

# Southampton to London Pipeline Project

## Deadline 6

Explanatory Memorandum (clean)

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**Esso Petroleum Company, Limited**

**The Southampton to London Pipeline Development Consent Order 202[\*]**

**Explanatory Memorandum**

**05.03.2020**

## 1 Summary

- 1.1 This explanatory memorandum sets out the purpose and effect of each article of, and the Schedules to, the draft Southampton to London Pipeline Project Development Consent Order (“**the Order**”), as required by regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009.
- 1.2 Regulation 5(2)(c) requires explanatory memoranda to explain “*the purpose and effect of provisions in the draft order*”.

## 2 Purpose of the Order

- 2.1 Esso Petroleum Company, Limited (“**Esso**”) proposes to apply to the Secretary of State under section 37 of the Planning Act 2008 (“**the 2008 Act**”) for an Order to undertake works to construct and maintain an aviation fuel pipeline approximately 97 kilometres in length from Boorley Green in Hampshire to Esso’s West London Terminal storage facility in the London Borough of Hounslow, together with associated development within the meaning of section 115 of the Planning Act 2008 (“**the proposed development**”).
- 2.2 A detailed description of the proposed development is included in chapter 3 of the Environmental Statement.

## 3 Nationally Significant Infrastructure Project – construction of a pipeline other than by a gas transporter

- 3.1 Schedule 1 to the Order contains a list of numbered works comprising the Nationally Significant Infrastructure Project (“**NSIP**”).
- 3.2 These works are within the definition of an NSIP for the purposes of sections 14(1)(g) and 21(1) of the 2008 Act because they comprise a pipeline (together with any apparatus and works associated therewith as defined by section 65 of the Pipe-lines Act 1962 (“**the 1962 Act**”)) the construction of which:
- 3.2.1 is a cross-country pipeline within the meaning of section 235(1) of the 2008 Act and section 66 of the 1962 Act, being a pipeline whose length will exceed 16.093 kilometres;
- 3.2.2 would (but for section 33(1) of the 2008 Act) require authorisation under section 1(1) of the 1962 Act; and
- 3.2.3 is within section 21(2)(a) of the 2008 Act, as both ends of the pipeline will be situated in England and Wales.
- 3.3 As the Scheme is an NSIP, development consent must be obtained from the Secretary of State to authorise it, and an application for a development consent order (“**DCO**”) must be made to the Secretary of State, care of the Planning Inspectorate (“**the Inspectorate**”), under section 37 of the 2008 Act.

#### **4 Associated development**

- 4.1 The Order would also seek consent for development which is associated with the NSIP. The Secretary of State may, under the provisions of section 115 of the 2008 Act, grant consent for development that is associated with the NSIP.
- 4.2 The Secretary of State for Communities and Local Government has issued guidance on associated development (the “**2013 Guidance**”) which sets out the defining characteristics of associated development and illustrates the types of development that may fall within its scope. Paragraph 5 of the 2013 Guidance sets out the key principles to which the Secretary of State will have regard when determining whether development should be treated as associated development. In summary:
- 4.2.1 there must be a direct relationship between associated development and the NSIP. Associated development should, therefore, either support the construction or operation of the NSIP or help address its impacts;
  - 4.2.2 associated development should not be an aim in itself; and
  - 4.2.3 associated development should be proportionate to the nature and scale of the NSIP.
- 4.3 The Order seeks consent for a number of permanent and temporary works, which Esso considers to comprise associated development, namely:
- 4.3.1 permanent and temporary accesses;
  - 4.3.2 temporary construction compounds, including office, welfare and security facilities, car parking and storage areas; and
  - 4.3.3 temporary logistics and construction materials storage hubs.
- 4.4 Esso considers that all of the above elements fall within the scope of associated development and accord with the principles set out in the 2013 Guidance. They are not integral aspects of the NSIP, nor an aim themselves, but are required to support the construction and operation of the NSIP and/or to address its impacts.
- 4.5 It should be noted that Esso has chosen not to differentiate the NSIP and associated development works in Schedule 1 to the Order. Ultimately, however, all elements of the Scheme either constitute part of the NSIP or are “associated development” within the meaning of section 115(2) of the 2008 Act, and so could properly be authorised by the Order.
- 4.6 Finally, in order to ensure that the proposed development and the associated development are constructed efficiently and without impediment, the Order contains the powers to carry out the works listed (a) to (q) in Schedule 1. The use of such measures is widely precedented in Orders granting development consent under the 2008 Act – see, for example, the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014, the National Grid (Hinkley Point C Connection Project) 2016 and the Thorpe Marsh Gas Pipeline Order 2016.

## 5 Ancillary Matters

- 5.1 The Order also contains several ancillary matters to the NSIP, i.e. provisions not consisting of development, pursuant to sections 120(3), 120(4) and Schedule 5 of the 2008 Act.
- 5.2 The main ancillary matter is a power to acquire land or rights over land compulsorily or by agreement, in accordance with section 120(4) of the 2008 Act, which is required for the proposed development, or to facilitate it, or that is incidental to the proposed development under section 122 of the 2008 Act. A justification for these powers will be provided in the Statement of Reasons that accompanies the application.
- 5.3 In addition to providing for these powers, the Order seeks to apply and modify statutory provisions that relate to the compulsory acquisition of land. Under sections 117 and 120(5) of the 2008 Act, an instrument containing provisions of this nature must be made by Statutory Instrument. The Order is therefore presented in that form.
- 5.4 Other ancillary matters include works to, and the temporary stopping up of streets, regulation of vehicular traffic, the use of watercourses, public drains and sewers for the discharge of water, the temporary use of land for constructing and maintaining the proposed development, the felling or lopping of trees and hedgerows, and the application and disapplication of legislation relating to the proposed development.
- 5.5 The applicant considers that these powers are required for the development to which the Order relates, or are required to facilitate or are incidental to that development.

## 6 The draft Order

- 6.1 The Order draws on the General Model Provisions (**the “GMP”**) in the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (**“the Model Provisions Order 2009”**). The GMP were followed because there are no model provisions for pipeline development. Some elements of the GMP are not, however, well suited to pipeline development and a number of changes have been made as a consequence. These are discussed in relation to individual articles in greater detail below.
- 6.2 The Localism Act 2011 (**“the 2011 Act”**) removed the requirement for the decision maker to have regard to the Model Provisions Order 2009 in deciding applications and so they no longer have any formal legal status. Secondary legislation under the 2011 Act also removed the requirement for an applicant to explain in the explanatory memorandum divergences from the Model Provisions Order 2009, although it is noted that the “Legislation” page of the Inspectorate’s website states that:
- “... it may ... still be useful and helpful for applicants to show how and why they have departed from the Model Provisions Order in their applications.”*
- 6.3 Paragraph 1.5 of the Inspectorate’s Advice Note 15 (July 2015) also states that *“If a draft DCO includes wording derived from other made DCOs, this should be explained in the Explanatory Memorandum. The Explanatory Memorandum should explain why that particular wording is relevant to the proposed draft DCO, for example detailing what is factually similar for both the relevant consented NSIP and the Proposed Development ... the ExA and Secretary of State*

*will need to understand why it is appropriate for the scheme applied for. Any divergence in wording from the consented DCO drafting should also be explained.”*

- 6.4 Where there is a departure from the GMP, or an article is based on other precedent DCOs, an explanation of the new provision is provided. In general, the precedents followed in drafting the Order are other DCOs for pipeline development (primarily the Thorpe Marsh Gas Pipeline Order 2016 (2016/297) and the River Humber Gas Pipeline Replacement Order (SI 2016/853)), as well as DCOs and Transport and Works Act Orders for other linear schemes, such as the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 (SI 2014/2384) and the National Grid (Hinkley Point C Connection Project) Order 2016 (SI 2016/49). Reference has also been made to other recently made DCOs, such as the A19/A184 Testo’s Junction Alteration Order (SI 2018/994), the Silvertown Tunnel Order 2018 (SI 2018/574) and the A14 Cambridge to Huntingdon Improvement Order 2016 (SI 2016/547).
- 6.5 The purpose and effect of the provisions of the Order are now explained in sequence.

## **Part 1 – Preliminary**

### *Preamble*

- 6.6 The Order, in common with all statutory instruments, is introduced by a preamble.

### *Article 1 – Citation and commencement*

- 6.7 Article 1 sets out the name of the Order, establishing how it may be cited in subsequent legislation. It also states the date on which the Order would come into force, if made.

### *Article 2 – Interpretation*

- 6.8 The purpose of article 2(1) is to define terms used in the remainder of the Order. A number of the definitions used in the GMP have been transposed into the Order. However, the GMP are also amended and supplemented in the Order to reflect the particular circumstances of the proposed development and changes to the 2008 Act which have been made since it was originally enacted.
- 6.9 The following terms defined in the Order are found in substantially the same terms in the GMP and are self-explanatory: the 1961 Act; the 1965 Act; the 1980 Act; the 1990 Act; the 2008 Act; the book of reference; building; carriageway; highway; the land plans; the Order limits; owner; statutory undertaker; street authority; the tribunal; undertaker; watercourse; and Works plans.
- 6.10 The following definitions which are used in the GMP have been substantively modified in the Order:
- 6.10.1 “the Order land” is defined to mean “*the land shown on the land plans which is within the limits of land to be acquired or used permanently or temporarily and described in the book of reference.*” (*emphasis added*) The wording underlined is included to make clear that any land required permanently or temporarily in connection with the construction and maintenance of the proposed development, and not only land or rights to be acquired, forms part of the Order land and is therefore subject (unless

provided otherwise) to the powers contained in the Order. The “Order limits” is defined in similar terms in the Order;

