. In every case where that has to be done, the decision-maker must apply planning judgment to the particular facts and circumstances, having regard to relevant policy, guidance and advice. The facts and circumstances will change from one case to the next.' [29]
>
> c. 'the effect of a particular development on the setting of a listed building— where, when and how that effect is likely to be perceived, whether or not it will preserve the setting of the listed building, whether, under government policy in the NPPF, it will harm the "significance" of the listed building as a heritage asset, and how it bears on the planning balance—are all matters for the planning decision-maker, subject, of course, to the principle emphasized by this court in East Northamptonshire District Council v Secretary of State for Communities and Local Government [2015] 1 W.L.R. 45 (at [26] to [29]), Jones v Mordue [2016] 1 W.L.R. 2682 (at [21] to [23]), and Palmer (at [5]), that "considerable importance and weight" must be given to the desirability of preserving the setting of a heritage asset. Unless there has been some clear error of law in the decision-maker's approach, the court should not intervene (see Williams,

> at [72]). For decisions on planning appeals, this kind of case is a good test of the principle stated by Lord Carnwath in Hopkins Homes Ltd. v Secretary of State for Communities and Local Government [2017] 1 W.L.R. 1865 (at [25]) - that "the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly".’ [30].

9. The most recent judgment of the Court of Appeal addressing paragraph 196 NPPF is *City and Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 320. In that case the Court confirmed that neither 29838 paragraph 196 NPPF nor s66(1) Listed Buildings Act 1990 require an internal heritage balance to be conducted in order to arrive at the level of harm to an asset before weighing that harm against public benefits. The key passages of the judgment are at [71]-[81].

Appendix 2 – Paragraphs 25 to 43 and 50 of the decision letter

25. The Secretary of State notes the ExA’s consideration of cultural heritage and the historic environment in Chapter 5.7 of the Report and the differing positions on this matter among others of: Wiltshire Council [ER 5.7.55 – 5.7.61]; the Historic Buildings and Monuments Commission for England (“Historic England”) [ER 5.7.62 – 5.7.69]; the National Trust [ER 5.7.70 – 5.7.71]; English Heritage Trust [ER 5.7.72]; International Council on 7 Monuments and Sites (“ICOMOS”) Missions [ER 7.7.73 – 5.7.80]; Department for Digital, Culture, Media and Sport (“DCMS”) [ER 5.7.81 – 5.7.83]; International Council on Monuments and Sites, UK (“ICOMOS-UK”) [ER 5.7.84 – ER 5.7.98]; Stonehenge and Avebury World Heritage Site Coordination Unit (“WHSCU”) [ER 5.7.99 – ER 5.7.104]; the Stonehenge Alliance (comprising: Ancient Sacred Landscape Network, Campaign for Better Transport, Campaign to Protect Rural England, Friends of the Earth, and Rescue: The British Archaeological Trust) [ER 5.7.105 – 5.7.108]; the Consortium of Archaeologists and the Blick Mead Project Team (“COA”) [ER 5.7.109 – 5.7.120]; and the Council for British Archaeology (“CBA”) and CBA Wessex [ER 5.7.121 – 5.7.128].

26. Central to the Secretary of State’s consideration of cultural heritage and historic environment is the question of the Development’s conformity with the NPSNN and whether substantial or less than substantial harm is caused to the Outstanding Universal Value (“OUV”) of the WHS. The NPSNN (paragraphs 5.131-5.134) states that substantial harm to or loss of designated assets of the highest significance, including World Heritage Sites, should be wholly exceptional and that any harmful impact on the significance of a designated heritage asset should be weighed against the public benefit of the development, recognising that the greater the harm to the significance of the heritage site, the greater the justification that will be needed for any loss. Where the Development would lead to substantial harm to or total loss of significance of a designated heritage asset, the Secretary of State should refuse consent unless it can be demonstrated that the substantial harm or loss of significance is necessary in order to deliver substantial public benefits that outweigh that loss or harm. Where the Development will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal.

27. The Secretary of State notes that the concept of OUV has evolved and been incorporated in the UNESCO document ‘The Operational Guidelines (“OG”) for the Implementation of the World Heritage Convention’3 , which have been regularly revised since 1977 (the latest update

being in 2019). It is noted that the term OUV is defined in paragraph 49 of the OG as meaning: 'Outstanding Universal Value means cultural and/or national significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity'. The Secretary of State notes the UNESCO definitions of criteria for inscription of the WHS on the World Heritage List [ER 2.2.2] and the description of the attributes of OUV4 [ER 2.2.6] has been set out by the ExA. The WHS Management Plan that was adopted for the WHS in 2015 sets out the vision and management priorities for the WHS to sustain its OUV [ER 3.13.1 - 3.13.2]. The ExA has also considered the local Development Plan, National Planning Policy Framework ("NPPF"), and the Statement of Outstanding Universal Value that exists for the WHS as important and relevant matters [ER 5.7.13 - 5.7.17].

28. The ExA concludes the Development would benefit the OUV in certain valuable respects, especially relevant to the present generation. However, permanent irreversible harm, critical to the OUV would also occur, affecting not only present, but future generations. It considers the benefits to the OUV would not be capable of offsetting this harm and that the overall effect on the WHS OUV would be significantly adverse [ER 5.7.321]. The ExA considers the Development's impact on OUV does not accord with the Wiltshire Core Strategy Core Policies 59 and 58, which aim to sustain the OUV of the WHS and ensure the conservation of the historic environment [ER 5.7.322 – 5.7.324], and that the Development is also not consistent with Policy 1d of the WHS Management Plan [ER 5.7.325]. It considers this is a factor to which substantial weight can be attributed [ER 7.5.11].

29. In the ExA's overall heritage assessment [ER 5.7.327 – 5.7.333] the ExA considers the cultural heritage analysis and assessment methodology adopted by the Applicant appropriate, subject to certain points of criticism. These include poor consideration of the influence of the proposed Longbarrow Junction on OUV; inadequate attention paid to the less tangible and dynamic aspects of setting, as well as the absence of consideration of certain settings; and concerns regarding the consideration given to the interaction and overall summation of effects. The ExA took these points into account in its assessment [ER 5.7.327]. The ExA is also content overall with the mitigation strategy, apart from the proposed approach to artefact sampling and various other points identified. As set out in Appendix E to its Report the ExA recommends the Secretary of State considers resolving these matters if the decision differs from the recommendation [ER 5.7.328].

30. On the effects of the Development on spatial relations, visual relations and settings, the ExA concludes that substantial harm would arise. This conclusion does not accord with that of Historic England, but is based on the ExA's professional judgments, having regard to the entirety of evidence on cultural heritage [ER 5.7.329]. In particular, the ExA places great weight on the effects of the spatial division of the cutting, in combination with the presence of the Longbarrow Junction on the physical connectivity between the monuments and the significance that they derive from their settings. This includes the physical form of the valleys, with their historic significance for past cultures, and the presence of archaeological remains [ER 5.7.330].

31. The ICOMOS mission reports and the WH Committee decisions, alongside the submissions of DCMS, in the context of the remainder of the evidence examined have been noted by the ExA and it regards the reports and decisions as both relevant and important, but not of such weight as to be determinative in themselves [ER 5.7.331].

32. The Secretary of State notes the ExA's approach has been to integrate cumulative and in-combination effects into its assessment, where relevant and that the ExA agrees with the outcome of the Applicant's exercise that cumulative effects arising from the future baseline would not be significant, and that adequate mitigation has been arranged in respect of in-combination effects during construction and operation [ER 5.7.332].

33. It is the ExA's opinion that when assessed in accordance with NPSNN, the Development's effects on the OUV of the WHS, and the significance of heritage assets through development within their settings taken as a whole would lead to substantial harm [ER 5.7.333]. However, the Secretary of State notes the ExA also accepts that its conclusions in relation to cultural heritage, landscape and visual impact issues and the other harms identified, are ultimately matters of planning judgment on which there have been differing and informed opinions and evidence submitted to the examination [ER 7.5.26]. The Secretary of State notes the ExA's view on the level of harm being substantial is not supported by the positions of the Applicant, Wiltshire Council, the National Trust, the English Heritage Trust, DCMS and Historic England. These stakeholders place greater weight on the benefits to the WHS from the removal of the existing A303 road compared to any consequential harmful effects elsewhere in the WHS. Indeed, the indications are that they 9 consider there would or could be scope for a net benefit overall to the WHS [ER 5.7.54, ER 5.7.55, ER 5.7.62, ER 5.7.70, ER 5.7.72 and ER 5.7.83].

34. The Secretary of State notes the differing positions of the ExA and Historic England, who has a duty under the provisions of the National Heritage Act 1983 (as amended) to secure the preservation and enhancement of the historic environment. He agrees with the ExA that there will be harm on spatial, visual relations and settings that weighs against the Development. However, he notes that there is no suggestion from Historic England that the level of harm would be substantial. Ultimately, the Secretary of State prefers Historic England's view on this matter for the reasons given [ER 5.7.62 – 5.7.69] and considers it is appropriate to give weight to its judgment as the Government's statutory advisor on the historic environment, including world heritage. The Secretary of State is satisfied therefore that the harm on spatial, visual relations and settings is less than substantial and should be weighed against the public benefits of the Development in the planning balance.

35. Whilst also acknowledging the adverse impacts of the Development, the Secretary of State notes that Historic England's concluding submission [Examination Library document AS-111] states that it has supported the aspirations of the Development from the outset and that putting much of the existing A303 surface road into a tunnel would allow archaeological features within the WHS, currently separated by the A303 road, to be appreciated as part of a reunited landscape, and would facilitate enhanced public access to this internationally important site [ER 5.7.62] and that overall it broadly concurs with the Applicant's Heritage Impact Assessment [ER 5.7.66]. Furthermore, it is also noted from Historic England's concluding submission that it considers the Development proposes a significant reduction in the sight and sound of traffic in the part of the WHS where it will most improve the experience of the Stonehenge monument itself, and enhancements to the experience of the solstitial alignments [ER 5.12.32]. It considers that, alongside enhanced public access, these are all significant benefits for the historic environment.

36. The Secretary of State also notes from Historic England's concluding submission made during the examination [Examination library document AS-111] that its objective through the course of the examination was to ensure that the historic environment is fully and properly taken into account in the determination of the application and, if consented, that appropriate safeguards be built into the Development across the dDCO, OEMP and the Detailed

Archaeological Mitigation Strategy ("DAMS") [ER 5.7.63]. Whilst it is also noted that Historic England identified during the examination a number of concerns where further information, detail, clarity or amendments were needed, particularly around how the impacts of the Development would be mitigated, their concluding submission states that its concerns have been broadly addressed. Historic England believe that the dDCO, OEMP and DAMS set out a process to ensure that heritage advice and considerations can play an appropriate and important role in the construction, operation and maintenance of the Development. As a consequence of the incorporation of the Design Vision, Commitments and Principles in the OEMP, together with arrangements for consultation and engagement with Historic England, it considers sufficient safeguards have been built in for the detailed design stage and there are now sufficient provisions for the protection of the historic environment in the dDCO. It is Historic England's view that the DAMS is underpinned by a series of scheme specific research questions which will ensure that an understanding of the OUV of the WHS and the significance of the historic environment overall will guide decision making and maximise opportunities to further understand this exceptional landscape. It considers the DAMS will also ensure that the archaeological mitigation under the Site Specific Written Schemes of Investigation ("SSWSIs") will be supported by the use of innovative methods 10 and technologies and the implementation of an iterative and intelligent strategy, which will enable it to make a unique contribution to international research agendas.

37. Given the amendments and assurances requested and received during the course of the examination and the safeguards that are now built into the DCO overall, Historic England states in the concluding submission that it is confident of the Development's potential to deliver benefits for the historic environment.

38. The Secretary of State also notes that Historic England would continue to advise the Applicant on the detail of the design and delivery of the Development through its statutory role and its roles as a member of Heritage Monitoring and Advisory Group and of the Stakeholder Design Consultation Group. The ExA agrees with Historic England's view that this would also help minimise impact on the OUV, and delivery of the potential benefits for the historic environment [ER 5.7.69].

39. Historic England's response to the Secretary of State's further consultation on 4 May 2020 also indicates that its advice has addressed the need to avoid any risk of confusion which might impede the successful operation of the processes, procedures and consultation mechanisms set out in the revised DAMS and OEMP designed to minimise the harm to the Stones and surrounding environment of the WHS.

40. Similarly, the Secretary of State also notes the National Trust's support for the Development and view that, if well designed and delivered with the utmost care for the surrounding archaeology and chalk grassland landscape, the Development could provide an overall benefit to the WHS. It also considers the Development could help to reunite the landscape providing improvements to monument setting, tranquillity and access for both people and wildlife. Following initial concerns about the lack of detail in relation to both design and delivery, it is now satisfied that sufficient control measures have been developed through the DAMS and OEMP and also in the dDCO [ER 5.7.70 – 5.7.71]. English Heritage Trust support the scope for linking Stonehenge back to its wider landscape and making it possible for people to explore more of the WHS and welcomes the reconnection of the line of the Avenue [ER 5.7.72]. DCMS also expressed the view that the Development represents a unique opportunity to improve the ability to experience the WHS and its overall impact would be of

benefit to the OUV of the WHS, primarily through the removal of the existing harmful road bisecting the site [ER 5.7.81 – 5.7.83].

41. The Secretary of State notes that whilst Wiltshire Council acknowledge that the most significant negative impact of the Development would be that of the new carriageway, cutting and portal on the western part of the WHS, the Council considers the removal of the existing A303 road would benefit the setting of Stonehenge and many groups of monuments that contribute to its OUV and the removal of the severance at the centre of the WHS caused by the road would improve access and visual connectivity between the monuments and allow the reconnection of the Avenue linear monument. It considers the removal of the existing Longbarrow Roundabout and the realignment of the A360 would also benefit the setting of the Winterbourne Stoke Barrow Group and its visual relationship to other groupings of monuments in the western part of the WHS and the absence of road lighting within the WHS and at the replacement Longbarrow Junction would help reduce light pollution. The rearranged road and byway layout to the east would remove traffic from the vicinity of the scheduled Ratfin Barrows [ER 5.7.55 – 5.7.57].