- 6.10.2 “relevant planning authority” is defined to mean the local planning authority for the area to which any provision in the Order relates (including the requirements in Schedule 2) and which has the relevant legislative competence for the matter to which that provision relates; and
- 6.10.3 “street” is defined to mean *“the whole or any part of any highway, road, lane, footway, alley, passage, square, court and any land laid out as a way, whether it is for the time being formed as a footpath or not, together with land on the verge of a street or between two carriageways, and includes part of a street and any bridge, viaduct, overpass or underpass which a street passes over.”* This reflects the definition of “street” under section 48 of the New Roads and Street Works Act 1991 (**“the 1991 Act”**) so that it is clear that footpaths and highways are included within the definition of street under the Order and are therefore subject to the various powers in relation to streets in Part 3 of the Order.
- 6.11 The following are defined terms which have been included in the Order in addition to those found in the GMP but which are precedented in a number of made DCOs and/or are self-explanatory in the context of this Order: “the 1962 Act”, “the 1981 Act”; “the 1984 Act”; “the 2016 Regulations”; “access and rights of way plans”; “address”; “authorised development”; “business days”, “code of construction practice”, “cycle track”; “electronic transmission”; “environmental statement; “footway” and “footpath”; “general arrangement plans”; “limits of deviation”; “permit schemes”; “Requirements”; “special category land plan”; and “traffic authority”.
- 6.12 In addition to the above, the following defined terms which do not appear in the GMP have been included in the Order and require further explanation:
- a) “apparatus” has the same meaning as in Part 3 of the 1991 Act, unless otherwise provided for in any provision of the Order. The term “apparatus” is commonly defined in DCOs (see for example the Silvertown Tunnel Order 2018) and is normally defined by reference to Part 3 of the 1991 Act, as it is here. However, the inclusion of the additional words “unless otherwise provided for” allows for a narrower or more expansive definition of the term to be employed depending upon the context (see for example article 11(5) of the Order);
- b) “commence”, means *“beginning to carry out any material operation (as defined in section 155 of the 2008 Act) forming part, or carried out for the purposes, of the authorised development other than operations consisting of remediation works, environmental (including archaeological) surveys and investigation, site or soil survey, erection of fencing to site boundaries or marking out of site boundaries, installation of amphibian and reptile fencing, the diversion or laying of services or environmental mitigation measures, and “commencement” must be construed accordingly”*.

This makes it clear that a number of works that would constitute a ‘material operation’ under the Town and Country Planning Act 1990 are not to be taken to mean that the proposed development has ‘commenced’. This enables Esso to

undertake certain preparatory works prior to the submission of relevant details for approval under the requirements, which Esso considers to be proportionate given the nature and scale of the proposed development. The works that are excluded from the definition of commencement are either *de minimis* or have minimal potential for adverse impacts. These are preparatory works which would be carried out at a stage where the detailed design of the authorised development is unlikely to have crystallised sufficiently to allow the pre-commencement requirements to be discharged. They may in some cases need to be carried out in order to comply with the pre-commencement requirements (for example, to inform assessments and proposals required to be submitted for approval). In other cases the works relate to matters such as remediation, should contamination be found, or diversion or laying of services. Esso should be permitted to carry out low impact preparatory works following the grant of the Order, while it is working to discharge the pre-commencement requirements, thereby helping to minimise the construction timetable and consequentially reduce impacts of the proposed development on those affected. This is a widely precedented approach in other made DCOs, see, for example, the River Humber Gas Pipeline Replacement Order 2016 and the Thorpe Marsh Gas Pipeline Order 2016;

- c) “maintain” which includes to inspect, assess, repair, test, cleanse, adjust, alter, divert, renew or re-lay, improve, landscape, preserve, make safe, dismantle, remove, clear, reconstruct, refurbish, replace, demolish, abandon or decommission any part of the authorised development, provided those works do not give rise to any materially new or materially different environmental effects to those identified in the environmental statement. However, the renewal, re-laying, reconstruction or replacement of the entirety of the pipeline works may not be undertaken as a maintenance activity.

It is considered that this is an appropriate definition, since it affords the flexibility required to enable Esso to respond to the range of maintenance activities that may need to be undertaken during the lifetime of the proposed development. It also considered that this is a reasonable definition, given the proviso that any works to maintain the proposed development must not give rise to any materially new or materially different environmental effects to those identified in the Environmental Statement.

The list of maintenance activities also includes a number of activities which could have been included in a pipeline construction authorisation under the 1962 Act and is reflective of the duties imposed on the operators of pipelines in regulation 13 of the Pipelines Safety Regulations 1996 to ensure that a pipeline is maintained in an efficient state, in efficient working order and in good repair;

A similar approach to the drafting of this definition has been taken by other DCO promoters – see, in particular, the Thorpe Marsh Gas Pipeline Order 2016 and the Silvertown Tunnel Order 2018.

- d) “pigs” is defined to mean pipeline inspection gauges, used to inspect the pipeline once operational. The term is employed in Schedule 1 of the Order; and



- e) “pipeline works” is a reference to Works Nos. 1A to 1H (inclusive) as set out in Schedule 1 and “valve works” is a reference to Works Nos. 2B to 2G (inclusive) and 2I to 2O (inclusive) as set out in Schedule 1. These definitions are of relevance to article 6 (limits of deviation) and Schedule 2 (requirements), which are discussed below.
- 6.13 Article 2(2) provide that a broad definition of ‘rights over land’ and ‘creation of rights over land’ applies to the Order.
- 6.14 Article 2(3) provides that measurements are approximate. The purpose of this is to ensure that if, upon construction of the proposed development, it transpires that the distances are marginally different to those listed in the Order, there is no issue over whether the works are permitted by the Order. This provision therefore allows for a small tolerance with respect to any distances and points, although works will take place within the limits of deviation. It is common-place to include such provision in an Act or instrument authorising linear infrastructure (see for example the National Grid (Hinkley Point C Connection Project) Order 2016).
- 6.15 Article 2(4) provides that areas given in the book of reference are approximate as these are not covered by article 2(3). The purpose and effect of this provision is the same as set out in the previous paragraph.
- 6.16 Article 2(5) clarifies that references to any statutory body include that body’s successors from time to time.
- 6.17 Article 2(6) and 2(7) tie references to lettered / numbered points and numbered works in the Order to the access and rights of way plans and Schedule 1, respectively.
- 6.18 Article 2(8) confirms that the expression “includes”, when used in the Order, is to be construed without limitation.

## **Part 2 – Principal powers**

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

- 6.19 Article 3(1) grants the development consent by giving Esso the power to construct the proposed development, which is described in Schedule 1. This article makes the consent subject to the requirements that are listed in Schedule 2.
- 6.20 Article 3(2) states that any enactment applying to land within the Order limits has effect subject to the provisions of the Order. This provision ensures that the modifications made in the Order apply to any enactments that may affect the proposed development and further ensures consistency with legislation more generally. This provision provides clarity in respect of amendments made to legislation in articles 26 and 36 and the modifications of compensation and compulsory purchase legislation set out in Schedule 6 to the Order. There is precedent for such a provision. For example, the Secretary of State approved the same wording in the A14 Cambridge to Huntingdon Improvement Order 2016 (see article 5(2)) and the Testo’s Junction Alteration Order 2018 (see article 3(2)).

#### *Article 4 – Maintenance of the authorised development*

- 6.21 This provision adapts article 3 of the GMP and authorises Esso to maintain the proposed development. “Maintain” is defined in article 2(1) as including to “*to inspect, repair, test, cleanse, adjust, alter, divert, renew or re-lay, improve, landscape, preserve, make safe, dismantle, remove, clear, reconstruct, refurbish, replace, demolish, abandon or decommission*”, which affords the flexibility required to enable Esso to respond to the range of maintenance activities that may need to be undertaken during the lifetime of the proposed development.
- 6.22 As noted at paragraph 6.12(c) above, this list of maintenance activities:
- 6.22.1 is reflective of other made DCOs (see, in part, the Thorpe Marsh Gas Pipeline Order 2016);
  - 6.22.2 includes a number of the activities that could have been included in a pipeline construction authorisation under the 1962 Act; and
  - 6.22.3 accords with the duties on the operators of pipelines in regulation 13 of the Pipelines Safety Regulations 1996 to ensure that a pipeline is maintained in an efficient state, in efficient working order and in good repair.
- 6.23 The inclusion of “divert” within the definition of “maintain” is consistent with section 21 of the 2008 Act, which allows an NSIP pipeline to be diverted within the authorised limits of deviation, and is preceded (see, for example, article 2 of the Thorpe Marsh Gas Pipeline Order 2016). The power to divert the proposed development may be necessary in case of urgent maintenance works. Article 6 of the Order (limits of deviation) sets out how the limits of deviation apply in this case.
- 6.24 Article 4 clarifies that any diversionary works must also be consistent with the description of the proposed development in Schedule 1 to the Order. This approach to drafting is broadly in accordance with that approved by the Secretary of State in the Thorpe Marsh Gas Pipeline Order 2016 and is therefore preceded.

#### *Article 5 – Maintenance of drainage works*

- 6.25 The purpose of this article is to make it clear that any realignment of drainage works or other works to them that are carried out as part of the proposed development do not affect the existing allocation of responsibility for maintenance of those drains, unless this is agreed between Esso and the responsible party. Responsibility for maintenance of drainage works may sit with the Environment Agency, an internal drainage board, a lead local flood authority or a landowner.
- 6.26 This provision does not feature in the GMP but is well preceded (see for example article 4 of the A14 Cambridge to Huntingdon Improvement Order 2016 and article 5 of the Testo’s Junction Alteration Order 2018).

#### *Article 6 - Limits of deviation*

- 6.27 Article 6 allows for both lateral and vertical limits of deviation in respect of the pipeline works and valve works (as defined). The ability to include such a power is contained in section 120(3) of the 2008 Act, which enables an Order granting development consent to make provision relating to, or to matters ancillary to, the development for which consent is granted. A very

similar approach to the drafting of this article has been taken in other made DCOs for pipelines – see, for example, the Thorpe Marsh Gas Pipeline Order 2016.