42. The Secretary of State also notes from the Statement of Common Ground agreed between Wiltshire Council and the Applicant [Examination library document AS-147] that Wiltshire Council's regulatory responsibility include managing impacts on Wiltshire's heritage assets and landscape, in relation to its statutory undertakings. These responsibilities include having regard to the favourable conservation status of the WHS. The document notes that the Development affects several built heritage assets, both designated and undesignated. However, all sites of interest along the route had been visited by the relevant Council officer with the built heritage consultant, and general agreement exists regarding the likely extent of the Development's impacts. Wiltshire Council agreed that there are no aspects that are considered likely to reach a level of 'substantial harm'.

43. The Secretary of State has also carefully considered the ExA's concerns and the respective counter arguments and positions of other Interested Parties, including ICOMOS-UK, WHSCU, the Stonehenge Alliance, the COA and the CBA in relation to the effects of elements of the Development on the OUV of the WHS and on the cultural heritage and the historic environment of the wider area raised during the examination. The Secretary of State notes in particular the concerns raised by some Interested Parties and the ExA in respect of the adverse impact arising from western tunnel approach cutting and portal, the proposed Longbarrow Junction and, to a lesser extent, the eastern approach and portal [ER 5.7.207]. He accepts there will be adverse impacts from those parts of the Development. However, on balance and when considering the views of Historic England and also Wiltshire Council, he is satisfied that any harm caused to the WHS when considered as a whole would be less than substantial and therefore the adverse impacts of the Development should be balanced against its public benefits.

50. ……………………………………………………………………………………… In conclusion on cultural heritage and the historic environment, the Secretary of State places great importance in particular on the views of his statutory advisor, Historic England and also sees no reason to doubt the expertise of those from Historic England or other statutory consultees that have advised on this matter (or indeed on other matters relating to the application). As indicated above, whilst he accepts there will be harm, there is no suggestion from Historic England that the harm will be substantial. The Secretary of State agrees with Historic England on this matter and is also encouraged by the continued role Historic England would have in the detailed design and delivery of the Development should consent be granted. Whilst also acknowledging some Scientific Committee experts are not content with the mitigation

proposed and also that the ExA was not content with the proposed approach to artefact sampling, the Secretary of State accepts Historic England's views on this matter and is satisfied that the mitigation measures included in the updated OEMP and DAMS as submitted by the Applicant on 18 May 2020 and secured by requirements 4 and 5 in the DCO are acceptable and will help minimise harm to the WHS.

SCHEDULE 3

THE AFFECTED PARTIES' DEADLINE 8 PROTECTIVE PROVISIONS [REP8-108]

Date: 1 March 2021

Application by Aquind Limited for a Development Consent Order for the 'Aquind Interconnector' electricity line between Great Britain and France (PINS reference: EN020022)

Development Consent Protective Provisions in relation to Little Denmead Farm

On behalf of

Mr. Geoffrey Carpenter & Mr. Peter Carpenter ("Affected Party")

Registration Identification Number: 20025030

Submitted in relation to Deadline 8 of the Examination Timetable

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Ref: 584927-6

INTRODUCTION

1. As the Affected Party stated as part of its oral submissions during Issue Specific Hearing 4 on the draft DCO ("**ISH4**") and during Compulsory Acquisition Hearing ("**CAH3**"), and as requested by the ExA, the Owners submit this note with respect to the revised draft protective provisions it is proposing to be inserted into the draft DCO **[REP7-014]**.

2. The Affected Party's proposed revised Protective Provisions are contained within this Note.

3. These revised Protective Provisions are proposed without prejudice to the primary contention of the Affected Party that the inclusion of Part V powers in the draft DCO **[REP7-014]** are:

   a. Unlawful and objectively unjustified due to their irrational scope (as in, the scope of the underlying evidence is narrower than the breadth of the powers sought such that the extent of powers is itself irrational and not based on objective evidence);

   b. The purpose of the powers sought can only encompass development for a purpose "in the field of energy" under sections 14(6)(a) and 35(2)(a)(i) of the Planning Act 2008 ("**PA 2008**") and cannot, in law, include or encompass a non-statutory purpose such as "commercial telecommunications" so the purpose of acquisition would be tainted by illegality in the event of inclusion of any isolated purpose for "commercial telecommunications";

   c. Assuming the scope of the development is confined to development exclusively in the field of energy and there is some evidence of such development comprising a small number of electricity cables envisaged to be under Little Denmead Farm and a Converter Station to be erected on its Northern Part, then it remains not objectively shown, nor compellingly so, that it is lawfully justified, necessary or proportionate to preclude the ongoing operation of the 80 year old Farm land after conclusion of construction of that development on the land that would be temporarily used merely for construction purposes;

   d. The Secretary of State's Guidance *requires* the Applicant to explore all reasonable alternatives and it has not. It also *requires* negotiation by the Applicant with the Affected Party and it has not. These Protective Provisions provide an evidential proxy for that situation that was otherwise required by that Guidance to have taken place but has not at all occurred; and

e. Unlawful and objectively unjustified due to the fact that the Applicant cannot demonstrate during the Examination that there is a reasonable prospect of the requisite funds becoming available to cover its land acquisition costs. The Applicant has itself confirmed that "*AQUIND is not in a position to finance the Project on "balance sheet" as national TSOs and utilities may be in a position to do*." (see section 4.5 of the Applicant's Exemption Request made in connection to EU Regulation 2019/943). The Applicant has also confirmed that "*The Applicant has ... confirmed in response to agenda item 5.2 of CAH1 that the monies secured to date from its current investors do not include the costs associated with compulsory acquisition…"* (please see paragraph 9.2 of **REP7-075**).

4. These revised proposed Protective Provisions are based on the Protective Provisions granted by the Secretary of State in his development consent order "Riverside Energy Park Order 2020" made on the 9th April 2020 (SI 2020/413) (the "**Riverside DCO**"). See Schedule 10, Part 1 thereto.

5. They align to the same DCO that the Applicant explained to the ExA at CAH 3 on the 19th February 2021 that it would rely on and that the ExA requested a precedent form of DCO be used.

6. As the Affected Party set out to the ExA at CAH 3, the Secretary of State may include under section 120(3) of the Planning Act 2008 ("PA 2008") provisions that include, under section 120(4) and Part 1 of Schedule 5, paragraph 10:

   The protection of the property or interests of any person.

7. During ISH4, the Applicant submitted that it would be relying upon the Riverside DCO as an example of its own approach. In light of this, the Affected Party has also followed the Applicant's helpful lead in preparing the revised protective provisions appended to this Note.

8. In the Riverside DCO, a Protective Provision was provided in relation to a limited company – "RRRL" – that operated a facility that would be operating close by to the authorised development and the Provision provided to enable continued operation of the facility together with that development.

9. The Affected Party, self-evidently, is a “person” and also qualifies within paragraph 9 (so far as any qualification is important or relevant) as having a land “interest” by reason of its freehold ownership of Little Denmead Farm.

10. The Applicant has failed to commence any exploration of alternatives with the Affected Party prior to or during the Examination Period (due to close on the 8th March 2021) before or during its seeking of compulsory acquisition of any part of Little Denmead Farm. This is in clear breach of the Secretary of State’s “Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land (September 2013)” that states:

    "8. The applicant should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored. The applicant will also need to demonstrate that the proposed interference with the rights of those with an interest in the land is for a legitimate purpose, and that it is necessary and proportionate…

    26. Applicants should seek to acquire land by negotiation wherever practicable. As a general rule, authority to acquire land compulsorily should only be sought as part of an order granting development consent if attempts to acquire by agreement fail …"

11. The Applicant has not, and has not evidenced to the Secretary of State that it is not practicable to negotiate with the Affected Party. Indeed, the Affected Party submitted proposed protective provisions at Deadline 5 of the Examination (November 2020) because there was no contact by the Applicant privately with the Affected Party or its advisors. The Applicant has to date (as at 1 March 2021) never formally commented on as part of the Examination, or approached the Affected Party privately, about its proposed protective provisions. Indeed, the proposed Protective Provisions align with Riverside DCO Protective Provisions and show what might have been achievable by negotiation. Instead, **if the Secretary of State were to authorise Part V of the DCO <u>without</u> the Protective Provisions below included, it would set a grave precedent for future DCOs and result in effective deletion of paragraph 8 of the Secretary of State’s Guidance in that paragraph and in paragraph 26 of the same Guidance.**

12. Instead, the inclusion of the Affected Party's revised proposed Protective Provisions set out below would enable the Secretary of State to lawfully and rationally conclude that the requirements of his Guidance paragraphs 8 (sentence 1) and 26 could be said to be satisfied by the terms of those Provisions. Whereas

without the inclusion of those Provisions in the event of Part V being authorised, the Secretary of State would be acting unlawfully and in breach of his own Guidance paragraphs 8 and 26, in particular, not properly directing himself in law and fact in relation to the requirements in the second part of paragraph 8.

13. The Affected Party's revised proposed Protective Provisions envisage below a situation where the Secretary of State determines that he will grant the DCO and that he is entitled to authorise compulsory acquisition powers pursuant to section 122 Planning Act 2008, including to extend the Order Limits to include Stoneacre Copse for such purposes. **In only such a case**, the Affected Party's Protective Provisions that are below would then become a relevant consideration for the Secretary of State when determining the appropriate extent of compulsory acquisition powers and other powers should be authorised in relation to Little Denmead Farm. These Protective Provisions reflect what the Affected Party submits is appropriate in relation to Little Denmead Farm in such a scenario.

14. To be clear, the Affected Party proposes the revised Protective Provisions below only should the Secretary of State decide to grant the DCO with compulsory acquisition powers and with Stoneacre Copse included within the Order Limits. The Affected Party proposes these revised Protective Provisions **without prejudice** to its **primary** contentions that compulsory acquisition powers are not justified, that the Order Limits should not be extended to include Stoneacre Copse, and that the DCO itself should not be granted.

Reasonable Landscaping Alternative on Little Denmead Farm – as proposed by the Affected Party at Deadline 5

15. The Affected Party's alternative landscape proposals were set out in their Deadline 5 submission *'Oral Submission in relation to Compulsory Acquisition Hearing 2'* (REP5-108). Appendix J (REP-126) addressed Aquind's proposed landscaping and contended that it was a veneer for excessive unjustified land take. The Applicant has to date never responded to these alternatives through the Examination or privately with the Affected Party. It has therefore not explored all reasonable alternatives to compulsory acquisition and thus not satisfied the requirements in paragraphs 7 and 8 of the Secretary of State's Planning Act 2008 guidance on the use of compulsory acquisition powers (2013).

16. The extent of the proposed landscaping exceeded the justification for which was created by unnecessary requirements not sustainably justifiable as part of the converter station proposals. For example:

    - The pre-determined mind set over the need for a fully tarmacked permanent impermeable access road across extensive tracts of our clients' agricultural land is excessive for both the construction and operational phases. The Affected Party suggested a temporary heavy duty haul road solutions and the applicant itself accepts that maintenance visits will be sporadic, perhaps 3 to 4 times per year. Yet these suggestions have been dismissed out of hand by generic response;

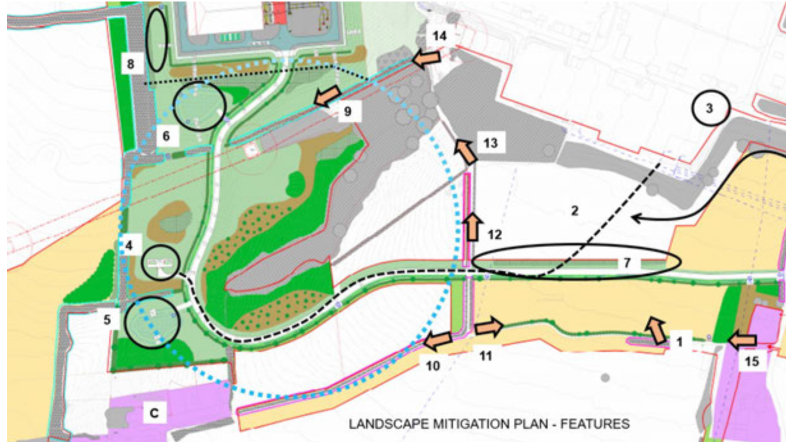
    - Consequently, in the absence of justification for a permanent impermeable access way the parasitic need for the southerly attenuation pond is removed;

    - Thirdly, we addressed how the landscape proposals appeared to be prospective mitigation for future proposals in relation to battery storage facilities; and

    - Finally, we addressed the excess telecommunications capacity that is created as a convenient residual opportunity for future development, enabled under the proposed access road and across areas of land outside the order limits but under option to the applicant.

17. As such, the landscape proposals conveniently enabled and mitigated future unrelated development whilst being promoted solely as adequate visual mitigation for this development.