- 6.28 This article provides Esso with a proportionate degree of flexibility in constructing the proposed development, reducing the risk that the proposed development as approved cannot later be implemented for unforeseen reasons (for example, ground conditions in a specific location), but at the same time ensuring that any flexibility will not give rise to any materially new or materially different environmental effects. The limits of deviation sought by the Order will also enable Esso to listen to and consider the needs of landowners and occupiers throughout the route of the pipeline.
- 6.29 The corridor of land within which the pipeline may be constructed, maintained or diverted under the Order is shown on the Works Plans and constitutes the lateral limits of deviation for the pipeline works. The lateral limits of deviation which are sought under the Order attempt to strike a balance between minimising impacts on landowners and important landscapes, archaeological and ecological features throughout the route of the proposed development on the one hand and Esso's need for flexibility in selecting the final route of the pipeline on the other, which is dependent, amongst other things, upon extant ground conditions in any given location.
- 6.30 The lateral limits of deviation typically extend to 26.7 metres in width. However, in some locations Esso has been able to commit to narrower limits of deviation, for example where the route of the pipeline passes through sensitive habitats or along streets and tracks. Notwithstanding the lateral limits of deviation shown on the Works Plans, it should also be noted that Esso has committed to a narrow working width in which construction can take place where routing through boundaries between fields where these include hedgerows, trees or watercourses, or in other sensitive areas as specified in the code of construction practice. Compliance with the code of construction practice is secured by requirement 5 of Schedule 2 to the Order.
- 6.31 The lateral limits of deviation for valves is based upon the need to locate the valve compound (5 x 7 meters) over the pipeline and thus the final location of valve compound is not known at this time and will be dependent upon where the pipeline is installed within the lateral pipeline limits deviation.
- 6.32 There are two classes of vertical limits of deviation for the pipeline works: upwards and downwards. Any pipeline marker posts and cathodic protection test posts are excluded from the vertical limits of deviation, which is confirmed by the definition of "pipeline works" in article 2(1) of the Order.
- 6.33 The upwards vertical limit of deviation (i.e. the minimum depth at which the pipeline may be laid) is 1.2 metres from the surface of the ground, except where ground conditions make compliance with this upward limit impracticable, in which case the upwards limit is 0.7 metres below the surface of the ground. This upwards limit is included to avoid, insofar as possible, interference with ground level activities such as agricultural operations.
- 6.34 The downwards vertical limit of deviation in respect of those sections of the pipeline works which may be constructed using trenched construction methods is 4 metres below the surface of the ground, except where ground conditions or existing infrastructure make compliance with this downward limit impracticable, in which case the downwards limit is 5 metres below the

surface of the ground, following consultation with the Environment Agency and provided that such extension from the 4 metres base limit does not give rise to any new or materially different environmental effects to those assessed in the environmental statement. These limits represent the lowest depths to which a trenching machine can excavate.

- 6.35 The downwards vertical limit of deviation in respect of those sections of pipeline works which may be constructed using trenchless construction methods is generally 12 metres below the surface of the ground to allow for the use of horizontal directional drilling and to pass safely beneath surface features such as roads, rivers and railways. In respect of Works Nos. 1D and 1G, the downwards limit is 16 metres below the surface of the ground. This is because, at these locations, the pipeline passes beneath the River Thames and the Basingstoke Canal, where the pipeline is required to be a minimum of 6 metres below the base of the river or canal and the precise depth at these locations is not yet known. In respect of Work No.1Eii, where the pipeline passes beneath the North Downs railway line, the A331, the River Blackwater and the Ascot to Guildford railway line, the downwards vertical limit of deviation is 50 metres below the surface of the ground. These deeper limits are required in order to allow Esso the flexibility to select the appropriate construction methodology, including trenchless techniques, primarily due to the unknown geology in these locations.
- 6.36 In respect of the valve works (i.e. Works Nos. 2B to 2G and Works Nos. 2I to 2O), the upwards vertical limits of deviation are as described in Schedule 1 to the DCO. The downwards vertical limits of deviation are 4 metres below the surface of the ground.
- 6.37 This article also allows a potential extension to the limits of vertical deviation specified in paragraphs (1)(b), (c) and (d) where the undertaker is able to demonstrate to the Secretary of State's satisfaction (and the Secretary of State has certified accordingly following consultation with the relevant planning authority) that such extension would not give rise to any materially new or materially different environmental effects to those reported in the Environmental Statement. This provision appears in other made DCOs – see for example article 6 of the Testo's Junction Alteration Development Consent Order 2018 and allows for unexpected ground conditions that make it dangerous or unduly complex to install within the stated limits of vertical deviation in paragraphs (1)(b), (c) and (d).
- 6.38 The limits of deviation referred to in this article and (the lateral ones which will be shown on the application plans) have been taken into account in the preparation of the Environmental Statement and the potential impacts of installing the pipeline within the permitted limits has been assessed.

#### *Article 7 – Benefit of the Order*

- 6.39 Article 7 overrides section 156(1) of the 2008 Act (as permitted by section 156(2)) to give the benefit of the Order to Esso rather than anyone with an interest in the land. It would be impracticable for a variety of landowners to implement parts of the proposed development in an uncoordinated manner, which might be the case if section 156(1) were to remain.
- 6.40 The purpose of paragraph (2) is to clarify the exceptions where the provisions of the Order will self-evidently benefit others. Absent this provision, there would be a contradiction since strictly speaking only Esso could benefit from these works. The same wording was accepted and approved by the Secretary of State in the River Humber Gas Pipeline Replacement Order 2016 (see article 9(2)).

6.41 Paragraph (1) is based on article 4 of the GMP.

*Article 8 – Consent to transfer benefit of the Order*

This article is based on article 5 of the GMP and allows the benefit of the Order to be transferred or leased to others by Esso with the consent of the Secretary of State. The exercise of any transferred benefits or rights is subject to the same restrictions, liabilities and obligations as would apply under the Order if those benefits or rights were executed by the undertaker.

**Part 3 - Streets**

*Article 9 – Application of the permit schemes*

6.42 This article deals with the relationship between the Order powers and the traffic management permit schemes operated by Hampshire and Surrey County Councils (“**the Permit Schemes**”).

6.43 Paragraph (1) confirms that the Permit Schemes apply and will be used by Esso in connection with the construction and maintenance of the authorised development, subject to the qualifications in paragraphs (2) and (3).

6.44 Paragraph (4) clarifies that the procedure for appeals in Part 2 of Schedule 2 of the draft DCO is capable of applying to any refusal to grant a permit, or to any decision to grant a permit subject to conditions, but not so as to limit any other appeal mechanism available to Esso under the permit schemes or otherwise.

*Article 10 – Power to alter layout, etc. of streets*

6.45 This article is not included in the GMP but does appear in a similar form in a number of made DCOs – see for example article 12 of the National Grid (Hinkley Point C Connection Project) Order 2016 and article 12 of the River Humber Gas Pipeline Replacement Order 2016. This article is provided for under section 120(3) and (4) together with paragraph 15 of Part 1 of Schedule 5 to the 2008 Act, namely the carrying out of civil engineering or other works.

6.46 Article 10(1) would permit Esso and anyone else with the benefit of the Order to temporarily alter the layout of the streets listed Schedule 3 (streets subject to temporary alteration of layout) to the Order, in connection with the carrying out of the proposed development. The article also provides a power to carry out works in any of these streets.

6.47 Paragraph 2 provides a broader power to permanently or temporarily alter the layout of any street which is not listed in Schedule 3, and the layout of any street having a junction with such a street. This broader power applies whether or not the street is located within the Order limits.

6.48 This power is included to ensure that Esso has the necessary flexibility to alter streets which, at the date on which the Order is made, are not listed within Schedule 3 (for example, due to issues arising during construction). This provision has been accepted in other made DCOs – see for example article 11(2) of the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 – and is considered to be reasonable because the consent of the street authority must be obtained before it can be exercised, such consent not to be unreasonably withheld or delayed.

- 6.49 Article 10(2) also sets out a broad range of works that Esso may undertake on any street, including altering the level or increasing the width of any street, making and maintaining passing places, altering existing facilities in streets and providing facilities for the management and protection of pedestrians (for example, pedestrian crossings). The works listed in article 10(2) do not limit the scope of works that can be undertaken by Esso on streets listed in Schedule 3. The range of activities provided for in article 10(2) is precededented in other DCOs – see for example article 11 of the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 and article 12 of the River Humber Gas Pipeline Replacement Order 2016.
- 6.50 Article 10(3) provides that any street altered temporarily under this article must be restored to the reasonable satisfaction of the street authority. This is a common proviso in DCOs which include the equivalent article – see, for example, article 12(3) of the National Grid (Hinkley Point C Connection Project) Order 2016.
- 6.51 Paragraph (5) provides that where a street authority fails to respond to an application for consent under article 10(2) within 42 days of the application being made, it is deemed to have given its consent. This article is considered necessary to enable Esso to exercise its powers and undertake works in an efficient and expeditious manner and to give full effect to the power to carry out the proposed development, as provided for under section 120(5) of the 2008 Act. Its inclusion was approved in the National Grid (Hinkley Point C Connection Project) Order 2016 (article 12).

*Article 11 – Street works*

- 6.52 Article 11 provides that Esso may undertake works in, on, or under the streets identified in Schedule 4 (streets subject to street works) and which are within the Order limits, for the purposes of the proposed development. The consent of the street authority is not required for works on a street identified in Schedule 4.
- 6.53 Article 11(1) sets out a non-exhaustive list of the street works that may be carried out by Esso on streets identified in Schedule 4. These include tunnelling under the street, placing apparatus under the street, works to improve sight lines, relining and replacement of road markings, and the removal and provision of permanent and temporary signage. These are activities which Esso may need to undertake in order to construct and maintain the proposed development.
- 6.54 Article 11(2) provides a broad power to undertake street works on any street which is not listed in Schedule 4 for the purposes of carrying out any of the works listed in sub-paragraph 1. This power applies whether or not street is located within the Order limits.
- 6.55 This power is included to ensure that Esso has the necessary flexibility to carry out works to streets which, at the date on which the Order is made, are not listed in Schedule 4 (for example, due to complexities arising during construction of the proposed development). This provision has been accepted in other made DCOs – see for example article 10 of the Thames Water Utilities (Thames Tideway Tunnel) Order 2014 – and is considered to be reasonable because the consent of the street authority must be obtained before it can be exercised by Esso, such consent not to be unreasonably withheld or delayed (see article 11(3)).
- 6.56 Article 11(4) confirms that where a street authority fails to respond to an application for consent under article 11(2) within 42 days of the application being made, it is deemed to have given that consent. This article is considered necessary to enable Esso to exercise its powers and

undertake works in an efficient and expeditious manner and to give full effect to the power to carry out the proposed development, as provided for under section 120(5) of the 2008 Act.