18. Our alternative proposals at Deadline 5 showed how, due to the nature of the local landscape and the topography, a more sensitive and geographically tighter scheme could adequately mitigate the proposed development. This was indicatively suggested by the diagram at paragraph 3 of Appendix J (REP-126) and which we replicate here:



a. That plan shows the extensive area circled dashed blue as the area over which the applicant's landscape proposals should be rolled back due to the absence of justification for the access road, the telecommunications buildings (numbered 4), the southerly attenuation pond (numbered 5) and the hedgerow (numbered 7).

b. The black dashed line (running between circles numbered 6 and 8) shows the indicative point *to* which landscaping proposals could be rolled back leaving enough width to establish a strong screening belt and utilising some localised bunding from excess spoil from levelling the converter station land. The northerly attenuation pond could be repositioned to point 8, to the west.

c. At that stage of the examination (Deadline 5) Aquind remained oblivious to ash die back (ADB) and its now accepted existence does not undermine these alternative proposals in the slightest. Stoneacre Copse, Crabdens Copse and Crabens Row remain strong existing established planting belts and can be managed to reduce the impact of ADB (as the Affected Party has offered to do) to maintain a good degree of visual mitigation. These belts would be further bolstered by a new additional thick belt of trees immediately to the south of the converter station.

d. There remains no need to thicken out Stoneacre Copse by planting trees circumnavigating the ancient woodland as is indicated by the applicant's landscape proposals or indeed for all the other extensive planting proposals across Little Denmead Farm.

e. The original Design and Access Statement (DAS) (APP-114) set out the applicant's landscape design principles at section 7.4 which broadly stated were to:

- minimise the loss of existing vegetation;
- include management measures;

- create new woodland, glades, scrub and hedgerow planting, within locations broadly indicated upon the indicative landscape mitigation plans to provide appropriate screening from sensitive receptors; and
- enhance existing vegetation.

f. These principles have not substantively changed since the first iteration of the DAS however there were substantial additions to the "*planning and landscape*" section 5.7 of the following DAS iteration (REP1-032) which sought to justify the landscape proposals further with reference to safety in relation to the proposed boundaries of the new compound and proximity to existing overhead lines.

g. The Affected Party's alternative landscaping proposals do not infringe the additional safety needs of the development given they represent a lighter touch, utilise the topography and additional bunding and can be located in a belt safely sitting between the overhead power lines and proposed compound boundary. These zones to be 'kept free' are shown in the DAS, for example at page 28 of tracked DAS update document REP7-022.

h. Nor have the Affected Party's alternative landscape proposals ever infringed the Applicant's landscape design principles as set out from the outset. Our proposals retain existing green capital, enhance it through management and propose additional planting in more appropriate locations to extend the local green infrastructure network for ecological as well as visual mitigation purposes, whilst also retaining as much agricultural land as possible which should be a continuing principal feature of this local landscape.

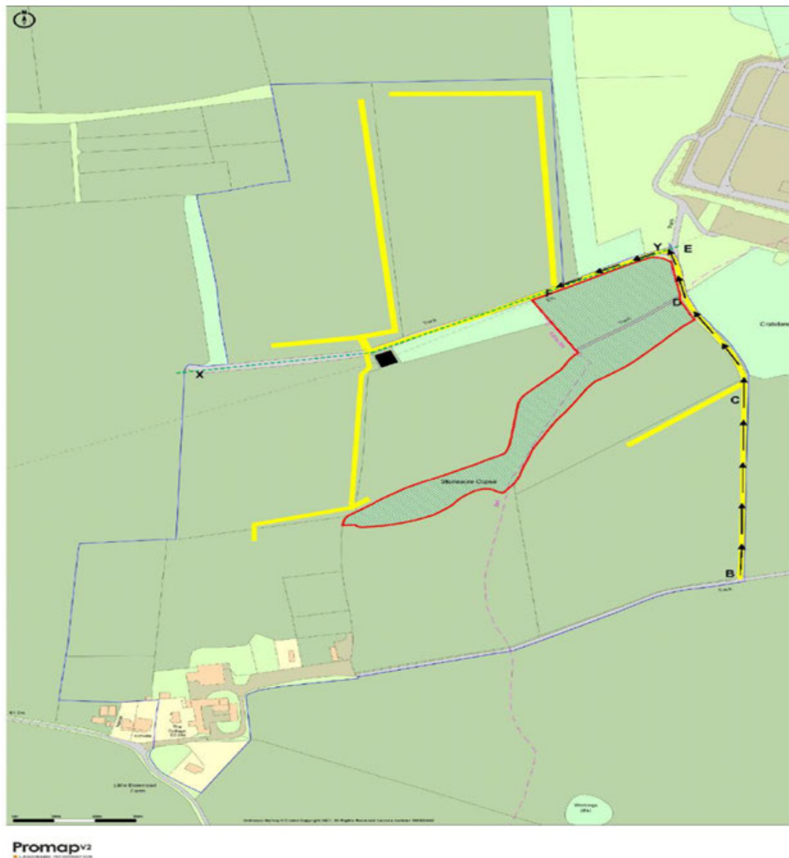
i. The retained but relocated attenuation pond is intended to have the same capacity as the applicant's proposed one which takes in to account the fact that the required volume of surface water storage remains undetermined until infiltration rates of the existing substrate surrounding the soakaway can be confirmed.

Reasonable Landscaping Alternative on Little Denmead Farm – As proposed by the Affected Party at Deadline 8

19. The revised proposed Protective Provisions below contain terms reflecting the Affected Party's previously proposed alternative landscaping on Little Denmead Farm, but with one further adjustment with respect to

how much of its freehold interest the Affected Party is willing to allow to be compulsorily acquired by the Applicant (as a facilitative neighbour to new electricity providers).

20. Please see the image below. The Affected Party proposes that the Applicant only be allowed to compulsorily acquire its freehold interest to all the land to the north of the northern most edge of the access track coloured yellow, with such access track being shown approximately running on the land between points 'X' and 'Y' on the plan below. For clarity, the plan below includes yellow strips north of this line which are existing tracks referred to in a licence agreement but are not relevant here.



21. This would provide the Applicant with sufficient land on which to construct the converter station, security fencing and also leave enough land on which to have permanent landscaping on the converter station's southern most fringes.

22. This would also enable the Applicant, as a result of the Affected Party's unilateral DCO Obligation, to construct an alternative access from the bottom left hand corner of the converter station to meet the alternative access route the Affected Party has offered under the DCO Obligation (the alternative access route under the DCO obligation runs from points B to F on the image above and is shown marked with

black arrows). Alternatively, this could allow an access way from indicative location shown on the converter station plan southwards and then eastwards to the alternative access way (for the avoidance of doubt the existing track coloured yellow running between points X and Y remains in the Carpenters' freehold ownership). This allows the Applicant to take the maintenance access track from any point along the existing to the southern most fringes of the converter station. This in itself would allow the Applicant access into the converter station throughout its operational life.

23. This, together with the Affected Party's proposal in the Protective Provisions below for only a temporary access way to be built during operations for **heavy vehicles** (for example large cranes or abnormal load vehicles) as and when there is a need to repair, inspect, maintain or facilitate emergency access and they cannot use the alternative access route granted under the Affected Party's DCO Obligation, should be sufficient for the Applicant's purposes. This represents a reasonable alternative for the Applicant to now **demonstrate** it has properly explored, or in the alternative that the Secretary of State accepts that the Applicant has had plenty of opportunity to have explored it and can be properly satisfied of that.

Article 38

SCHEDULE 13

PROTECTIVE PROVISIONS

PART 7

FOR THE PROTECTION OF THE OWNER OF LITTLE DENMEAD FARM

1. For the protection of the Owner of and of Little Denmead Farm as referred to in this part of this Schedule the following provisions have effect unless otherwise agreed in writing between the undertaker and the Owner of that land.

2. In this part of this Schedule

"**Affected Property**" means that part of the Order land in the freehold ownership of the Owner which on the date upon which this Order comes into force pursuant to Article 1 are those plots identified as being in the freehold ownership of the Owner in the book of reference as plot numbers 1-32, 1-32a, 1-38, 1-51, 1-57, 1-69, 1-70, 1-71, and 1-72 as shown on the land plans, and Footpath 4 as shown on plan EN020022-2.5-AROW-SHEET1-REV03;

"Agricultural Soil Quality" means soil that is suitable for agricultural production;

"**Alternative Apparatus**" means alternative apparatus adequate to enable the Owner to fulfil its functions at Little Denmead Farm in a manner no less efficient than previously;

"Apparatus" means any electric cables, electrical plant, drains, mains, sewers, pipes, conduits or any other apparatus belonging to or maintained by the Affected Party or used for, or for purposes connected with, the use or operation of Little Denmead Farm and includes any structure in which apparatus is or will be lodged or which gives or will give access to apparatus;

"Construction Period" means the period of time from the commencement of actual construction of the Converter Station, Related Structures and Related Cables and Work No. 3 as they relate to Little Denmead Farm (prior notice of which must be given in writing by the undertaker to the Owner) to the issue of certification of the practical completion of Works No. 2 (b) to (t) and (x) to (z). Work No. 2 (aa) and (bb) are only to be located on Little Denmead Farm on a temporary basis to the south of the green dashed line between X and Y on The Plan and are to be removed in their entirety after certification of the practical completion of Works No. 2 (b) to (t) and (x) to (z);

“Converter Station” means one converter station built for the purpose of transmission of electricity within the parameters of one only of either Option B(i) or (ii) as shown on the plan entitled "Converter Station and Telecommunications Buildings Parameter Plans Combined Options" with Plan Reference EN020022-2.6-PARA-Sheet1 REV 02, the plan entitled "Converter Station and Telecommunications Buildings Parameter Plans Option B(i)" with Plan Reference EN020022-2.6-PARA-Sheet2 REV 03, and the plan entitled "Converter Station and Telecommunications Buildings Parameter Plans Option B(ii)" with Plan Reference EN020022-2.6-PARA-Sheet3 REV 03, north of the existing pylon line on the northern part of the Affected Property;

“Decommissioning Period” means for the purposes of this Part 7 only, the period that starts on the date identified pursuant to Requirement 24(3)(f) of Schedule 2 to this Order (decommissioning) as being the beginning of the relevant decommissioning works and concludes on the date on which the undertaker concludes the last phase of restoration of Little Denmead Farm to being land suitable for agricultural production;

“**Fibre Optic Data Transmission Cables**” means fibre optic cables connected to the Converter Station for the purpose of control, monitoring, and protection of the HVDC and HVAC electricity cable circuits, and for telecommunications relating to the Converter Station;

"**Landscaping Area of the Affected Property**" means the extent of the area of ground shown on The Plan comprising the area north of the northern most edge of the existing access track coloured yellow, such existing access track being shown approximately running on the land between points 'X' and 'Y' on The Plan;

"**Little Denmead Farm**" means the part of the land known as Little Denmead Farm, Broadway Lane, Denmead, Waterlooville, PO8 0SL, as shown on the title plan registered at HM Land Registry under title number HP763097, and that falls within the Order Limits;

"**Operational Access Way**" means a route identified by black arrows (and extending as far westwards to coincide with a permanent access from the Converter Station) showing the access way between points B and F on The Plan comprised of an existing accessway in part within the Order Limits and in part outside the Order Limits but within Little Denmead Farm adjacent to those Order Limits, and over which access in both directions by light vehicles may be taken by the undertaker from the highway of Broadway Lane to the built Converter Station during the Operational Period for the purposes of periodic inspection and maintenance of the Converter Station, Related Structures and Related Cables;

"Operational Period" means the period from the date of certified practical completion of the Converter Station on the Affected Property until the conclusion of the Decommissioning Period;

"Owner" means Mr Geoffrey Carpenter and Mr Peter Carpenter (and their successors in title respectively), who are the joint freehold owners of Little Denmead Farm;

"**Related Cables**" means such part of the authorised development specified in Schedule 1, Work Nos. 2 (b) (g), (h) and (r), being respectively two 320 kilovolt HVDC cable circuits and two 400 kilovolt HVAC cable circuits for the transmission of electricity with the Fibre Optic Data Transmission Cables all being connected to the Converter Station;

"**Related Structures**" means such part of the authorised development specified in Schedule 1, Work Nos. 2 (c), (d), (e), (f), (i), (j), (k), (l), (m), (n), (o), (p), (q), (s), (t), (x), (y) and (z);

"Stoneacre Copse" means that part of Little Denmead Farm comprised of broadleaved ancient woodland in the National Forest Inventory (and which falls within plot number 1-32a as shown on the land plans);

"**Stoneacre Copse Management Plan**" means a written management plan relating to Stoneacre Copse, to apply for the duration of the Operational Period only, and formulated pursuant to forestry principles published by the Forestry Commission produced and maintained by the Owner with the following objectives: i) arresting the extent of Ash dieback to at least the extent identified as then present in that Copse in survey Drawing Reference EN020022/Rev 01 (dated 14th October 2020), Figure 1 of Annex 1 to

Appendix 3 to the "Request for Changes to the Order Limits", document reference 7.7.17; ii) establishing and undertaking regular monitoring and maintenance of the trees that are the subject of Ash dieback; iii) obtaining all necessary licences to ensure the objectives of the management plan are satisfied; iv) establishing continued and sustainable treescape within Stoneacre Copse;

"Temporary Access Roadway" means a temporary access roadway laid within the Temporary Access Road Zone for the purposes of enabling such repair of the Converter Station or the Related Structures or the Related Cables as may be necessary to ensure operation of that development as may arise during the Operational Period;

"**Temporary Access Roadway Zone**" means the zone of access within which the undertaker may construct a temporary haul road on Little Denmead Farm , and one related temporary attenuation pond, for the purpose of constructing the Converter Station, Related Structures and Related Cables and which zone is identified shaded in light grey within Little Denmead Farm and identified as "Parameter Zone 1 Access Road" on "the plan entitled "Converter Station and Telecommunications Buildings Parameter Plans Option B(i)" with Plan Reference EN020022-2.6-PARA-Sheet2 REV 03, and the plan entitled "Converter Station and Telecommunications Buildings Parameter Plans Option B(ii)" with Plan Reference EN020022-2.6-PARA-Sheet3 REV 03; and

"The Plan" means the plan identified as the "Accessway Plan – Plan 1 of 2' and showing a route identified by black arrows showing an access way between points B and F, which accessway remains in the freehold title of Little Denmead Farm, together with the remainder of the access way in the westward direction therefrom running West to East between points X and Y, and identifying the said accessway from the northern most side of which accessway is land able to be compulsorily acquired under para 3 of this part 7, and certified in Schedule 14. **[See the Plan appended to [REP7-119]].**

Compulsory Acquisition, temporary possession and access

3. – (1) Regardless of any provision in this Order or anything shown on the land plans and in the book of reference, the undertaker cannot enter, posses, or acquire (whether by exercising its powers under Part 5 or any other part of this Order or otherwise) any part of Little Denmead Farm save as expressly provided for as follows:

(a) subject to sub-para (b) the undertaker cannot compulsorily acquire any permanent interest in or rights in, under or over land within Little Denmead Farm, or compulsorily extinguish any interest or right in, under or over land within Little Denmead Farm otherwise than for the purpose of the field of energy and of the extent:

i) up to such extent of the land area to the north of the northern most edge of the accessway that is coloured yellow and which is shown as running between points 'X' and 'Y' on The Plan, and of no more volume than the outermost extent of the Converter Station and Related Structures as built; and

ii) of the volume identifiable by the extrapolation of the section shown in Plate 3.5 of Chapter 3 of the environmental statement (description of the proposed development) along the route shown hatched in blue identified in figure 24.2 of document called 'Illustrative cable route' in reference 6.2.24 of volume 2 of the environmental statement and on drawing number EN020022-ES-24.2-SHEET1, such linear volume not being above 1.05m below ground level as at the date on which the Order is made, for the purposes of situating the Related Cables;

(b) the undertaker must receive from the Secretary of State his written satisfaction of an enforceable bond provided by the undertaker an enforceable bond to cover all decommissioning occurring upon, and restoration costs of, any and all land so acquired within Little Denmead Farm, such bond to remain in place until the conclusion of all restoration works to the reasonable satisfaction of the Owner,

(c) the undertaker may not otherwise than within a single phase and during Work No. 2(a), Work No. 3 and the Construction Period enter and temporarily possess the Affected Land for those purposes related to the construction of the Converter Station, Related Structures and Related Cable in the field of energy;

(d) the undertaker must remove during the Decommissioning Period the Converter Station, Related Structures and Related Cables pursuant to the approved decommissioning plan required under Requirement 24 of Schedule 2 to this Order and ensure that the extent of Little Denmead Farm that is the subject of paragraph1 (b) of this Part 7 is reinstated to be Agricultural Soil Quality;

(e) the undertaker or any party referred to in Article 6 and Article 7 cannot situate any structures, cables and equipment or part of any structures, cables and equipment, or carry out any works, for the purposes of commercial telecommunications on, in or over Little Denmead Farm unless the same has been agreed in writing exclusively by the Owner;

Temporary access through Little Denmead Farm during the Operational Period

4. —(1) Where during the Operational Period the undertaker requires to undertake repair works, inspection for such repair works (whether routine repair works or emergency repair works) or maintenance works at the Converter Station for the purpose of ensuring continuity of the ongoing operation of the Converter Station or Related Structures or Related Cables and continuity of the generation of electricity, and requires for such repair works, inspection for such works, or maintenance works, access across Little Denmead Farm otherwise than for light vehicles, for heavy vehicles which in the reasonable opinion of the undertaker are not able to use the Operational Access Way, the undertaker may lay and use the Temporary Access Roadway the within the Temporary Access Road Zone for only such purposes and for only such duration that is reasonably necessary to ensure such repair (and no more).

(2) Before entry to any part of Little Denmead Farm for the purposes of paragraph 3(1), the undertaker must:

(a) Notify in writing to the Owner not less than 72 hours (save for in emergencies, in which case written notice must be delivered to the Owner as soon as reasonably practicable) in advance of the need for the Temporary Access Roadway to be laid within the Temporary Access Road Zone; and

(b) Agree with the Owner the timing and practical arrangements relating to the construction and use of the Temporary Access Roadway (including health and safety and protective works) , to ensure that the execution and use of the Temporary Access Roadway takes account of the need to also secure the safe and efficient operation of Little Denmead Farm.

(3) The undertaker must ensure that it has an enforceable bond in place to cover all costs relating to or that arise from the execution of works to lay, use and remove the Temporary Access Roadway, any damage or harm caused by the construction, use and removal of the Temporary Access Roadway, , and in relation to the reinstatement of the relevant parts of Little Denmead Farm to Agricultural Soil Quality as may be affected by the installation, use and removal of the Temporary Access Roadway and certify in writing to the Owner that such bond is in place not less than 72 hours before taking entry into Little Denmead Farm;

(4) The undertaker must use all reasonable endeavours to co-ordinate the execution of the works associated with paragraph 3(1) of this Part 7 and their prompt execution in the interests of

safety and the efficient and economic execution and maintenance of the authorised development and taking into account the need to ensure the safe and efficient operation of Little Denmead Farm; and

(5) The undertaker must certify in writing to the Owner the date on which the relevant repair works have been completed, such notice to be sent to the Owner within 5 days of completion of such works.

(6) The undertaker must remove the Temporary Access Roadway within 14 days of the certification referred to in paragraph 4(5) above. (or such other timescale agreed in writing with the Owner);

(7) Within two weeks (or such other timescale agreed in writing with the Owner) of the Temporary Access Roadway, the undertaker must reinstate the relevant land within Little Denmead Farm to Agricultural Soil Quality

5. The Owner shall use its reasonable endeavours to co-operate with the undertaker for the purposes of paragraph 4 of this Part 7;

Apparatus at Little Denmead Farm

6 — (1) Regardless of any provision in this Order or anything shown on the land plans, the undertaker must not acquire any apparatus within Little Denmead Farm otherwise than by agreement.

(2) If, in the exercise of the powers conferred by this Order, the undertaker:–

(a) acquires any interest in land in which any Apparatus is placed or over which access to any Apparatus is enjoyed; or

(b) requires that the Apparatus within Little Denmead Farm is relocated, diverted or removed,

any right of the Owner to any part of Little Denmead Farm and/or to maintain that apparatus in that land and to gain access to it must not be extinguished, and that Apparatus must not be relocated, diverted or removed, until equivalent rights have been granted to the Owner for alternative apparatus and equivalent alternative apparatus has vested in the Owner and (in relation to Apparatus) has been constructed and is in operation, and access to it has been provided. The location of equivalent alternative apparatus and

rights for the equivalent alternative apparatus must in each case be agreed between the undertaker and the Owner before any step is taken to extinguish, relocate, divert or remove as aforesaid.

(3) If, for the purpose of executing any works in, on or under Little Denmead Farm, the undertaker requires the relocation, diversion or removal of any Apparatus placed in Little Denmead Farm, the undertaker must give to the Owner for approval written notice of that requirement, a plan and section of the work proposed and of the proposed position of the alternative apparatus together with a timetable for when the Alternative Apparatus is to be provided or constructed by the undertaker.

(4) The approval of the Owner under sub-paragraph (3) must not be unreasonably withheld and if by the end of the period of 28 days beginning with the date on which the notice, plan, section and timetable have been supplied to the Owner, the Owner has not intimated approval or disapproval of such notice, plan, section and timetable and the grounds of disapproval, the Owner is deemed to have approved the said notice, plan, section and timetable as submitted.

(5) When giving its approval under sub-paragraph (4), the Owner may specify such reasonable requirements that are necessary in the provision or construction of the Alternative Apparatus.

(6) In the event that the Owner issues a disapproval to the notice, plan, section and timetable within the 28 day period referred to in sub-paragraph (4), the undertaker may refer the matter to appeal in accordance with Schedule 3 of this Order (procedures in relation to certain approvals etc).

(7) Any Alternative Apparatus to be provided or constructed pursuant to this paragraph must be provided or constructed by the undertaker within a timescale, to a standard and in such manner and in such line or situation as is agreed with the Owner or in default of agreement settled by appeal in accordance with Schedule 3 of this Order (procedures in relation to certain approvals etc)

Decommissioning of the Converter Station - Restoration of land within Little Denmead Farm

7 Regardless of any provision to the contrary in this Order, the undertaker shall, in preparing a decommissioning plan to submit to the relevant planning authority pursuant to Requirement 24 of Schedule 2 to this Order, ensure that the plan requires the undertaker to restore Little Denmead Farm to Agricultural

Soil Quality and to consult the Owner and take into account such representations as may be made by the Owner before submitting the decommissioning plan, to the relevant public authority or Secretary of State for its or his approval (as the case may be).

Obstruction of Access during Operational Period and Decommissioning Period

8. If in consequence of any agreement reached or the powers granted under this Order access to Little Denmead Farm is materially obstructed during the Construction Period Operational Period and the Decommissioning Period , the undertaker must provide such (in the reasonable opinion of the Owner) suitable alternative means of access to Little Denmead Farm as will enable the Owner to maintain or use Little Denmead Farm no less effectively than was possible before such obstruction occurred;

Temporary Prohibition or restriction of streets, public rights of way and permissive paths during Construction Period

9 — (1) Regardless of the temporary prohibition or restriction of use of streets under the powers conferred by article 13 (Temporary closure, alteration, diversion or restriction of streets, public rights of way and permissive paths) and subject to any health and safety requirements by the undertaker (such requirements to be notified in writing to the owner by the undertaker at least 10 working days before exercising powers under article 13 in relation to the relevant streets, public rights of way and permissive paths) , the Owner is at liberty at all times to enter and pass and re-pass, on foot and/or with or without vehicles, plant, animals, and machinery, any street, public right of way or permissive path used to access Little Denmead Farm (including Stoneacre Copse) which has been temporarily closed, altered, diverted or restricted under article 13 for all purposes connected with the Owner's residential, recreational, and agricultural use and to do all such things in, upon or under any such street used to access Little Denmead Farm (including for the avoidance of doubt Stoneacre Copse) as may be reasonably necessary or desirable to enable the Owner to continue to use Little Denmead Farm for agricultural and residential purposes during the Construction Period.

Modification of other powers in this Order in relation to Little Denmead Farm (including Stoneacre Copse)

10 — (1) Regardless of the functions therein stated, such functions under the following Articles as may otherwise affect Little Denmead Farm shall be modified as follows in relation to the Owner and Little Denmead Farm:

(a) article 10 (power to alter layout etc. of streets), the undertaker may not exercise the powers available under article 10 in relation to the Affected Property, subject to the extent that similar rights are granted to the undertaker by the Owner under a separate written agreement ;

(b) article 11 (street works), the undertaker may not exercise the powers available under article 11 in relation to the Affected Property, subject to the extent that similar rights are granted to the undertaker by the Owner under a separate written agreement ;

(c) article 14 (access to works), the undertaker may not create during the Operational Period any accesses to works over the Affected Property otherwise than by written agreement with the Owner;

(d) article 17 (discharge of water), the undertaker may not, in relation to the Affected Property, use any watercourse or any public sewer or drain for the drainage of water in connection with the carrying out, operation or maintenance of the authorised development or inspect, lay down, take up and alter pipes, make openings into, and connections with, the watercourse, public sewer or drain on the Affected Property otherwise than by written agreement with the Owner;

(e) article 19 (authority to survey and investigate land), the undertaker must not, in relation to the Affected Property, exercise the powers in article 19 otherwise than by written agreement with the Owner;

(f) article 41(felling or lopping or trees and removal of hedgerows), the undertaker may not, in relation to the Affected Property, exercise the powers in article 41 otherwise than by written agreement with the Owner;

(g) article 42 (trees subject to tree preservation orders), the undertaker may not, in relation to the Affected Property, exercise the powers in article 41 otherwise than by written agreement with the Owner.

(h) article 29 (rights under and over streets), the undertaker may not, in relation to the Affected Property, exercise the powers in article 29 otherwise than by written agreement with the Owner;

Stoneacre Copse

11. Regardless of any provision in this Order or anything shown on the land plans and in the book of reference, the undertaker cannot enter, posses, or acquire (whether by exercising its powers under Part 5 or any other part of this Order) any part of Stoneacre Copse.

12. Not later than 12 months after this Order comes into force, the Owner shall commission the Stoneacre Copse Management Plan for the sustainable management of Ash dieback at Stoneacre Copse.

13. The Owner shall manage Stoneacre Copse in accordance with the Stoneacre Copse Management Plan for the duration of the Operational Period only.

Landscaping works on Little Denmead Farm

14.— (1) Regardless of any provision in this Order or anything shown on the land plans and in the book of reference, Work No. 2 (aa) can only be carried out and kept on Little Denmead Farm on a permanent basis on the Landscaping Area of the Affected Property.

(2) Any works falling under Work No. 2 (aa) and (bb) can only be carried out on Little Denmead Farm south of the Landscaping Area of the Affected Property on a temporary basis and during the Construction Period only, and must be removed from all land south of the Landscaping Area of the Affected Property after the completion of the Construction Period. The undertaker must send the Owner certification in writing as to the date on which such works have been so removed within 5 days of their removal. The undertaker must within 15 working days of such certification reinstate the land on Little Denmead Farm south of the green dashed line between points X and Y on The Plan to Agricultural Soil Quality.

Works on Little Denmead Farm

15. —(1) Regardless of any provision in this Order, the undertaker cannot enter or possess any part of Little Denmead Farm other than in relation to the execution of works relating to the Converter Station, Related Structures, Related Cables and Work No. 3. For the avoidance of doubt, regardless of any provision in this Order or anything shown on the land plans and in the book of reference, the undertaker cannot acquire (whether by exercising its powers under Part 5 or any other part of this Order or otherwise) any part of Little Denmead Farm.

(2) Not less than 28 days before starting the execution of any works in, on or under the part of Little Denmead Farm that is not the subject of permanent compulsory acquisition powers that is authorised under paragraph 3(a) of this Part 7 that may materially affect the operation of Little Denmead Farm, the undertaker must submit to the Owner for approval a plan, section and description of the works to be executed on such land and a timetable for when such works are to be carried out.

(3) The approval of the Owner under sub-paragraph (2) must not be unreasonably withheld and if by the end of the period of 28 days beginning with the date on which the plan, section, description and timetable have been supplied to the Owner, the Owner has not intimated disapproval of such plan, section, description and timetable and the grounds of disapproval, the Owner is deemed to have approved the said plan, section description and timetable as submitted.

(4) When giving its approval under sub-paragraph (2), the Owner may specify such reasonable requirements which in the Owner's opinion are necessary in the execution of the works.

(5) The works described in sub-paragraph (2) must be executed only in accordance with the plan, section, description and timetable submitted under sub-paragraph (2) and in accordance with such reasonable requirements as may be given in accordance with sub-paragraph (4) by the Owner. Where the Owner reasonably requires any protective works to be carried out by itself or by the undertaker (whether of a temporary or permanent nature) such protective works, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, must be carried out to the Owner's reasonable satisfaction prior to the works described in sub-paragraph (3).