- 6.57 The authority given by this article is a statutory right for the purposes of section 48(3) (streets, street works and undertakers) and 51(1) (prohibition of unauthorised street works) of the 1991 Act, which means that the Order replaces the need to apply for a street works licence under that Act.
- 6.58 Article 11(6) has been introduced to clarify the scope of the definition of “apparatus” for the purposes of article 11. This is to ensure that the definition expressly includes elements of the pipeline works which may be placed, kept, maintained, altered and renewed in, on or under a street in accordance with the power in article 11(1).
- 6.59 Article 11 is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) of the 2008 Act as it is required to enable Esso to construct and maintain the proposed development. Article 10 is based on and adapts article 8 of the GMP and other made DCOs, such as article 10 of the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 and article 12 of the Thorpe Marsh Gas Pipeline Order 2016.

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

- 6.60 Article 12 modifies the application of the 1991 Act to works carried out under the powers of the Order. These modifications replace those in article 8 of the GMP and reflect the modifications to the 1991 Act made in other recent DCOs, for example the Silvertown Tunnel Order 2018. Power to disapply these sections of the 1991 Act is provided for under section 120(5) of the 2008 Act.

#### *Article 13 – Temporary stopping up, alteration, diversion or restriction of streets and public rights of way*

- 6.61 This article is based on article 11 of the GMP and allows for the temporary stopping up, alteration, diversion or restriction of streets and public rights of way for the purposes of the proposed development. This article is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) of the 2008 Act and is a matter specifically identified in paragraph 17 of Schedule 5 to the 2008 Act.
- 6.62 Paragraph (2) of the article clarifies that Esso may use any street or public right of way temporarily stopped under the powers conferred by the article as a temporary working site. This provision has precedent in a number of made DCOs, including the Thorpe Marsh Gas Pipeline Order 2016.
- 6.63 Paragraph (3) states that reasonable access for pedestrians going to or from premises abutting a street or public right of way must be provided if there would otherwise be no such access.
- 6.64 Without limitation on the scope of paragraph (1) of article 13, paragraph (4) provides for the temporary stopping up, alteration, diversion or restriction of streets and public rights of way specified in Schedule 5 (temporary stopping up of streets and public rights of way), subject to the provision of temporary diversions as specified in Part 1 of Schedule 5 (no temporary diversion need be provided in the case of streets and public rights of way which are listed in Part 2 of Schedule 5). The consent of the street authority is not required for the temporary stopping up, alteration, diversion or restriction of the use of streets or public rights of way included in Schedule 5 to the Order.

- 6.65 Paragraph (5) confirms that Esso must not stop up, alter or divert the streets and public rights of way mentioned in paragraph (1) without the consent of the street authority (such consent not to be unreasonably withheld or delayed). As noted, the consent of the street authority is not required to stop up, alter or divert the streets and public rights of way specified in Schedule 5.
- 6.66 Paragraph (6) confirms that any temporary diversion provided under paragraph (4) in respect of the streets or public rights of way stopped up, diverted or altered listed in Schedule 5, is not required to be of a higher standard than the temporarily stopped up street. This is a departure from article 11 of the GMP, but is included to ensure that Esso is only required to provide a like-for-like replacement.
- 6.67 Paragraph (7) provides a right to compensation for any person suffering loss due to the suspension of a private right of way under this article.
- 6.68 Paragraph (8) states that a street authority which fails to notify Esso of its decision in respect of an application for consent within 42 days of the application being made is deemed to have given its consent. It is considered necessary to remove the possibility for delay and provide certainty that the proposed development can be delivered by Esso in a timely manner.
- 6.69 Articles 9 and 10 of the GMP have not been included in the Order as the permanent stopping up of streets is not required and no permanent extinguishment of public rights of way is proposed.

#### *Article 14 – use of private roads*

- 6.70 Article 14 is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) as it is required for the construction of the proposed development. It is based on article 13 of the Silvertown Tunnel Order 2018.
- 6.71 This article authorises the temporary use – in common with other users – of private roads within the Order limits by persons or vehicles, for the purposes of, or in connection with, the construction and maintenance of the proposed development, without the need for Esso to acquire a permanent right of way over that land or take temporary possession of the land under articles 30 and 31 of the Order (for example, there may be private farm roads with the Order limits that provide key access routes to parts of the proposed development). Esso will be liable to compensate any person who has suffered loss or damage as a result of the exercise of this power.
- 6.72 Article 14 therefore creates a power to “use” a private road for a temporary period that is proportionate to the limited nature of the use, rather than extinguishing, suspending or permanently interfering with the private rights of a landowner (through the acquisition of a permanent right). This is akin to the powers for temporary use under articles 30 (temporary use of land for carrying out the authorised development) and 31 (temporary use of land for maintaining the authorised development) of the Order; however, it is distinguished because Esso does not require the exclusive use and possession of the private roads whilst exercising this power.
- 6.73 Article 14(4) clarifies that Esso may only use a private road pursuant to this article for such time as the power to take temporary possession of land under articles 30 and 31 of the Order is capable of being exercised in relation to the land. This ensures that the land upon which any private accesses are located would not be permanently subject to the power in article 14.



### *Article 15 – Access to works*

- 6.74 This article is adapted from article 12 of the GMP and provides, in article 15(1), a general power to form and layout means of access to public highways within the Order limits, with the consent of the street authority (following consultation by the street authority with the relevant planning authority), to provide an appropriate degree of flexibility in case the need for an access only becomes apparent at a later stage in the implementation of the proposed development.
- 6.75 Article 15(2) confirms that the agreement of the street authority is not required for the formation, layout or improvement of the means of access which are described in Schedule 1 to the Order. This would include the temporary and permanent means of access described in Works Nos. 8A to 8CZ, 9A to 9AU, 10A to 10J and 11A to 11E. Since consent for these specific Works is sought under the DCO, it is considered appropriate to exclude them from the requirement for street authority consent under Article 15(1).
- 6.76 Article 15(3) confirms that, where a street authority receives an application for consent under paragraph (1), it is deemed to have granted its consent to that application if it fails to notify Esso of its decision by the end of the period of 42 days beginning with the date on which the application was made. As elsewhere, it is considered necessary to remove the possibility for delay and provide certainty that the proposed development can be delivered by Esso in a timely manner.
- 6.77 The powers under this article are provided for under sections 120(3) and 120(4) together with paragraph 15 of Schedule 5 to the 2008 Act as the power to form and layout means of access, or improve existing means of access, is clearly related to the construction of the proposed development. This provision has precedent in other made development consent orders, including the York Potash Harbour Facilities Order 2016.<sup>1</sup>

### *Article 16 – Traffic regulation*

- 6.78 This article is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) of the 2008 Act. It will enable Esso to impose temporary and permanent traffic regulation orders (“**TROs**”) over roads for the purposes of, or in connection with, the construction of the proposed development, and, given the number of works proposed in, on or under roads, is necessary to facilitate the safe construction of the proposed development. This provision does not feature in the GMP but precedent for its inclusion can be found in a number of made DCOs, including the River Humber Gas Pipeline Replacement Order 2016.
- 6.79 Article 16(1) enables Esso to impose TROs in respect of any road for the purposes of the proposed development, whether or not within the Order limits, provided the consent of the traffic authority is obtained. The traffic measures which may be imposed include, for example, the prohibition of stopping, waiting, loading or unloading of vehicles and the prohibition of vehicular access to a road.
- 6.80 Articles 16(2) and (3) set out a notification process whereby Esso must notify and advertise its intention to impose a TRO on the road prior to the TRO coming into effect. The proposed timeframes are consistent with those approved under article 16 of the River Humber Gas Pipeline Replacement Order 2016.

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<sup>1</sup> SI 2016/772

- 6.81 Article 16(4) provides that any TRO made under this article has the same effect as if it was made by the traffic authority or local authority where the road is located. This gives the TRO the necessary status under the Road Traffic Regulation Act 1984 and provides Esso with the statutory power to enforce the TRO. Article 16(5) also confirms that any TRO made under the powers in paragraph (1) may be suspended, varied or revoked by Esso at any time, by subsequent exercise of those powers. These provisions are consistent with article 16 of the River Humber Gas Pipeline Replacement Order 2016.
- 6.82 Article 16(7) confirms that where a traffic authority fails to respond to an application for consent under paragraph (1) within 42 days of receiving the application, it is deemed to have given its consent. This is to ensure that Esso can impose the TROs as quickly as possible in order to control traffic along the specified roads as necessary during construction. As elsewhere, it is considered necessary to enable Esso to exercise its powers in an efficient and expeditious manner, whilst still providing the traffic authority a sufficient amount of time to either approve or reject the application. This provision was also included in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014.

*Article 17 – agreements with street authorities*

- 6.83 This article is a provision relating to, or to matters ancillary to, the proposed development under section 120(3) of the 2008 Act and provides that Esso and street authorities may enter into agreements relating to:
- 6.83.1 the construction of new streets (including any structures carrying those streets) under the Order;
  - 6.83.2 the strengthening, improvement, repair or reconstruction of any street, including any structure carrying the street over any part of the authorised development;
  - 6.83.3 the maintenance of the structure of any bridge or tunnel carrying a street over or under any part of the authorised development;
  - 6.83.4 the strengthening, improvement, repair or reconstruction of any street under the Order;
  - 6.83.5 any stopping up, alteration or diversion of a street under the Order;
  - 6.83.6 the carrying out in the street of any works referred to in article 10 (power to alter layout, etc. of streets) and article 11 (street works); and
  - 6.83.7 such other works as the parties may agree.
- 6.84 This list reflects article 14(1) of the GMP, save that sub-paragraph (1)(b) has been added to clarify that, as well as providing for the construction of streets (including any structures carrying those streets) an agreement may relate to strengthening, improving, repairing or reconstructing streets (or structures). This provision has precedent in article 17 of the River Humber Gas Pipeline Replacement Order 2016.
- 6.85 The power to enter into agreements with street authorities is necessary as section 278 of the Highways Act 1980 (agreements as to the execution of works) does not relate to the powers

under this Order. A similar approach has been taken in made DCOs, such as article 17 of the River Humber Gas Pipeline Replacement Order 2016.