(6) In the event that the Owner issues a disapproval to the plan, section, description and timetable within the 28 day period referred to in sub-paragraph (2), the undertaker may refer the matter to appeal in accordance with Schedule 3 of the Order (procedures in relation to certain approvals etc).

(7) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 28 days before commencing the execution of any works, a new plan, section and description instead of the plan, section and description previously submitted, and having done so the provisions of this paragraph apply to and in respect of the new plan, section and description.

(8) The undertaker is not required to comply with sub-paragraph (2) in a case of emergency works (as defined in the 1991 Act) but in that case it must give to the Owner notice as soon as is reasonably practicable and a plan, section and description of those works as soon as reasonably practicable subsequently and must comply with sub-paragraphs (4) and (5) in so far as is reasonably practicable in the circumstances.

(9) Where in consequence of the proposed construction or maintenance of any part of the authorised development, the undertaker or Owner requires the removal of Apparatus or the Owner makes requirements for the protection or alteration of Apparatus, the undertaker shall use its reasonable endeavours to co-ordinate the execution of the works in the interests of safety and the efficient and economic execution and maintenance of the authorised development and taking into account the need to ensure the safe and efficient operation of Little Denmead Farm and the Owner shall use its reasonable endeavours to co-operate with the undertaker for that purpose.

(10) If in consequence of any agreement reached under Part 7 the access to any Apparatus or Alternative Apparatus is materially obstructed, the undertaker must provide such alternative means of access to such Apparatus or Alternative as will enable the Owner to maintain or use the Apparatus or Alternative Apparatus no less effectively than was possible before such obstruction.

(11) The undertaker must send the Owner certification in writing as to the date on which the works covered by this paragraph 15 have been practically completed. The undertaker must within 20 working days of such certification then remove all apparatus and Work No. 3 from the part of Little Denmead Farm that has not been the subject of compulsory acquisition powers under paragraph 3(1) of this Part 7, and reinstate the land on Little Denmead Farm south of the green dashed line between points X and Y on The Plan to Agricultural Soil Quality.

Due care and skill

16. —(1) The fact that any act or thing may have been done by the undertaker pursuant to an approved plan or document will not excuse the undertaker from liability under the provisions of this Part 7 if the undertaker fails to carry out and execute the works properly with due care and attention and in a skillful and workman like manner or in a manner that does not accord with the approved plan or document,

Indemnity

17 —(1) Subject to sub-paragraphs (2) and (3), if by reason of, or in connection to, or in consequence of the following with respect of the part of Little Denmead Farm that is not the subject of compulsory acquisition powers granted under paragraph 3(a) of this Part 7:

(a) the presence of the undertaker (including any person employed or authorised by the undertaker) ; or

(b) the presence of equipment belonging to the undertaker or any person employed or authorised by the undertaker ; or

(c) the construction, use or removal of any works (including access, utilities and landscaping), authorised by this Part 7 of this Schedule 13 ; or

(d) any reinstatement works authorised by this Part 7 of this Schedule 13; or

(e) the construction, use, maintenance or failure of any part of the Converter Station, Related Structures or Related Cables; or

(f) the repair, inspection, removal, alteration or protection of the Converter Station, Related Structures and Related Cables; or

(g) the inspection, removal, alteration or protection of any Apparatus or Alternative Apparatus

(h) the construction, use, maintenance or failure of any part of the authorised development by or on behalf of the undertaker;

(i) any act or default of the undertaker (or any person employed or authorised by him) in the course of carrying out works, use or maintenance;

(j) any subsidence resulting from any of these works;

(k) decommissiong of works authorised under this Part 7 and of the Converter Station, Related Structures, Related Cables and Work No.3;

(l) loss of access (temporary or permanent);

by or on behalf of the undertaker or in consequence of any act or default of the undertaker (or any person employed or authorised by the undertaker) in the course of carrying out such works, use, reinstatement, repair, inspection, removal, alteration, protection or maintenance, including without limitation works carried out by the undertaker under this Part of this Schedule, any loss, disturbance, expense, or damage that is caused, in the reasonable opinion of the Owner, to the Agricultural Soil Quality of any part of Little Denmead Farm) or to the property of the Owner or to Apparatus or Alternative Apparatus, or there is any interruption caused to the operation (including agricultural production) of Little Denmead Farm, and the Owner suffers loss, disturbance, damage or expense as a result of that or becomes liable to pay any amount to any third party, the undertaker will:–

(m) bear and pay on demand the loss, disturbance, expense, or damage reasonably incurred by the Owner in relation to the property, Apparatus, Alternative Apparatus and Agricultural Soil Quality at Little Denmead Farm;

(n) bear and pay on demand the reasonable expenses incurred by the Owner in, or in connection with, the inspection, removal, alteration or protection of any Apparatus or Alternative Apparatus within Little Denmead Farm;

(o) bear and pay on demand the loss, disturbance, expense, or damage reasonably incurred by the Owner in relation to the interruption in the operation of Little Denmead Fram, including agricultural production;

(p) bear and pay on demand the cost reasonably incurred by the Owner in making good such damage or loss, or restoring the relevant part of Little Denmead Farm to being suitable for agricultural production; and

(q) bear and pay on demand and indemnify the Owner for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from Owner, by reason or in consequence of any such damage or interruption or Owner becoming liable to any third party as aforesaid other than arising from any default of Owner.

(2) The fact that any act or thing may have been done by the Owner on behalf of the undertaker or in accordance with a plan approved by the Owner or in accordance with any requirement of the Owner or under its supervision will not (unless sub-paragraph (3) applies), excuse the undertaker from liability under the provisions of this sub-paragraph (1) unless the Owner fails to carry out and execute the works properly with due care and attention and in a skillful and workman like manner or in a manner that does not accord with the approved plan or as otherwise agreed between the undertaker and the Owner.

(3) Nothing in sub-paragraph (1) shall impose any liability on the undertaker in respect of:any damage or interruption to the extent that it is attributable to the neglect or default of the Owner, its servants, contractors or agents.

(4) The Owner must give the undertaker reasonable notice of any such third party claim or demand and no settlement or compromise must, unless payment is required in connection with a statutory compensation scheme, be made without first consulting the undertaker and considering their representations.

(5) The Owner must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands, and penalties to which the indemnity under this paragraph 16 applies. If requested to do so by the undertaker, the Owner shall provide an explanation of how the claim has been minimised. The undertaker shall only be liable under this paragraph 17 for claims reasonably incurred by the Owner.

(6) The undertaker must not re-enter Little Denmead Farm in the absence of restoration of the land to the Agricultural Soil Quality and payment referred to in paragraph 17(1) above.

SCHEDULE 4

THE AFFECTED PARTIES' SIGNED UNILATERAL DCO OBLIGATION SUBMITTED AT DEADLINE 8 [REP8-095]

Date: 1 March 2021

Application by Aquind Limited for a Development Consent Order for the 'Aquind Interconnector' electricity line between Great Britain and France (PINS reference: EN020022)

Development Consent Planning Obligation in relation to Little Denmead Farm

On behalf of

Mr. Geoffrey Carpenter & Mr. Peter Carpenter

Registration Identification Number: 20025030

Submitted in relation to Deadline 8 of the Examination Timetable

Blake Morgan LLP
6 New Street Square
London EC4A 3DJ
www.blakemorgan.co.uk
Ref: 584927-6

1. INTRODUCTION

1.1. Mr Geoffrey Carpenter and Mr Peter Carpenter (the "**Owners**") own the freehold interest to Little Denmead Farm, which covers plots 1-32, 1-32a, 1-38, 1-51, 1-57, 1-69, 1-70, 1-71, and 1-72, and they also benefit from a right of way granted by deed of easement over plots 1-60, 1-63, and 1-65, such plot numbers as shown on the latest revised Land Plans (document reference **[REP7-003]**) (the "**Owners' Property**").

1.2. The Applicant is seeking compulsory acquisition powers over the Owners' Property.

1.3. The Applicant is in particular seeking to permanently compulsorily acquire the freehold interest to plot 1-32 because it proposes to construct a permanent access road (amongst other things) on and through plot 1-32.

1.4. The Owners have submitted throughout the Examination, its detailed reasons as to why there is no need for the Applicant to seek permanent compulsory acquisition powers due to this proposed permanent access road, because there is in fact no need for such permanent access after construction of the proposed application works.

1.5. There are alternative reasonable means of ensuring justified types of access that can be used by the Applicant during the operation of the proposed application development but that have not been explored by the Applicant with the Owners and that failure is a breach of the Secretary of State's guidance on the use of compulsory purchase powers.

1.6. The orthodox position is that the law requires the party seeking powers of compulsory acquisition to demonstrate, in essence, a lawful, evidentially justified and decisive case for acquisition and that is compelling for all parts of land envisaged to be taken. An owner need do nothing at all to defend the taking of their land against their will. The Owners do not accept the permanent maintenance of what would be in fact a 'temporary construction' road on their land ("temporary" because the Applicant has confirmed that the unmanned Converter Station would only need to accessed 3 to 4 times a year for inspection and maintenance – there is no need for a permanent access road for such temporary purposes)

1.7. The Owners also do not accept that the Applicant can in law or fact, or has shown that, compulsory acquisition powers over Stoneacre Copse are justified.

1.8. The Applicant and local planning authority having had the opportunity to comment on the Owners' draft unilateral development consent obligation throughout the Examination and each having raised no substantive or drafting concerns, save that the obligation be in some way "delivered" to the local planning authority. In that respect the Owners have revised their unilateral Development Consent Obligation so that its terms are enforceable by the relevant local planning authority.

1.9. In respect of the contention by the Applicant during Compulsory Acquisition Hearing 3 ("**CAH3"**) that a unilateral planning obligation must be in some way "delivered" to the local planning authority, the Affected Party notes that "delivery" is not a term used in section 106 of the Town and Country Planning Act 1990 as a precondition to the lawfulness of an obligation. As the Owners set out during CAH3, there is no statutory bar in section 106 of the Town and Country Planning Act 1990 to a party "interested in land" (as the Owner is) from relying on a planning obligation in the form of either a bilateral agreement or a unilateral undertaking. Both are, ultimately, "planning obligations". Also, the Applicant's attention is drawn to the clear terms of section 106 that include no such limitation on a section 106 obligation. All that is required is for the deed to state who the local planning authority is and this is because section 106 results to deem the obligation to be a "local land charge" and so the local planning authority falls to be identified... There is no statutory requirement to "deliver" an obligation to a local planning authority. If the Applicant were correct to assert that, in some way, section106 precluded use by a party of a unilateral undertaking under section 106, then it would result to ensure that any promoter of an NSIP could choose to refuse to enter into a planning obligation as a means to avoid the establishment of an alternative to compulsory acquisition – and that would be self-serving. It is also in law untenable. The Affected Party has offered the undertaking below in order to show that there is a demonstrable alternative to the justified need for periodic access by light vehicles over the Owner's Property to the Converter Station in circumstances where the Applicant has (inexplicably) simply refused to countenance, to engage or to explore such alternatives.

APPENDIX 1

SIGNED UNILATERAL DEVELOPMENT CONSENT OBLIGATION

DATED 1ST March 2021

BY

GEOFFREY CARPENTER AND PETER CARPENTER

UNILATERAL DEVELOPMENT CONSENT OBLIGATION

THIS UNILATERAL DEVELOPMENT CONSENT OBLIGATION is made by **DEED** on the 1ST day of March 2021

BY:-

(1) **GEOFFREY CARPENTER** of [redacted] and

(2) **PETER CARPENTER** of [redacted]

(together the "**Owner**")

RECITALS:

(A) The Land is located in the administrative area of both Winchester City Council and East Hampshire District Council who are the local planning authorities for part of the area within which the National Infrastructure Project is to be located;

(B) The Owner is the registered proprietor of the Land which is registered at the Land Registry with freehold Title Number HP763097;

(C) Within the Land within its Easternmost boundary is an actual trackway laid by, and that was used previously by, National Grid as an accessway for the purposes of ensuring by agreement with the Owner access for the purpose of maintenance of its Lovedean Substation and which connects to Broadway Lane along a right of way in favour of the Land, and which trackway and way are identified on the said Title Number. The route of this track is the Accessway (as defined below);

(D) Pursuant to the Town and Country Planning Act 1990: section 106(1)(a) and section 106(1A), the Owner may restrict the use of its Land in any specified way; section 106(9)(a) and (aa), this unilateral planning obligation is a development consent planning obligation for the purposes of section 106; section 106(9)(b), the land is part of the land within HM Title Reference HP763097 and the Owner owns the freehold of that part; section 106(9)(d), Winchester City Council is the local planning authority;

(E) The Developer has submitted the Application to the Secretary of State that encompasses part of the Land ("the Affected Land") and seeks its Development for a Converter Station and related electricity and fibre optic cables in the field of energy under the Planning Act 2008.

(F) The Developer proposes to build one Converter Station on the northern part of the Affected Land and has expressed and evidenced in its design and access statement that forms part of the Application a need for periodic access by light vehicles from the highway named Broadway Lane to the Converter Station for the purposes of period inspection and maintenance of structures relating to and equipment within the built Converter Station and which has a related spares building near to it.

(G) In the absence of any engagement or exploration by the Applicant of all reasonable alternatives and mindful of the obligations on the Applicant and the Owner under paragraph

8 of the Secretary of State's "*Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land*" and of paragraph 25 of the same guidance that requires land compulsorily "only where attempts to acquire by agreement fail"; and the Owner recognising that it has successfully farmed the Land alongside the electricity-related infrastructure at Lovedean Substation for many decades (including by having previously agreed with National Grid the use of the access way for maintenance access of that electricity-related infrastructure), the Owner continues to recognise the need for ongoing good neighbourly relations with different infrastructure providers.