- 6.86 Article 17(2) outlines what matters these agreements may address. This list covers the same matters as article 14(2) of the GMP.

#### **Part 4 – Supplemental powers**

##### *Article 18 – Discharge of water*

- 6.87 This article is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) of the 2008 Act and establishes statutory authority for Esso to discharge water into any watercourse, public sewer or drain in connection with the carrying out or maintenance of the proposed development, subject to first obtaining the consent of the owner, who may impose reasonable conditions. For the avoidance of doubt, this article does not permit Esso to discharge into private drains or sewers.
- 6.88 This power is standard across DCOs and the drafting has been based on article 14 of the GMP, except that:
- 6.88.1 the words “or delayed” have been added after the words “unreasonably withheld” in sub-paragraph 4(a);
  - 6.88.2 it is intended that protective provisions will be included in *Part 4 (for the protection of the Environment Agency) of Schedule 9 (protective provisions)* which will be referenced in sub-paragraph 5 of this article. These protective provisions are currently under negotiation. The proposed development will involve works to the bed and banks of watercourses which would be considered a “flood risk activity” requiring permitting from the Environment Agency and the anticipated protective provisions would provide an alternative mechanism for seeking consent. . A similar proviso was approved in article 18 of the River Humber Gas Pipeline Replacement Order 2016;
  - 6.88.3 references to the Water Resources Act 1991 in paragraphs 7 and 8 have been replaced by the superseding provisions of the Environmental Permitting (England and Wales) Regulations 2016; and
  - 6.88.4 paragraph (9) has been added and states that a person who fails to notify the undertaker of their decision in respect of an application for consent/approval under sub-paragraphs (3) and (4)(a) within 28 days of the application being made is deemed to have granted consent/approval. This time limit is considered necessary to remove the possibility for delay and provide certainty that the proposed development can be delivered in a timely manner. A similar provision was approved in article 19 of the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014.

##### *Article 19 – Protective work to buildings*

- 6.89 Article 19 is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) of the 2008 Act. This power is standard across DCOs and the drafting has been

based on other made DCOs, such as article 17 of the National Grid (Richborough Connection Project) Development Consent Order 2017<sup>2</sup>, as well as article 17 of the GMP.

- 6.90 The purpose of this article is to allow Esso to undertake protective works to buildings, such as underpinning, in the unlikely event that such a need arises, and to set out the procedure that will apply in those circumstances.

*Article 20 – Authority to survey and investigate the land*

- 6.91 Article 20 is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) of the 2008 Act and is a matter specifically identified in paragraph 12 of Schedule 5 to the 2008 Act, which states that a DCO can provide for the carrying out of surveys or taking of soil samples. The inclusion of this power is standard across DCOs.
- 6.92 The drafting of paragraphs (1), (3), (4), (5) and (7) is based on article 18 of the GMP, except that the powers in paragraph (1) have been extended to include monitoring of land, including any watercourses, groundwater, static water bodies or vegetation of the land, and making bore holes and excavations on land. To facilitate the construction and maintenance of the proposed development and to avoid or reduce its impacts, it is important that Esso has a range of powers available to survey and investigate land. The list of activities is also reflective of those included and approved in other made DCOs, for example the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014.
- 6.93 The drafting in paragraph (1) departs from the GMP by authorising surveys, where reasonably necessary, on land outside the Order limits, provided that the land in question is affected by the proposed development. The extension of this power to land beyond the Order limits has precedent in the Silvertown Tunnel Order 2018 (article 16). The ability to survey land adjacent to the Order limits is required so that Esso can be confident that surveys can be conducted to assess the effects of the proposed development, or on the proposed development, from outside the Order limits. It imposes a lesser burden than seeking compulsory acquisition of such land.
- 6.94 Paragraph (2) has been included to provide the ability to take, and process, samples of water, air, soil or rock, flora, bodily excretions, non-human dead bodies, or any non-living thing present as a result of human action found on, in or over the land. This wording is not contained in the GMP. It reflects the wording of section 53(3A) of the 2008 Act, which clarifies that the right to enter land for the purposes of surveying includes the power to take and process certain types of samples. This may be included in a DCO under section 120(4) and paragraph 12 of Part 1 of Schedule 5 to the 2008 Act, which makes specific provision for the inclusion of powers for carrying out surveys or taking of soil samples. This provision is precedent and was approved in article 18 of the River Humber Gas Pipeline Replacement Order 2016.
- 6.95 Paragraph (6) confirms that, as soon as reasonably practicable following the completion of any activities under paragraph (1), Esso must remove any apparatus and restore the land to the reasonable satisfaction of the owners of the land. This duty is analogous to that contained in articles 30 and 31 of the Order, where Esso has taken temporary possession of land for the purposes of carrying out or maintaining the authorised development. A similar provision is found in article 18(5) of the Thorpe Marsh Gas Pipeline Order 2016.

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<sup>2</sup> SI 2017/817

- 6.96 Paragraph (8) does not feature in the GMP. It provides that, where a highway or street authority fails to respond within 28 days to an application for making trial holes, boreholes or excavations within a highway or street, it is deemed to have given its consent to those works. As noted elsewhere, a deemed approval process is appropriate to enable Esso to exercise its powers and undertake works in an efficient and expeditious manner. This wording is precedented and was approved in article 19 of the A19/A184 Testo's Junction Alteration Order 2018.
- 6.97 Finally, paragraph (9) also departs from the GMP by applying section 13 of the Compulsory Purchase Act 1965. This provides Esso with an enforcement mechanism (by way of a warrant) where entry onto, or possession of, land under the article is refused. This wording is precedented and was approved in article 16 of the Silvertown Tunnel Order 2018.

## **Part 5 – Powers of acquisition and possession of land**

- 6.98 The ability to include powers in a DCO to acquire land, or create, suspend, extinguish, or interfere with interests in or rights over land (whether compulsorily or by agreement) is provided for under section 120(3) and (4) and paragraphs 1 and 2 of Schedule 5 to the 2008 Act. These paragraphs provide the justifications for the powers in articles 21 (compulsory acquisition of land), 23 (compulsory acquisition of rights and restrictive covenants), 25 (private rights over land), 28 (acquisition of subsoil or airspace only) and 29 (rights under or over streets) below.

### *Article 21 – Compulsory acquisition of land*

- 6.99 Article 21(1) follows article 28 of the GMP and authorises the acquisition of the land described in the book of reference and shown on the land plans by compulsory purchase. It grants the power to acquire such of that land as is required for the proposed development, or to facilitate it, or is incidental to it. The power of acquisition over the Order land is qualified and restricted by sub-paragraph (2), in the case of parcels of land where only rights and restrictive covenants can be acquired (article 23), or where possession of land parcels as specified in the Order may be taken temporarily only (article 30). The exercise of article 21 is also restricted by article 24 (time limit for exercise of authority to acquire land compulsorily). Paragraph (3) clarifies that nothing in article 21 authorises the acquisition of an interest which is for the time being held by or on behalf of the Crown.
- 6.100 Sub-paragraph (2) of the GMP has been deleted. This would provide for the automatic extinguishment of any rights applying across the Order land as soon as the Order land (or rights over the Order land) is vested in Esso. This is inconsistent with article 25 (private rights over land), which, in keeping with the GMP, provides for the extinguishment of such rights upon the earlier of the vesting of the land (or rights over land) or entry onto the land. If sub-paragraph (2) were retained, there is a risk that Esso could be in breach of existing private rights and restrictions by taking entry to land and carrying out works prior to the vesting date, which it is otherwise authorised to do. All matters relating to the extinguishment and compensation for private rights are therefore addressed in article 25 (private rights over land), which is an approach adopted consistently across DCOs.

### *Article 22 – Compulsory acquisition of land – incorporation of the mineral code*

- 6.101 This article incorporates Parts 2 and 3 of Schedule 2 (Mineral) to the Acquisition of Land Act 1981 to any land acquired by Esso that may contain mines or minerals. The effect of the provision to prevent Esso from acquiring the rights to any mines and minerals underneath the

acquired land (unless they are expressly purchased), and provides mine owners with the ability to work the mines and extract minerals, subject to certain restrictions. The ability to restrict the working of mines and minerals is provided for under section 120(3) of the 2008 Act. The drafting of this article is based on article 19 of the GMP and has been approved in a number of DCOs.

#### *Article 23 – compulsory acquisition of rights and restrictive covenants*

- 6.102 This article gives Esso the power to acquire existing rights and restrictions or create new rights and restrictions over the Order land as described in the book of reference and shown on the land plans. The article has been adapted from article 21 of the GMP and reflects recent approaches to DCO drafting. However, subparagraphs (2) and (4) of article 21 of the GMP have not been included as similar provision is instead included in article 25 (private rights over land). The reasoning for this is explained in relation to article 20 above.
- 6.103 Paragraph (2) provides that where Esso needs only to acquire rights or impose restrictive covenants over land, it will not be obliged to acquire any greater interest in that land. This reflects the drafting in article 21(3) of the GMP.
- 6.104 Paragraph (3) applies Schedule 6, which imposes modifications to the compulsory purchase and compensation provisions under general legislation. They do not affect the entitlement to compensation, but generally ensure that the compensation procedure applies to the additional categories of acquisition covered by the Order – the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories (included to allow lesser land interests to be acquired).
- 6.105 For the purpose of section 126(2) of the 2008 Act, the relevant compensation provisions are modified only to the extent necessary to ensure that they apply properly to the acquisition of rights, and not so as to affect the amount of compensation to which landowners would be entitled. Furthermore, the provisions have been amended so that the time limits are consistent with the Order (five years as opposed to three years) and to include the appropriate references to the 2008 Act.
- 6.106 The modifications are applicable generically to Orders of this kind and are based on changes made consistently in most schemes granted under the 2008 Act (see, for example, Schedule 6 to the A14 Cambridge to Huntingdon Improvement Order 2016).
- 6.107 As a result of changes contained in the Housing and Planning Act 2016, the Order has also been updated to ensure that the correct provisions are modified. These changes are based on the amendments contained in High Speed Rail (London - West Midlands) Act 2017 and have also been adopted in the London Overground (Barking Riverside Extension) Order 2017<sup>3</sup>.
- 6.108 Paragraph (6) is included to clarify that nothing in article 23 authorises the acquisition of rights over, or the imposition of restrictions affecting, an interest which is held by or on behalf of the Crown. This reflects the position in section 135 of the 2008 Act.