(H) The Application Order Limits have been drawn to not include all of the Land and so a development consent planning obligation is the only means by which access along an existing access way within the Land between the highway and envisaged location of the Converter Station can be provided.

(I) The Owner therefore wishes to bind certain parts of the Affected Land as shown on the Plan, so as to facilitate access for the Developer through the Land to the converter station along a prescribed route around the perimeter of the Land.

(J) The Owner is satisfied that the requirements of section 106 of the Town and Country Planning Act and of section 104(3) of the Planning Act 2008 and National Planning Policy Statement EN-1 (Energy), paragraphs 4.1.8 and footnote 73 are met by this Deed of Obligation.

(K) This Deed of Obligation is relevant to planning, necessary to make the proposed development acceptable in planning terms, directly related to the proposed development, fairly and reasonably related in scale and kind to the proposed development, and reasonable in all other respects.

(L) This Deed of Obligation directly relates to both the land encompassed by the Application and the adjacent Land of the Owner, and is necessary to avoid the need for a permanent access across the central part of the Land whilst also enabling during the operation of the Converter Station access to and from the highway to that Converter Station for maintenance access for light vehicle use.

(M) This Deed of Obligation , is fair and reasonable in scale and kind because otherwise the Land would cease to be a viable concern if the other permanent access envisaged by the Application in the central part of the Land were constructed and retained, and is otherwise reasonable because the use of the accessway by National Grid previously for a similar purpose of ensuring periodic access to its Lovedean Substation was acceptable to that national electricity provider.

NOW THIS DEED WITNESSES as follows:-

1 Definitions

1.1 The following words and phrases shall unless the context otherwise admits or requires have the following meanings:-

"Accessway"	means the existing access between the points marked A and B on Plan 2 and C, D, E and F on Plan 1. Those parts of the Accessway shown coloured yellow comprise the part of the Affected Land subject to a site access licence entered into between (1) the Owner and (2) the Developer dated 13th November 2020;
"Affected Land"	means the part of the Land within the Order Limits of the Application and that is bound by this Deed, the extent of which is shown outlined in blue on the Plan;
"Application"	means the application for a development consent order, reference EN020022, made by Aquind Limited in relation to the Aquind Interconnector, under the Planning Act 2008 to the Secretary of State on 14 November 2019 for the elements of development described in paragraph 3.5(A)-(D) in the Statement requesting a direction dated 19 June 2018;
"Begins"	means the earliest date on which a material operation as defined in Section 155 of the Planning Act 2008 and "Begin", and "Begun" shall be construed accordingly;
"Converter Station"	Means that part of the Development which comprises one Converter Station for the Planning Act 2008 Purposes;
"DCO"	means such grant of a development consent order pursuant to the Application as may be made by the Secretary of State;
"Decommissioning Period"	Means the date on which the Converter Station begins to be decommissioned pursuant to Requirement 24 of the DCO;
"Developer"	Aquind Limited (company reference number 06681477) and such third party as may be agreed in writing by the Owner to use the Operational Accessway for maintenance purposes
"Development"	means the development described in paragraph 3.5 (A)-(D) of the Statement in the field of energy requesting a direction under Section 35 of the Planning Act 2008 (dated 19 June 2018) proposed to be situated on part of the Land to which this unilateral development consent obligation relates and directed by the Secretary of State to be treated as development requiring development consent;
"Land"	means the freehold property owned by the Owner, known as Little Denmead Farm, Broadway Lane, Denmead, Waterlooville PO8 0SL located within the geographical area of both Winchester City Council and East Hampshire District Council, HM Land Registry Title HP763097 and shown for the purpose of identification edged red on the Plan attached at Appendix 1 to this Deed, and which is not wholly within the Order Limits of the Application;

"Operational Period"	Means the period of time between the date of certification of the Converter Station and the date on which the Decommissioning Period begins;
"Order Limits"	means that extent of land covered by the Application and as defined in Article 2(1) of the DCO that covers part of the Land;
"Owner's Protective Provisions"	means the protective provisions for the protection of Little Denmead Farm submitted by the Owner during the Examination (and as revised during the Examination);
"Parameter Zone 1 Access Road"	means the zone of access within which the Developer may construct a temporary haul road on the Land for the purpose of constructing the Converter Station, and which zone is identified shaded in grey on the plan entitled "Converter Station and Telecommunications Buildings Parameter Plans Option B(i)" with Plan Reference EN020022-2.6-PARA-Sheet2 REV 03, and the plan entitled "Converter Station and Telecommunications Buildings Parameter Plans Option B(ii)" with Plan Reference EN020022-2.6-PARA-Sheet3 REV 03, as certified by the DCO
"Plan 1"	means the plan attached to this Deed labelled Accessway Plan – Plan 1 of 2 attached at Appendix 2 to this Deed;
"Plan 2"	means the plan attached to this Deed labelled Accessway Plan – Plan 2 of 2 attached at Appendix 2 to this Deed;
"Planning Act 2008 Purpose"	Means the purpose of the field of energy specified in sections 14(6)(a) and 35(2)(a)(i) of the Planning Act 2008
"Purposes"	means the purposes of repair, inspection, maintenance and emergencies relating to the Converter Station;
"Savings"	means the savings set out in Schedule 2;
"Secretary of State"	means the Secretary of State for Business, Energy and Industrial Strategy who is determining the Application; and
"Town and Country Planning Act"	means the Town and Country Planning Act 1990, as amended.

2 INTERPRETATION

2.1 In this Deed:-

2.1.1 the headings are for ease of reference and shall not affect interpretation;

2.1.2 words importing the singular include where the context so admits the plural and vice versa and the masculine includes the feminine and vice versa;

2.1.3 references to Clauses, paragraphs, plans, drawings and Schedules are references to clauses, paragraphs, plans, drawings and schedules to this Deed;

2.1.4 references to the Owner shall include its successors in title;

2.1.5 references to Developer shall include its successors in title within the Order Limits;

2.1.6 any covenant not to do any act or thing includes an obligation not to knowingly allow, permit or suffer that act or thing to be done by another person and any covenant to do any act or thing includes an obligation to procure the doing of that act or thing by another person;

2.1.7 any references to any statutes or statutory instruments shall include and refer to any statute or statutory instrument amending, consolidating or replacing them respectively from time to time and for the time being in force; and

2.1.8 where two or more persons are bound by any of the covenants in this Deed their liability shall be joint and several.

3 STATUTORY AUTHORITY

3.1 This Deed of Planning Obligation is made pursuant to:-

3.1.1 Section 106, and 106(9)(aa) of the Town and Country Planning Act and is a development consent planning obligation for those purposes;

3.1.2 Section 111 of the Local Government Act 1972;

3.1.3 Section 2 of the Local Government Act 2000;

3.1.4 Section 1 of the Localism Act 2011; and

3.1.5 all other powers enabling in that behalf,

with the intent that the terms hereof will be planning obligations so as to bind the Land as hereinafter provided and shall be enforceable.

3.2 This Deed is made under section 106 of the Town and Country Planning Act and the planning obligations are entered into with the intent that, they shall be enforceable without limit of time by Winchester City Council and East Hampshire District Council against the Owner in accordance with the provisions of this Deed including its successors in title and assigns and any person corporate or otherwise that acquires an interest or estate created in the Land (or any part or parts thereof) as if that person had also been an original covenanting party in respect of the planning obligations which relate to the interest or estate for the time being held by that person.

3.3 If the DCO is not Begun or shall at any time be quashed, revoked or otherwise changed or withdrawn, then this Deed shall immediately cease to have effect from the earliest date of the said event.

4 CONDITIONAL ENTRY INTO FORCE AND CURRENCY

4.1 The obligations in this Deed shall not bind the Owner otherwise than for the duration of the Operational Period and unless first:

4.1.1 The Secretary of State finds in relation to the Application (whether himself or by agreement with a finding by the Examination Authority) that during the Operational Period:

(a) an access way enabling periodic access by the Developer for the Purposes between the highway and the Converter Station is necessary; and

(b) the permanent presence of an access way within the Parameter Zone 1 Access Road is not necessary because of this development consent obligation is an alternative; and

4.1.2 The Secretary of State grants the DCO under section 114 of the Planning Act 2008; and

4.1.3 In the event of any claim to the High Court against the grant of the DCO, expiry of any consequential right to appeal in relation to such claim; and

4.1.4 The DCO is not quashed; and

4.1.5 The Development Begins for the purposes of section 155(1) of the Planning Act 2008; and

4.1.6 Practical completion of the Converter Station is certified and the same is communicated in writing to the Owner.

OWNER'S OBLIGATIONS

4.2 The Owner undertakes:

4.2.1 Subject to the Savings in Schedule 2, to carry out the undertakings as set out in Schedule 1 of this Deed.

5 SUCCESSORS IN TITLE

This Deed is intended to be enforceable against any person deriving title from the Owner.

6 ENFORCEABILITY

6.1 This development consent obligation is enforceable to the extent that the obligation relates to land within the area of the following local planning authority:

6.1.1 Within the administrative area of Winchester City Council, that council in its capacity as the local planning authority; and

6.1.2 Within the administrative area of East Hampshire District Council, that council in its capacity as the local planning authority;

and no obligation will be enforceable by either of those local planning authority otherwise than during the period of the Operational Period.

7 Local Land Charge

The Owner shall register this Deed in the relevant registers of local land charges against the Land.

8 Release upon Parting with Interest and Discharge

The Owner shall upon parting with its interest in the Land or in any part thereof be released from all obligations, rights and duties in respect of the whole or part of the Land as the case may be except in respect of any prior or subsisting breach of obligation under the terms of this Deed.

9 Notices

9.1 Any notice, consent or approval required to be given under this Deed shall be in writing and shall be delivered personally or sent by pre-paid first class recorded delivery post.

9.2 The address for service of any such notice, consent or approval as aforesaid shall be in the case of service upon the Owner the registered office or such other address as shall have been previously notified.

9.3 A notice, consent or approval required or authorised to be given under this Deed shall be deemed to be served as follows:-

9.3.1 if personally delivered at the time of delivery and if posted at the time when it would be received in the ordinary course of business; and

9.3.2 to prove such service it shall be sufficient to prove that personal delivery was made or that the envelope containing such notice, consent or approval was properly addressed and delivered into the custody of the postal authority in a pre-paid first class recorded delivery envelope.

9.4 Owner will take into account such representations made by the Developer as the Owner considers reasonable.

10 Third Parties

It is not intended that this Deed should give rights hereunder to a third party arising solely by virtue of the Contracts (Rights of Third Parties) Act 1999.

11 Jurisdiction

11.1 This Deed shall be governed by, and construed and interpreted in accordance with the laws of England and Wales.

11.2 If any provision of this Deed is found (for whatever reason) to be invalid, illegal or unenforceable, that invalidity, illegality or unenforceability will not affect the validity or enforceability of the remaining provisions of this Deed.

12 DELIVERY

The provisions of this Deed shall be of no effect until this Deed has been dated.

Schedule 1
The Undertaking

1 Save as otherwise agreed in writing by the Owner, and subject to the Savings in Schedule 2 of this Deed, the Owner will not impede the periodic use of the Accessway for the Purposes by the Developer.

Schedule 2

Savings

The Owner may:

1 Use to carry out landownership functions

1.1 The Owner may carry out its land ownership functions along the Accessway, but in so exercising such functions the Owner shall cause as little interference as is reasonably practicable to the exercise of its Undertaking in paragraph 1 of Schedule 1 to this Deed.

2 Repair of the Accessway

2.1 The Owner may repair from time to time the Accessway, but in so doing shall seek to minimise interference so far as is reasonably practicable with the exercise of its Undertaking in paragraph 1 of Schedule 1 to this Deed.

3 Works on the Affected Land by the Owner and Reasonable Interruption of the Accessway

3.1 The Owner may develop the Accessway, but in that eventuality must provide a route of access to the Developer that, in the reasonable opinion of the Owner serves an equivalent function to the Purposes and is of an equivalent physical nature, if the Owner cannot exercise its Undertaking in paragraph 1 of Schedule 1 to this Deed as a result of any such development.

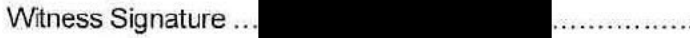
3.2 The Owner may interfere with, temporarily interrupt, impede access by the Developer along the Accessway, and carry out any works that in the reasonable opinion of the Owner are necessary, along the Accessway if it becomes thus necessary including where the Owner considers that the Developer's use of the Accessway has resulted in or caused any damage to the Accessway, or the Developer obstructs the Accessway, or uses the Accessway in a manner that requires, in the reasonable opinion of the Owner, the Owner to carry out repairs or maintenance to the Accessway.

3.3 In the event that, in the reasonable opinion of the Owner, the matters referred to in paragraph 3.2 result in the Owner incurring costs, the Owner is entitled to preclude use of the Accessway for the Purposes until it has received cleared funds of a sum equivalent to the costs incurred by the Owner. Upon receipt of the said sum, the Owner shall give written notice of that receipt to the Developer.

IN WITNESS whereof the Owner hereto has executed this Deed the day and year first before written

EXECUTED and **DELIVERED** as a **DEED**)
by **GEOFFREY CARPENTER**)
in the presence of:)

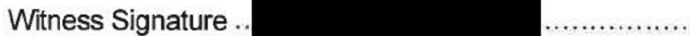
GEOFFREY CARPENTER.

Witness Signature ...  ....

Witness Name: ...HENRY BRICE...............
Witness Address: ...IAN JUDD + PARTNERS...
4 HIGH STREET, BISHOPS WALTHAM
SOUTHAMPTON, SO32 1AB............
Witness Occupation: ...CHARTERED SURVEYOR

EXECUTED and **DELIVERED** as a **DEED**)
by **PETER CARPENTER**)
in the presence of:)

PETER CARPENTER.

Witness Signature ..  ....