#### *Article 24 – Time limit for exercise of authority to acquire land compulsorily*

- 6.109 This article reflects article 10 of the GMP in full. It gives Esso five years to issue 'notices to treat' or to execute a 'general vesting declaration' to acquire the land that is subject to the power

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<sup>3</sup> SI 2017/830

of compulsory purchase. These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should this Order be made.

- 6.110 The article also sets a five year time limit on Esso's power to take temporary possession of land, although it does not prevent Esso from remaining in possession of land after that time if it took possession within the five year limit (this provision has consistently been approved by the Secretary of State, see for example article 35 of the River Humber Gas Pipeline Replacement Order 2016 and article 20 of the National Grid (Richborough Connection Project) Development Consent Order 2017).

#### *Article 25 – Private rights over land*

- 6.111 In order for it to be possible to implement the proposed development, provision is needed for the extinguishment of private rights and restrictions over the Order land which would be incompatible with that implementation. Article 25 supplies that provision.
- 6.112 The drafting is based on article 22 of the GMP, but has been modified in a number of respects, most notably to ensure that the article applies to private rights and restrictions over the Order land generally, rather than merely to rights of way over land. This approach has been accepted and approved on a number of occasions (see, for example, article 23 of the River Humber Gas Pipeline Replacement Order 2016).
- 6.113 Article 25(1) provides for the extinguishment of private rights and restrictions over so much of the Order land as is subject to compulsory acquisition under article 21 (compulsory acquisition of land), from the moment of acquisition or occupation of that land. This allows Esso to obtain clean title to land subject to compulsory acquisition under article 21 and is widely precedented in other made Orders, including for example in article 23 of the National Grid (Hinkley Point C Connection Project) Development Consent Order 2017.
- 6.114 Article 25(2) follows the GMP and provides that rights over Order land that is already owned by Esso are also extinguished, at the point that any activity authorised by the Order interferes with or breaches those rights.
- 6.115 Article 25(3) departs from the GMP and provides for the extinguishment of private rights over land subject to compulsory acquisition of rights and imposition of restrictions in so far as they would be inconsistent with the exercise of the right acquired or the burden of the restriction imposed in order to construct the proposed development. The approach enables Esso to take clean title and is widely precedented, including for example in article 23 of the National Grid (Richborough Connection Project) Development Consent Order 2017.
- 6.116 Article 25(4) follows the GMP and provides for the temporary suspension of private rights over Order land that is not acquired but is occupied temporarily by Esso in order to construct the proposed development. The suspension is for the duration of the occupation.
- 6.117 Paragraphs (5) to (8) of article 25 make provision for compensation and for circumstances where rights are preserved. The drafting reflects the GMP.
- 6.118 Article 25(9) sets out a list of matters deemed to be private rights to provide certainty as to the scope of the article. The list of deemed private rights is broad in order to ensure that any right which could potentially interfere with the implementation of the proposed development can be extinguished. This provision does not feature in the GMP, however it is commonly included in

DCOs and a similar list of rights which are within its scope appears in the equivalent article in the River Humber Gas Replacement Pipeline Order 2016 (article 23).

- 6.119 Articles 25(10) and 24(11) are bespoke to this Order. Article 25(10) is included to ensure that any existing rights owned by the undertaker in, on, under or over the Order land are not extinguished or discharged by this article. This is necessary because the route of the proposed pipeline is in close proximity to other pipeline infrastructure owned by Esso. Without this provision, there would be a risk that the rights enjoyed by Esso in relation to that apparatus (and any restrictions) could be extinguished.
- 6.120 Article 25(11) is included to ensure that any land or rights in land acquired, or works to be constructed, by Esso, which do not automatically benefit from the protections afforded to statutory undertakers by the 2008 Act, are to benefit from the protections in sections 127 (statutory undertakers' land) and 138 (extinguishment of rights, and removal of apparatus, of statutory undertakers etc.) of the 2008 Act in relation to any future NSIP proposals that may be brought forward and which might impact on the proposed development. Esso considers this provision to be appropriate in circumstances where the proposed development is itself a nationally significant infrastructure project delivering infrastructure for which there is considered to be an urgent need. Therefore, securing protection for the ongoing use of the pipeline were future NSIP proposals to pose a risk of detriment to the proposed development, is appropriate and proportionate. The application of these provisions is provided for under sections 120(3), 120(5)(a) and 120(5)(c) of the 2008 Act.

#### *Article 26 – Modifications of Part 1 of the 1965 Act*

- 6.121 The purpose of this article is ensure consistency between the provisions of the Order and the Compulsory Purchase Act 1965 (as amended by the Housing and Planning Act 2016) as applied by section 125 of the 2008 Act. These modifications have broad precedent – see for example Schedule 14 to the High Speed Rail (London – West Midlands) Act 2017<sup>4</sup> and the Silvertown Tunnel Order 2018.
- 6.122 The modification of the 1965 Act under article 26 is provided for under section 120(5)(a) of the 2008 Act, which allows a DCO to exclude, modify or apply any statutory provision which relates to any matter for which provision may be made in the Order (in this case, the compulsory acquisition powers under the Order). In accordance with section 126(2) of the 2008 Act, these provisions are modified only to the extent necessary to ensure that they apply properly to the compulsory acquisition powers authorised by the Order.

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

- 6.123 This article applies (with minor modifications to make the provisions appropriate to the context of acquisition under powers in a development consent order) the provisions of the 1981 Act to compulsory acquisition under the Order so that Esso has the option of acquiring the Order land that is subject to the powers of compulsory acquisition by vesting declaration.
- 6.124 Vesting declarations are one of two ways of acquiring land that is subject to compulsory purchase. The other method involves serving a notice to treat on the land owner to commence

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<sup>4</sup> 2017 c. 7



the process of establishing the acquisition price, after which title in the land is transferred. The date on which title will transfer is uncertain under the notice to treat method.

- 6.125 A vesting declaration, in contrast, sets the date on which title to the land is transferred to the acquiring authority. Compensation is negotiated or determined and paid later. Vesting declarations therefore allow title to land to pass to the acquiring authority more quickly than using the notice to treat method, and also allow several parcels to be acquired at once. Their use is subject to serving notices and observing time limits as required by the 1981 Act (as amended by the Housing and Planning Act 2016).
- 6.126 The modifications ensure consistency with the standard five year period sought under the Order for acquisition. It further ensures that appropriate references are made to the 2008 Act. The modifications differ from those included in article 23 of the GMP, which have now been superseded as a result of changes to the 1981 Act, and are based on recent DCO precedent, such as the Silvertown Tunnel Order 2018 (article 26) and the Port of Tilbury (Extension) Order 2019 (article 31).
- 6.127 The modification to the 1981 Act under article 27 is provided for under section 120(5)(a) of the 2008 Act, which allows a DCO to exclude, modify or apply any statutory provision which relates to any matter for which provision may be made in the DCO (in this case, the compulsory acquisition powers under the Order).

#### *Article 28 - Acquisition of subsoil or airspace only*

- 6.128 This article is based on article 24 of the GMP but, in addition to the acquisition of subsoil interests, is extended to allow Esso to acquire the airspace above land, rather than having to acquire all of the land. The purpose of this article is to give Esso the flexibility to minimise the extent of interests to be acquired, with less impact on affected landowners.
- 6.129 Any subsoil or airspace acquired under this provision can only be used for the same purposes for which Esso could have acquired all of the land. This provision allows acquisition of the minimum interest needed to deliver the scheme.
- 6.130 This too is a standard provision used in many DCOs (see, for example, article 27 of the Testo's Junction Alteration Order 2018) and article 26 of the Port of Tilbury (Expansion) Order 2019.

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

- 6.131 Article 29 follows Model Provision 27 and empowers Esso to enter on and appropriate and use land above or below streets within the Order limits, without having to acquire the street or any right or easement in it. The exercise of this power, without full acquisition, is prohibited in the circumstances set out in paragraph (3). Compensation is payable for any loss or damage caused to an owner or occupier of land affected by the power of appropriation where no acquisition has taken place. This article has been included in the majority of DCOs made to date.

#### *Article 30 – Temporary use of land for carrying out the authorised development*

- 6.132 This article is, subject to the modifications and additions described below, based on article 28 of the GMP and enables Esso, in connection with the carrying out of the proposed development, to take temporary possession of land listed in Schedule 7 (land of which temporary possession

may be taken). It is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) of the 2008 Act in that powers to use land temporarily for construction purposes are required to facilitate the construction of the proposed development.

- 6.133 In a departure from the GMP, article 30(1) also provides for the powers of temporary possession to apply to any other Order land which is subject to compulsory acquisition under the Order, provided that the compulsory acquisition process has not begun in relation to it.
- 6.134 This approach allows greater flexibility in the event that, following further detailed design work, it is decided that only temporary possession rather than permanent acquisition of the land is required, thus reducing the impact on landowners. In keeping with this approach, sub-paragraph (1)(d) confirms that works comprised in the proposed development can be undertaken on land of which temporary possession has been taken and, under sub-paragraph (4), are not required to be removed from that land. This approach has been adopted in numerous DCOs, including article 27 of the River Humber Gas Pipeline Replacement Order 2016.
- 6.135 Sub-paragraphs (1)(b) and (c) also confer upon Esso the right to remove any structures, apparatus, buildings and vegetation, and to construct temporary works (including means of access), security fencing, storage areas, buildings and structures on land of which temporary possession has been taken under this article. This builds on the equivalent provision in the GMP, to ensure that Esso has the power to remove all necessary features from land that may be encountered along the route of the pipeline, and to construct all necessary temporary works in the process.
- 6.136 The article also clarifies, at sub-paragraph (3), that Esso may not, unless the landowner agrees, remain in temporary possession:
- 6.136.1 in relation to the land specified in Schedule 7 (land of which temporary possession may be taken), i.e. where no permanent interest is to be taken, for longer than one year after completion of the part of the proposed development to which the possession of the land relates;
- 6.136.2 in relation to the other Order land, i.e. where a permanent interest may be taken, for longer than one year after completion of the work for which temporary possession was taken, unless Esso exercises compulsory acquisition powers over it by serving a notice of entry or making a general vesting declaration.
- 6.137 Sub-paragraph (3) therefore accords with the principle of the equivalent provision in the GMP, but makes clear the distinction in time limits as between the different categories of land of which temporary possession may be taken, as set out in sub-paragraph (1).
- 6.138 Article 30(4) also departs from the GMP in specifying that Esso is not required to:
- 6.138.1 restore land on which any permanent works have been constructed under paragraph (1)(d);
- 6.138.2 restore the land of which temporary possession has been taken to a better condition than it was in before temporary possession;

- 6.138.3 remove any ground strengthening works which have been placed on the land to facilitate construction of the proposed development;
  - 6.138.4 remove any measures installed over or around statutory undertakers' apparatus to protect that apparatus from the proposed development; or
  - 6.138.5 remove or reposition any apparatus belonging to statutory undertakers or necessary mitigation works.
- 6.139 These exceptions and clarifications to the general requirement that Esso must remove all temporary works and restore land of which temporary possession has been taken are considered to be appropriate and reasonable.
- 6.140 Article 30(7) has been included to clarify that any dispute as to the satisfactory removal of temporary works and restoration of land under sub-paragraph (4) does not prevent Esso from giving up possession of the land.
- 6.141 Article 30(9) clarifies that Esso may not compulsorily acquire under this Order the land referred to in paragraph (1)(a)(i) of article 30. This is the land of which only temporary possession may be taken, which refers to the parcels of land set out in Schedule 7.
- 6.142 Finally, article 30(11) has been included to clarify that Esso is authorised to take temporary possession of land specified in sub-paragraph (1) on more than one occasion. This might be required where, for example, Esso has given up possession of the land but subsequently identifies further works or activities that it needs to undertake on the land in order to construct the proposed development. A similar provision was approved in article 27 of the River Humber Gas Pipeline Replacement Order 2016.

*Article 31 – Temporary use of land for maintaining the authorised development*

- 6.143 This article is based on article 29 of the GMP and is drafted in substantially the same way as the equivalent provision in the River Humber Gas Pipeline Replacement Order 2016. It provides that Esso may take temporary possession of land within the Order limits as required for the purpose of maintaining the proposed development and to construct such temporary works on the Order land as may be reasonably necessary for that purpose for a period of five years from the date on which the proposed development is brought into operational use.
- 6.144 Sub-paragraph (1)(c) of the article extends article 29 of the GMP to include a right to enter on any land within the Order limits for the purpose of gaining reasonable access to land, where this is reasonably required to maintain the proposed development. This additional provision clarifies that Esso can secure appropriate access within the Order limits to those parts of the proposed development which need to be maintained, giving full effect to the maintenance powers granted under sub-paragraph (1)(a).
- 6.145 In common with article 29 of the GMP, provision is made for:
- 6.145.1 the maintenance powers in sub-paragraph (1) to only be exercised during the “maintenance period” (defined as five years from the date on which the proposed development is first brought into operational use or, in the case of landscape planting, five years from the date on which that landscape planting is completed); and

6.145.2 the giving of notice, the restoration of land and compensation for loss or damage. Sub-paragraph (4) of the article departs from the GMP in providing that, where a potential risk is identified to the proposed development (or any of its parts), the public, or the surrounding environment, Esso is not obliged to provide notice of entry. This is considered to be reasonable, as it is limited in scope to cases of emergency. The same provision was approved and accepted in article 28 of the River Humber Gas Pipeline Replacement Order 2016.

6.146 Article 31 is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) of the 2008 Act in that powers to use land temporarily for maintenance purposes are required to facilitate the maintenance of the proposed development.

#### *Article 32 – Crown rights*

6.147 This article does not form part of the GMP but is included in order to protect the Crown's position in relation to its own estates, rights, powers, privileges, authorities or exemptions and to ensure that the Crown's written consent is required where any land, hereditaments or rights are to be taken, used, entered or interfered with under the powers conferred by the Order. This reflects the statutory position set out in section 135 of the 2008 Act and has been included in substantially the same form in a number of DCOs, including the River Humber Gas Replacement Pipeline Order 2016 and the Port of Tilbury (Expansion) Order 2019.

#### *Article 33 – Special category land*

6.148 Like article 32, this provision does not form part of the GMP but provides that any special category land required by Esso for the purposes of exercising the Order rights will be permanently or, in the case of land to be used on a temporary basis, temporarily discharged from all rights, trusts and incidents to which it was previously subject. The special category land is the land to be identified in Part 5 of the book of reference as forming part of a common, open space or fuel or field allotment.

6.149 The Order seeks powers to acquire rights over land forming part of a common, open space or a fuel or field allotment. Under section 132 of the 2008 Act, the Order may include such provision if the Secretary of State is satisfied that the special category land, when burdened with the Order rights, will be no less advantageous to any affected persons than it was before the imposition of those rights. Esso believes that this will apply in relation to the rights that it will be seeking under the Order over special category land. This position is therefore recorded in the preamble to the Order, further to the requirement in section 132(2)(b) of the 2008 Act.

6.150 The drafting adopted reflects that approved in article 31 of the National Grid (Richborough Connection Project) Development Consent Order 2017.

#### *Article 34 – Statutory undertakers*

6.151 This article provides Esso with statutory authority to acquire interests and rights over land owned by statutory undertakers and to extinguish the rights of, remove or reposition the apparatus belonging to statutory undertakers.

6.152 The drafting is based on article 31 of the GMP but the article also seeks, in common with other DCOs (see, for example, article 31 of the Thorpe Marsh Gas Replacement Pipeline Order 2016), the power to:

- 6.152.1 construct the proposed development so as to cross under or over statutory undertakers' apparatus; and
- 6.152.2 construct over existing apparatus belonging to statutory undertakers any necessary track or roadway, together with the right to maintain and/or remove the same, and install such service media under or over the existing apparatus needed in connection with the proposed development. This power is sought to ensure that Esso is able to erect all necessary above ground installations, site compounds and storage areas in connection with the construction of the proposed development.
- 6.153 Diligent inquiries have been made to identify all relevant rights and statutory undertakers' apparatus. However, it is still possible that new rights or apparatus may be discovered during the course of the construction of the proposed development. On this basis, a general power for the extinguishment of rights and removal or relocation of apparatus belonging to statutory undertakers over or within the Order limits is required.
- 6.154 This article is subject to Schedule 9 (protective provisions), which contains provisions for the protection of certain statutory undertakers to ensure their continued ability to carry out their functions despite the interference with their rights / apparatus required to facilitate the proposed development.
- 6.155 Article 34 is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) of the 2008 Act and is a matter specifically identified in paragraph 1 of Schedule 5 to the 2008 Act, which provides that a DCO can include provision for the compulsory acquisition of land, and is also a matter specifically identified in paragraph 14 of Schedule 5 to the 2008 Act, which states that a DCO can provide for the removal, disposal and re-siting of apparatus.

*Article 35 – Recovery of costs of new connections*

- 6.156 Article 35 follows article 33 of the GMP and provides for the payment of compensation to owners and occupiers of property where apparatus is removed in accordance with article 34 (statutory undertakers). Article 35 departs from the GMP only by amending article 32(3) which is not relevant as the Order does not contain an article dealing with the apparatus and rights of statutory undertakers in stopped up streets.
- 6.157 This article is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) of the 2008 Act and is a matter specifically identified in paragraph 14 of Schedule 5 to the 2008 Act, which states that a DCO can provide for the removal, disposal and re-siting of apparatus.

**Part 6 – Operations**

*Article 36 – Disapplication and modification of legislative provisions*

- 6.158 Article 36 is bespoke to this Order and provides (in reliance on section 120(5)(a) of the 2008 Act) for the disapplication of certain requirements which would otherwise apply under public general legislation. Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the Order.

- 6.159 Article 36(1) provides for the disapplication of various additional consents which would otherwise be required from the Environment Agency, internal drainage boards or lead local flood defence authorities under the Environmental Permitting (England and Wales) Regulations 2016 (“**the 2016 Regulations**”), the Water Resources Act 1991 (“**WRA 1991**”) or the Land Drainage Act 1991 (“**LDA 1991**”). These are:
- 6.159.1 the requirements for approval under byelaws made or deemed to have been made under WRA 1991;
  - 6.159.2 the requirement for consent to place structures on or over rivers or other watercourses under the 2016 Regulations;
  - 6.159.3 the prohibition on placing obstructions in waterways which are not main rivers under LDA 1991; and
  - 6.159.4 the requirements for approval under any byelaws made under the LDA 1991 regulating the use and obstruction of watercourses.
- 6.160 These are consents for activities which may be a necessary part of the proposed development. In order to provide certainty that the proposed development can proceed, the Order disapplies the requirement for these consents. These disaplications are subject to ongoing discussion with the relevant consenting bodies. .
- 6.161 Esso considers that, in the context of the proposed development being of national significance, the Order should be the predominant authorising instrument for the works. The purpose of the regime created by the 2008 Act is to ensure that DCOs provide a unified consent for NSIPs and Esso considers that disapplying and modifying certain legislative provisions, as set out in the Order, is proportionate in this context. Similar disaplications were approved in the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016.
- 6.162 Article 36(1) also disapplies provisions of local legislation and byelaws which Esso considers may conflict with the construction and maintenance of the proposed development. . The provisions disapplied include:
- 6.162.1 Acts relating to the Basingstoke Canal (both the Basingstoke Canal Act 1778 and the Basingstoke Canal Act 1793) as the proposed development crosses the canal and may impact on rights protected in those Acts;
  - 6.162.2 the Surrey Act 1985 which contains controls regarding grass verges and excavations near highways which are inconsistent with the activities to be undertaken in connection with the proposed development;
  - 6.162.3 the Hampshire County Council Act 1972 which contains similar restrictions regarding open spaces and verges, prohibition of parking or camping on highway verges, control of goods service areas and excavations near highways which again are inconsistent with activities to be undertaken in connection with the proposed development; and
  - 6.162.4 a number of local byelaws restrict activities which will be involved in the construction of a pipeline in the land and associated activities such as parking for construction

vehicles, erection of structures, protection of flower beds, trees and grass, removal of substances, obstructions and for the protection of watercourses and wildlife.