Witness Name: HENRY BRICE.................
Witness Address: ..IAN JUDD + PARTNERS
4 HIGH STREET, BISHOPS WALTHAM
Southampton, SO32 1AB...........
Witness Occupation: ..Chartered Surveyor

APPENDIX 1

THE LAND

HM Land Registry
Official copy of
title plan

Title number HP753097
Ordnance Survey map reference SU6713SW
Scale 1:2500
Administrative area Hampshire: Winchester

This official copy issued on 23 July 2020 shows the state of this title plan on 23 July 2020 at 10:10:51.
It is admissible in evidence to the same extent as the original (s.67 Land Registration Act 2002).
This title plan shows the general position, not the exact line, of the boundaries. It may be subject to distortions in scale. Measurements scaled from this plan may not match measurements between the same points on the ground.
This title is dealt with by HM Land Registry, Durham Office.

APPENDIX 2

PLAN 1 & PLAN 2

Y
E
D
X
C
B

Promap V2
LANDMARK INFORMATION

Ordnance Survey © Crown Copyright 2021. All Rights Reserved

Accessway Plan – Plan 1 of 2

C

B

Track

A

GP

62.3m

Broadway Cottages

Little Lovedean

Track

Broadway Farm House

0m 20m 40m 60m

Ordnance Survey © Crown Copyright 2021. All Rights Reserved. Licence number 100022432

Promap V2 LANDMARK INFORMATION

Ordnance Survey Crown Copyright 2021. All rights reserved.
Licence number 100022432.
Plotted Scale - 1:2500. Paper Size – A4

Accessway Plan – Plan 2 of 2

SCHEDULE 5

CHRONOLOGY OF AND LINKS TO SUBMISSIONS RELATING TO COMMERCIAL TELECOMMUNICATIONS BY THE AFFECTED PARTIES (AND ANY RELEVANT RESPONSES BY THE APPLICANT)

Item No.	Deadline / Examination Library Reference / Document Library Reference / Link	Point raised by the Affected Parties regarding commercial telecoms / protective provisions	Where the Applicant responded
1	Deadline 4 REP4-047 / N/A – BM submission / Link	Schedule 4 of submission with relevant appendices – the submission is a note from Counsel note examining whether the use of fibre optic cables within the FOC cable (or spare capacity above otherwise necessary redundancy) for commercial telecommunications (and related infrastructure) can lawfully, or would be, able to be evaluated by the Applicant's evidence as "authorised development", with a summary of the consequences of it not being so and concerns over extensive land take. Appendix 1 – Extract from Oxford Dictionary, 6th Edition. Appendix 2 – Evaluation of whether interconnectors typically or atypically include use for commercial telecommunications of spare capacity in fibre optic cables, or of the inclusion and use of unnecessary fibre optic cables within the FOC cable, or Telecommunications buildings. Appendix 3 – Electricity Interconnector Licence for Aquind Limited under Section 6(1)(e) Electricity Act 1989. Appendix 4 – Electricity Interconnector Licence: Standard Conditions Appendix 5 – Direction under section 106(3) of the Communications Act 2003 applying the electronic communications code	Deadline 6 Applicant's responses to Deadline 4 submissions / REP6-067 (document reference: 7.9.23), Appendix A, Table 1.2, pages 1-17 to 1-24 (inclusive) / Link
2	Deadline 5 REP5-107 / N/A – BM submission / Link	Written Submission in relation to Issue Specific Hearing 1 setting out proposed amendments to the draft DCO.	Deadline 6 Applicant's response to action points raised at ISH1, 2 and 3 and CAH 1 and 2 / REP6-063 (document reference: 7.9.22) para 2.9, Question 3.4, pp.10-

Item No.	Deadline / Examination Library Reference / Document Library Reference / Link	Point raised by the Affected Parties regarding commercial telecoms / protective provisions	Where the Applicant responded
			12 / Link
3	Deadline 5 REP5-108 / N/A – BM submission / Link	Transcript of oral submissions in relation to Compulsory Acquisition Hearing 2	Deadline 6 Applicant's response to action points raised at ISH1, 2 and 3 and CAH 1 and 2 / REP6-063 (document reference: 7.9.22) para 2.9, Question 3.4, pp.10-12 / Link Applicant's written summaries of oral submissions at ISH1, 2 and 3 and CAH 1 and 2 / REP6-062 (document reference: 7.9.21), CAH2 Question 6.1 pp.4-6 / Link Applicant's response to Deadline 5 submissions (REP6-069 / document reference 7.9.25) Table 3.1 p.3-66 to p.3-68 / Link
4	Deadline 5 REP5-109 / N/A – BM Submission / Link	Draft Protective Provisions protecting the Affected Parties submitted.	Deadline 6 Applicant's response to Deadline 5 submissions / REP6-069 (document reference 7.9.25) Table 3.1 p.3-66 to p.3-68 / Link
5	Deadline 6 REP6-135 / N/A – BM submission / Link	Post hearing note in relation to oral representations relating to scope of Authorised Development Delivered during CAH2 and reduction of land take & follow up information in response to: (i) Requests by the ExA made during CAH2, (ii) Comments by the Applicant made during CAH2. Appendix NSPAD 1 – RR – 055 Appendix NSPAD 2 – RR – 055 Appendix NSPAD 3 – RR – 055 Appendix NSPAD 4 – RR – 055 Appendix NSPAD 5 – RR – 055 Appendix NSPAD 6 – RR – 055	Deadline 7 Applicant's Reponses to Deadline 6 Submissions – Appendices / REP7-074 (document reference 7.9.33.1) Appendix A, para 7, pp.6-8 / Link

Item No.	Deadline / Examination Library Reference / Document Library Reference / Link	Point raised by the Affected Parties regarding commercial telecoms / protective provisions	Where the Applicant responded
		Appendix NSPAD 7 – RR – 055 Appendix NSPAD 8 – RR – 055 Appendix NSPAD 9 – RR – 055 Appendix NSPAD 10 – RR – 055 Appendix NSPAD 11 – RR – 055 Appendix NSPAD 12 – RR – 055 Appendix NSPAD 13 – RR – 055 Appendix NSPAD 14 – RR – 055 Appendix NSPAD 15 – RR – 055 Appendix NSPAD 16 – RR – 055 Appendix NSPAD 17 – RR – 055 Appendix NSPAD 18 – RR – 055 Appendix NSPAD 19 – RR – 055 Appendix NSPAD 20 – RR – 055 Appendix NSPAD 21 – RR - 055	
6	Deadline 7 REP7-118 / N/A – BM Submission / Link	Response by the Affected Party to the Examining Authority's Further Written Questions (ExQ2) – Question ExADCO2.5.1 and Appendices. Appendix A: the ExA's Further Questions, Question DCO2.5.1 is set out. Appendix B: Secretary of State's Direction under section 35 & the Request Statement for the Direction. Appendix C: Secretary of State's Guidance on: Planning Act 2008: Changes to Development Consent Orders (December 2015). Appendix D: Extract from [REP6-063] 'Applicant's Response to action points raised at ISH1, 2 and 3, and CAH 1 and 2. Appendix E: Other DCO examples where ExA has considered the scope of the	Deadline 7 ExQ2 Response / REP7-038 (document reference 7.4.3) Table 1.5 Reference DCO2.5.1 page 1-24 to page 1-26 / Link Deadline 7c Response to Submissions on behalf of Mr G Carpenter and Mr P Carpenter at Deadline 7 Appendix B - Rev-001 / REP7c-014 (document reference 7.9.39.2) / Link

Item No.	Deadline / Examination Library Reference / Document Library Reference / Link	Point raised by the Affected Parties regarding commercial telecoms / protective provisions	Where the Applicant responded
		Development. Appendix F: Extract from Planning Act 2008. Appendix G: Extract form shorter Oxford Dictionary, 6th edition. Appendix H: Appendix NSPAD 6 – Monitoring Cable Design Diagram.	
7	Deadline 7 REP7-119 / N/A – BM Submission / Link	Protective Provisions submitted.	Deadline 7c Response to Submissions on behalf of Mr G Carpenter and Mr P Carpenter at Deadline 7 Appendix B – Rev-001 / REP7c-014 (document reference - 7.9.39.2) p.4 / Link
8	Deadline 7c REP7c-029 / N/A - BM Submission / Link	Scope of Planning Act 2008 Statutory Purposes & The Development Compulsory Acquisition of AP Land	Deadline 8 Applicant's Response to Deadline 7c Submissions – Appendix A / REP8-065 (document reference: 7.9.45.1) para 2, pp.1-5 / Link Applicant's Post Hearing Notes / REP8-057 (document reference: 7.9.44), para 4.3 p.9 / Link
9	Deadline 7c REP7c-030 / N/A BM Submission / Link	Statement on Funding & Compulsory Acquisition Compensation – Sections D, E, H Appendix 8 – Expert Evidence from Gateley Hamer	Deadline 8 Applicant's Response to Deadline 7c Submissions – Appendix A / REP8-065 (document reference: 7.9.45.1) para 3 pp.5-8 / Link
10	Deadline 8 REP8-094 / N/A – BM Submission - Link	Affected Party's Revised Version of the Applicant's Funding Statement, Rev 004 – see Introduction and Comments Section	Deadline 9 Response to Submissions made on behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter / REP9-019 (document reference 7.9.51), para 10 pp.25-26 / Link

Item No.	Deadline / Examination Library Reference / Document Library Reference / Link	Point raised by the Affected Parties regarding commercial telecoms / protective provisions	Where the Applicant responded
11	Deadline 8 REP8-096 / N/A – BM Submission / Link	Statement on Alternatives & Proportionate CPO Powers - Sections A, C and D	Deadline 9 Response to Submissions made on behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter / REP9-019 (document reference 7.9.51), para 2 pp.2-5 / Link
12	Deadline 8 REP8-098 / N/A – BM Submission / Link	Open Floor Hearing 3 Speech by Mr Henry Brice of Ian Judd & Partners	No response provided by the Applicant.
13	Deadline 8 REP8-100 / N/A / BM Submission / Link	Note on paragraph 19 of the "Guidance related to procedures for the compulsory acquisition of land" – Section B	Deadline 9 Response to Submissions made on behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter / REP9-019 (document reference 7.9.51), para 3 pp.6-10 / Link
14	Deadline 8 REP8-105 / N/A –BM Submission / Link	Draft DCO stripping out commercial telecommunications provisions	
15	Deadline 8 REP8-107 / N/A – BM Submission / Link	The Affected Party's Responses to the Applicant's submissions at Deadline 7C of the Examination – Section D	Deadline 9 Response to Submissions made on behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter / REP9-019 (document reference 7.9.51), para 9 pp.22-25 / Link
16	Deadline 8 REP-108 / N/A – BM Submission / Link	Revised draft Protective Provisions protecting the Affected Parties submitted.	Deadline 9 Response to Submissions made on behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter / REP9-019 (document reference 7.9.51), para 9 pp.22-25 / Link. However, we note that at para 1.3 of REP9-019 the Applicant suggests it responded to our amended version of the Draft DCO (REP8-105) in the schedule of changes requested to the draft DCO

Item No.	Deadline / Examination Library Reference / Document Library Reference / Link	Point raised by the Affected Parties regarding commercial telecoms / protective provisions	Where the Applicant responded
			[REP9-008]. That is not the case; the Applicant's only response in the schedule of changes at Deadline 9 concerned a change proposed by Historic England.

SCHEDULE 6

COMPARISON BETWEEN CHANGES TO THE DRAFT DCO RELATING TO COMMERCIAL TELECOMS, PROPOSED BY THE AFFECTED PARTIES AND PROPOSED BY THE APPLICANT

Item No.	Amendment made by Affected Parties in REP8-105 or by the Applicant following the SOS' request	Summary of amendment	Adopted by Applicant?	BM Comment
1	Affected Parties	*Part 1, General Provisions, 2 Interpretation* Definition of "authorised development".	No	This amendment is necessary to ensure that the Authorised Development remains within the clear constraints of the statutory definition of the word "development" within the meaning of S35(2)(a)(i) of the Planning Act 2008 in addition to S32 of the Planning Act 2008. S35(2) says *"the Secretary of State may give a direction under subsection (1) only if - (a) the development is or forms part of (i) a project (or proposed project) in the field of energy, transport, water, waste water or waste, or"*
2	Affected Parties	*Part 1, General Provisions, 2 Interpretation* Definition of "building".	No	We amended the definition of building so that it is as defined by reference to 235(1) of the Planning Act 2008. This is aligned to the statutory definition that is incorporated within the Planning Act by sections 32 and 235(1) thereof that defines "building" by reference to section 336(1) of the 1990 Act.
3	Affected Parties	*Part 1, General Provisions, 2 Interpretation* Addition of definition of "fibre optic data transmission cables".	No	These changes need to be made to align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to ensure the purpose of the authorised development remains exclusively within statutory scope of "the field of energy" under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3.5, 3.5.1(A)-(d), 3.5.2(A) of the Applicant's Statement request a Section 35 Direction [AS040] and [APPP-111], and

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				sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008.
4	Affected Parties	*Part 1, General Provisions, 2 Interpretation* Addition of definition of "Little Denmead Farm".	No	
5	Affected Parties	*Part 1, General Provisions, 2 Interpretation* Definition of "marine HVDC cables".	Partially	The Applicant has made changes to the definition (see item 6). The Affected Parties' changes go further than the Applicant's as we explain the purpose of the HVDC cables is for telecommunications relating to the Converter Station. These changes need to be made. As explained in the Affected Parties' amended DCO REP8-105, the changes were made to align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to constrain the purpose of the instant Application within the field of energy under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3.5, 3.5.1(A)-(d), 3.5.2(A) of the Applicant's Statement request a Section 35 Direction [AS-040] and [APP-111], and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008.
6	Applicant	*Part 1, General Provisions, 2 Interpretation* Deletion of "and for commercial telecommunications" from definition of "marine HVDC cables".	N/A	

Item No.	Amendment made by Affected Parties in REP8-105 or by the Applicant following the SOS' request	Summary of amendment	Adopted by Applicant?	BM Comment
7	Affected Parties	*Part 1, General Provisions, 2 Interpretation* Definition of "onshore HVAC cables".	Partially	The Applicant has made changes to the definition (see item 8). The Affected Parties' changes go further than the Applicant's as we explain the purpose of the HVDC cables <u>is for telecommunications relating to the Converter Station</u>. These changes need to be made. As explained in the Affected Parties' amended DCO REP8-105, the changes were made to align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to constrain the purpose of the instant Application within the field of energy under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3.5, 3.5.1(A)-(d), 3.5.2(A) of the Applicant's Statement request a Section 35 Direction [AS-040] and [APP-111], and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008.
8	Applicant	*Part 1, General Provisions, 2 Interpretation* Deletion of "and for commercial telecommunications" from definition of "onshore HVAC cables".	N/A	
9	Applicant	*Part 1, General Provisions, 2 Interpretation* Definition of "onshore site preparation works" to refer to "Work No. 2 **<u>(aa)</u>**" not "Work No. 2 (bb)".	N/A	
10	Affected Parties	*Part 1, General Provisions, 2 Interpretation*	No	These changes need to be made to align the terms of the Norfolk Vanguard Offshore Wind Farm Order

Item No.	Amendment made by Affected Parties in REP8-105 or by the Applicant following the SOS' request	Summary of amendment	Adopted by Applicant?	BM Comment
		Definition of "requirement" to refer to requirements set out under paragraphs 2 to 29 of Schedule 2.		2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to ensure the purpose of the authorised development remains exclusively within statutory scope of "the field of energy" under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3.5, 3.5.1(A)-(d), 3.5.2(A) of the Applicant's Statement request a Section 35 Direction [AS040] and [APPP-111], and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008.
11	Affected Parties	*Part 1, General Provisions, 2 Interpretation* Addition of definition of "section 35 direction".	No	These changes need to be made to align the scope of the authorised development with the terms of the Secretary of State's Section 35 Direction for a proposed Development under section 35(2)(a)(i), being a proposed project in the field of energy so as to constrain the purpose of the instant Application within the field of energy under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3.5, 3.5.1(A)-(d), 3.5.2(A) of the Applicant's Statement request a Section 35 Direction [AS-040] and [APP-111], and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008.
12	Affected Parties	*Part 1, General Provisions, 2 Interpretation* Deletion of definition of "telecommunications building".	Yes	
13	Affected Parties	*Part 1, General Provisions, 2 Interpretation* Addition of definition of "telecommunications	No	These changes need to be made to align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of

Item No.	Amendment made by Affected Parties in REP8-105 or by the Applicant following the SOS' request	Summary of amendment	Adopted by Applicant?	BM Comment
		infrastructure".		energy so as to constrain the purpose of the instant Application within the field of energy under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3.5, 3.5.1(A)-(d), 3.5.2(A) of the Applicant's Statement request a Section 35 Direction [AS-040] and [APP-111], and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008.
14	Affected Parties	*Part 1, General Provisions, 2 Interpretation* Definition of "undertaker" - addition of words "for the purposes of the field of energy".	No	These changes need to be made to align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to ensure that the purpose of the authorised development remains exclusively within the statutory field of energy under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3.5, 3.5.1(A)-(d), 3.5.2(A) of the Applicant's Statement request a Section 35 Direction [AS-040] and [APP-111], and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008.
15	Affected Parties	*Part 1, General Provisions, 2 Interpretation* Definition of "undertaking" – deletion of "and provision of telecommunications services".	No	These changes need to be made to align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to ensure that the purpose of the authorised development remains exclusively within the field of energy under section 14(6)(a) and under section 35(2)((a)(i) as "project in the field of energy" in line with paragraph 3.5, 3.5.1(A)-(d), 3.5.2(A) of the Applicant's Statement request a Section 35 Direction [AS-040] and

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				[APP-111], and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008, and because the "provision of telecommunications The Applicant's version of the DCO differs from ours here in that their definition of "undertaking" includes additional wording which has not been marked in tracked – specifically: *"the provision of ancillary services to facilitate and support the continuous flow of electricity"*. No explanation as to why that should be the case.
16	Affected Parties	*Part 2, Principle powers, 3 Development consent etc, Granted by Order* (1) Deletion of reference to Schedule 2, and addition of "to the requirements".	No	These changes need to be made to align with the terms used by Article 3 of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy; and to avoid doubt about, or any difference in the interpretation of relative relationship between "provisions" and "requirements" under section 120 of the Act in relation to the terms to which the authorised development is subject; and to ensure that Article 3(1) does not inadvertently introduced development not evaluated.
17	Affected Parties	*Part 2, Principle powers, 4 Authorisation of use* Deletion of entire section.	No	These changes need to be made. Article 4 is superfluous. See Articles 3 and 5 of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706. Article 3(1) provides authorisation for and Article 5 provides a power to maintain the authorised development. Particularised provision for "use" is not necessary. The authorised development attracts the application of section 157(1) of the 2008 Act that ensures the use remains in the field of energy.
18	Affected	*Part 2, Principle powers, 7 Consent to transfer the benefit*	Yes	

Item No.	Amendment made by Affected Parties in REP8-105 or by the Applicant following the SOS' request	Summary of amendment	Adopted by Applicant?	BM Comment
	Parties	*of Order* Deletion of 7(c) within Consent to transfer the benefit of the Order.		
19	Affected Parties	*Part 2, Principle powers, 8 Application, exclusion and modification of legislative provisions* Deletion of 8(4).	No	These changes need to be made. Article 8(4) has been deleted because the requirements of sections 104(3) and 114 of the Planning Act 2008 cannot encompass subsequently applying provisions in relation to matters required to be taken into account at a logically prior point before the making of an order.
20	Applicant	*Part 3, Streets, 14 – Access to Works* "Work No. 2 (bb)" to "Work No. 2 **(aa)**".	N/A	
21	Affected Parties	*Part 5 – Powers of Acquisition* Deletion of Part 5.	No	These changes need to be made. Section 120(3) and (4) provisions for a section 122 purpose cannot be included because the Applicant cannot on the law and facts it relies on during and within the period of statutory Examination required by section 98(1) of the 2008 Act, nor as submitted by the Affected Party, lawfully demonstrate satisfaction of paragraphs 7-20, and 25, of the Planning Act 2008: Guidance related to compulsory acquisition procedures; sections 122(2) and (3) cannot be satisfied because it cannot be said that there are no impediments to implementation of the authorised development because the Secretary of State is not in a position on the facts in front of the parties within the Examination period to know whether the impediments (such as lack of funding) can be overcome.
22	Affected Parties	*Schedule 1, Authorised Development, para 1* Addition of "in the field of	No	These changes need to be made to ensure that the authorised development remains within the scope of the jurisdiction of section

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		energy" and reference to section "35**(2)(a)(i)**" of the 2008 Act.		14(6)(a) and 35(2)(a)(i) exclusively relating to the field of energy and for not extra-statutory purpose.
22	Affected Parties	*Schedule 1, Authorised Development, para 1, Work No. 1* Deletion of "extensions of the existing substation, including site establishment, earthworks, civil and building works"	No	These changes need to be made. The Section 35 Direction did not include this development within its scope. See [APP-111] and [AS-040] paragraph 3.5.1(A), and [APP-118] EIA Chapter 3.
23	Affected Parties	*Schedule 1, Authorised Development, para 1, Work No. 2* Deletion of (u) "up to 2 telecommunications buildings with a security parameter fence including a security gate and in between sterile zone for up to 2 vehicles at any one time and associated fibre optic data transmission cables; and"	Yes	
24	Applicant	*Schedule 1, Authorised Development, para 1, Work No. 2* As a result of the deletion explained at Item 23, the numbering of subsequent paragraphs has been updated.	N/A	
25	Affected Parties	*Schedule 1, Authorised Development, para 1, Work No. 2 –* Addition of "construction" to (w) i.e. this in relation to an underground cable.	No	These changes need to be made. To confine the part of any access road within Little Denmead Farm to temporary use for construction purposes alone pending its subsequent removal after conclusion of the Construction Period.
26	Affected Parties	*Schedule 1, Authorised Development, para 1, Work*	No	These changes need to be made. This parking can only relate to the Converter Station and cannot relate to

Item No.	Amendment made by Affected Parties in REP8-105 or by the Applicant following the SOS' request	Summary of amendment	Adopted by Applicant?	BM Comment
		No. 2 Addition of "within Converter Station compound" to (z) in relation to parking spaces.		the Telecommunications Building(s).
27	Applicant	*Schedule 2, Requirements, 1 Interpretation* (1) Definition of "converter station parameter plans" the Applicant has deleted "and telecommunications building" twice from the definition.	N/A	
28	Applicant	*Schedule 2, Requirements 2 Time limits* (1) Amendment to cross reference - "Work No. 2 (bb)" to "Work No. 2 **(aa)**".	N/A	
29	Applicant	*Schedule 2 Requirements, 4 Converter station option confirmation* Deletion of words "and telecommunications building".	N/A	
30	Applicant	*Schedule 2 Requirements, 5 Converter station and optical regeneration station parameters* (2) Deletion of "and telecommunications building". Deletion of rows "telecommunications building", "telecommunication building compound", and "telecommunications building security perimeter fence" in Table WN2.	N/A	
31	Applicant	*Schedule 2 Requirements, 5 Converter station option confirmation*	N/A	

Item No.	Amendment made by Affected Parties in REP8-105 or by the Applicant following the SOS' request	Summary of amendment	Adopted by Applicant?	BM Comment
		(3) Deletion of "and telecommunications building".		
32	Applicant	*Schedule 2 Requirements, 6 Detailed design approval* (1) - Amendment to cross reference - "Work No. 2 (bb)" to "Work No. 2 **(aa)**".	N/A	
33	Applicant	*Schedule 2 Requirements, 6 Detailed design approval* (2) - Amendment to cross reference - "Work No. 2 (bb)" to "Work No. 2 **(aa)**".	N/A	
34	Applicant	*Schedule 2 Requirements, 6 Detailed design approval* (6) - Addition of "how those details provide for optical regeneration stations of a scale which is necessary for the operation of the authorised development and". This is in relation to the construction of the ORS within Works No. 5.	N/A	
35	Applicant	*Schedule 2 Requirements, 6 Detailed design approval* (12) - Deletion of references to "the telecommunication buildings" on three occasions. This is in relation to permanent fencing.	N/A	
36	Applicant	*Schedule 2 Requirements, 7 Provision of landscaping* (1) - Amendment to cross reference - "Work No. 2 (bb)" to "Work No. 2 **(aa)**".	N/A	
37	Applicant	*Schedule 2 Requirements, 9 Biodiversity Management*	N/A	

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		Plan (3) - Amendment to cross reference - "Work No. 2 (bb)" to "Work No. 2 **(aa)**".		
38	Applicant	*Schedule 2 Requirements, 12 Surface and foul water drainage* (1) - Amendment to cross reference - "Work No. 2 (bb)" to "Work No. 2 **(aa)**".	N/A	
39	Applicant	*Schedule 2 Requirements, 13 Surface and foul water drainage* (1) - Amendment to cross reference - "Work No. 2 (bb)" to "Work No. 2 **(aa)**".	N/A	
40	Applicant	*Schedule 2 Requirements, 14 Archaeology* (2) - Amendment to cross reference - "Work No. 2 (bb)" to "Work No. 2 **(aa)**".	N/A	
41	Applicant	*Schedule 2 Requirements, 17 Construction traffic management* (1) - Amendment to cross reference - "Work No. 2 (bb)" to "Work No. 2 **(aa)**".	N/A	
42	Applicant	*Schedule 7 Parameter Plans* Amendments to drawing titles to remove references to "the Telecommunication Buildings".	N/A	
43	Applicant	*Schedule 14 Certified Documents* Amendments to document title of Application Document	N/A	

Item No.	Amendment made by Affected Parties in REP8-105 or by the Applicant following the SOS' request	Summary of amendment	Adopted by Applicant?	BM Comment
		2.6 to remove reference to "the Telecommunication Buildings" and update the revision from "003" to **"004."**		
44	Affected Parties	*Schedule 13, Part 7 For the protection of the owners of Little Denmead Farm*	No	These changes need to be made. See BM Deadline 8 Document: "Development Consent Protective Provisions in relation to Little Denmead Farm" as submitted at Deadline 8.
45	Affected Parties	*Schedule 15, Deemed marine licence under the 2009 Act, Part 1, 1 Licensed marine activities* Addition of definition of "CrossChannel Fibre Cable crossings".	No	
46	Affected Parties	*Schedule 15, Deemed marine licence under the 2009 Act, Part 1, 1 Licensed marine activities* Addition of definition of "fibre optic cable".	No	
47	Affected Parties	*Schedule 15, Deemed marine licence under the 2009 Act, Part 1, 1 Licensed marine activities* (1) Definition of "marine HVDC cables".	Partially	The Applicant has made changes to the definition (see item 48). The Affected Parties' changes go further than the Applicant's as we explain the purpose of the HVDC cables is for telecommunications relating to the Converter Station. These changes need to be made. As explained in the Affected Parties' amended DCO REP8-105, the changes were made to align the terms of the Norfolk Vanguard Offshore Wind Farm Order 2020 SI 2020/706 that includes a converter station and interconnector and fibre optic cables in the field of energy so as to constrain the purpose of the instant Application within the field of energy under section 14(6)(a) and under section 35(2)((a)(i) as "project in the

Item No.	Amendment made by Affected Parties in REP8-105 or by the Applicant following the SOS' request	Summary of amendment	Adopted by Applicant?	BM Comment
				field of energy" in line with paragraph 3.5, 3.5.1(A)-(d), 3.5.2(A) of the Applicant's Statement request a Section 35 Direction [AS-040] and [APP-111], and sections 31 ("part"), 115(1)(b) and (2)(a) ("associated"); and 120(3) ("ancillary") of the Planning Act 2008.
48	Applicant	*Schedule 15, Deemed marine licence under the 2009 Act, Part 1, 1 Licensed marine activities* (1) Definition of "marine HVDC cables" - Deletion of "and for commercial telecommunications".	N/A	