6.163 A disapplication is also sought, in article 36(2), in respect of the temporary possession provisions of the Neighbourhood Planning Act 2017. This is required as the relevant sections of the Neighbourhood Planning Act 2017 have not been brought into force and subsidiary regulations to that Act have not yet been made, and there is therefore no certainty as to the requirements of the new temporary possession regime. As such, this enables the temporary possession regime created by this Order to be applied. This approach has recently been accepted by the Secretary of State in the Silvertown Tunnel Order 2018.

6.164 Article 36(3) clarifies that, for the purposes of the CIL Regulations, any building forming part of the proposed development falls within the exemption under regulation 6 and will not be considered as “development” for the purposes of levying CIL. Precedent for this approach can be found in Schedule 19 to the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014.

#### *Article 37 – Removal of human remains*

6.165 The purpose and effect of this article is to disapply section 25 of the Burial Act 1857 and replace it with an alternative procedure for managing the removal of any human remains disturbed during the course of carrying out the proposed development. Article 37 is based on article 17 of the GMP and is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) of the 2008 Act, as it relates to the construction of the proposed development, and is also provided for under section 120(5)(a) of the 2008 Act.

6.166 The article departs from the GMP in that paragraph (12) excludes the requirement to give notice before the removal of remains which the undertaker is satisfied were interred more than 100 years ago and that no relative or personal representative of the deceased is likely to object to their removal. This approach has precedent in the Crossrail Act 2008.

6.167 Paragraph (17) applies section 239 of the Town and Country Planning Act 1990 to land, and rights over land, acquired under the Order and permits the use of such land notwithstanding any obligation or restriction imposed under ecclesiastical law or law relating to burial grounds, save as provided for in the remainder of the article. Paragraph (18) excludes the application of the Town and Country Planning (Churches, Places of Religious Worship and Burial Ground) Regulations 1950.

6.168 The drafting in paragraphs (17) and (18) has precedent in the River Humber Gas Pipeline Replacement Order 2016, although the Order does not apply section 238 (use and development of consecrated land) of the Town and Country Planning Act 1990 as it is currently understood that there is no consecrated land within the Order limits.

6.169 Taken together, the effect of Article 37 is to replace the existing and disparate regimes regulating the removal of human remains and consolidate the applicable provisions in a single article in the Order. It is required by Esso to ensure that archaeological remains are recovered appropriately without causing unacceptable delay to the implementation of this nationally significant infrastructure project. Similar provision is made in a number of DCOs, including the River Humber Gas Pipeline Replacement Order 2016 (article 20) and the Thorpe Marsh Gas Pipeline Order 2016 (article 19).

*Article 38 – Application of landlord and tenant law*

- 6.170 This article follows article 35 of the GMP and governs the leasing of the proposed development by Esso to any other person. This article would override the application of landlord and tenant law (as authorised by section 120(5)(a) of the 2008 Act) insofar as it may prejudice the operation of any agreement for leasing the whole or part of the proposed development or the right to operate the same, and any agreement for the construction, maintenance, use or operation of the proposed development or any part of it entered into by Esso.

*Article 39 – Operational land for the purposes of the Town and Country Planning Act 1990*

- 6.171 This article follows article 36 of the GMP and means that permitted development rights which apply in respect of development in, on, over or under operational land by statutory undertakers pursuant to Parts 8, 13 and 15 of the Town and Country Planning (General Permitted Development) (England) Order 2015 will continue to be available in relation to land in respect of which those undertakers' apparatus and equipment may be relocated / diverted under the powers conferred by the draft DCO.
- 6.172 Article 39 is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) of the 2008 Act, as it relates to the operation of the proposed development. Precedent for the article can be found in other made DCOs, such as the Silvertown Tunnel Order 2018 (article 51).

*Article 40 – Planning permission*

- 6.173 This article departs from the GMP but is precedented, for example see Article 8 of the Tees Combined Cycle Power Plant Order 2019.<sup>5</sup> Insofar as Esso needs to obtain any other planning permission for anything relating to the proposed development (i.e. to facilitate its completion, construction, use or operation), this article seeks to avoid any question as to the interface between that planning permission and this Order (i.e. planning permission will not constitute a breach of the terms of this Order).

*Article 41 – Defence to proceedings in respect of statutory nuisance*

- 6.174 Article 41 is based on article 7 of the GMP and provides Esso with a defence to statutory noise nuisance proceedings under section 82(1) of the Environmental Protection Act 1990 in the circumstances set out in Article 41.
- 6.175 Article 7 of the GMP has been adapted to clarify that compliance with the controls and measures relating to noise which are described in the Code of Construction Practice or Construction Environmental Management Plan, or with any environmental permit, are capable of providing a defence to proceedings in nuisance.
- 6.176 Article 7 is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) of the 2008 Act, and is a matter specifically identified in paragraph 11 of Schedule 5 to the 2008 Act, which provides that a DCO can provide for the exclusion of liability in respect of acts or omissions.

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<sup>5</sup> SI 2019/827



*Article 42 – Felling or lopping of trees and removal of hedgerows*

- 6.177 Paragraph (1) of this article permits any tree or shrub within or overhanging land within the Order limits to be felled, lopped, pruned, coppiced, pollarded or reduced in height, or the roots of trees or shrubs which extend into the Order limits to be cut back, if Esso reasonably believes it to be necessary to prevent the tree, shrub or roots from obstructing the construction, operation or maintenance of the proposed development or from endangering anyone using it. Compensation is payable for any loss or damage caused. This drafting is based on article 39 of the GMP, but extends the power to include coppicing, pruning and pollarding trees and shrubs.
- 6.178 In respect of hedgerows, paragraph (3) confirms that Esso may only remove those important hedgerows which are listed in Schedule 10 (removal of important hedgerows) of the DCO. Important hedgerows are those which meet the criteria set out in regulation 4 of the Hedgerow Regulations 1997. Esso may remove other hedgerows which are located within the Order limits that may be required for the purposes of carrying out the authorised development. This drafting is precedented and was approved by the Secretary of State in the context of the Thorpe Marsh Gas Pipeline Order 2016.
- 6.179 The exercise of the any of the powers in paragraphs (1) and (3) is in each case subject to paragraph (2), which confirms that Esso must not cause unnecessary damage to any tree, shrub or hedgerow and that Esso must pay compensation to any person who sustains any loss or damage from the exercise of those powers.
- 6.180 The power in article 42 is provided for under sections 120(3) and (4), together with paragraph 13 of Schedule 5 to the 2008 Act. In addition, the power to disapply the consent requirements under the Hedgerow Regulations 1997 is provided for under section 120(5)(a) of the 2008 Act.

*Article 43 – Trees subject to Tree Preservation Orders*

- 6.181 This article follows article 40 of the GMP and would allow Esso to fell, lop or prune trees which are subject to a tree preservation order within the meaning of section 198 of the Town and Country Planning Act 1990. Those trees, and the works proposed to be undertaken to those trees, are listed in Schedule 8 (trees subject to tree preservation orders) of the Order.
- 6.182 Like article 42, article 43 is provided for under section 120(3) and (4), together with paragraph 13 of Schedule 5 to the 2008 Act. In addition, the power to disapply the penalties for non-compliance with a tree preservation order under the Town and Country Planning Act 1990 is provided for under section 120(5)(a) of the 2008 Act.

*Article 44 – Protection of interests*

- 6.183 This article gives effect to Schedule 9 (protective provisions), which contains provisions protecting the interests of third parties.
- 6.184 The Schedule currently contains protective provisions for the benefit of electricity, gas, water and sewerage undertakers and also railways interests and electronic communications code network operators. Esso has sought the views of these undertakers and operators in relation to these provisions, which are based on the standard protective provisions approved by the Secretary of State on other schemes (including the recent Testo's Junction Alteration Order

2018<sup>6</sup>) and discussions are ongoing with a number of these bodies in relation to the terms of the provisions proposed. Esso is also seeking protective provisions with the Environment Agency as an alternative to the permitting requirements for river crossings as a "flood risk activity" under the 2016 Regulations and has recently received a proposed form of protective provisions from Highways England, which Esso is now considering.

- 6.185 Article 44 is a provision relating to, or to matters ancillary to, the proposed development within section 120(3) of the 2008 Act and is a matter specifically identified in paragraph 10 of Schedule 5 to the 2008 Act, which states that a DCO can provide for the protection of the property or interest of any person.

*Article 45 – Certification of documents, etc.*

- 6.186 This article reflects article 41 of the GMP and would require Esso to submit to the Secretary of State as soon as practicable after the making of the Order copies of the documents, plans and sections referred to in the Order for certification as true copies. A list of the documents to be certified is set out in Schedule 11 to the Order.

*Article 46 – Service of notices*

- 6.187 This article governs how any notices that may be served under the Order shall be deemed to have been served properly. In particular it allows service by email with the consent of the recipient, and deals with the situation of service on an unknown landowner.

- 6.188 Although the article does not feature in the GMP, it is common to include such an article in an order authorising development such as this. The article has precedent in a number of DCOs including the River Humber Gas Pipeline Replacement Order 2016 (article 45).

- 6.189 The provision is useful because it provides clarity on the issue. It is noted that the service of notice provisions under sections 229 and 230 of the 2008 Act apply to notices served under the 2008 Act rather than notices served under a DCO order made under the 2008 Act.

*Article 47 – No double recovery*

- 6.190 This article makes it clear that compensation is not payable both under this Order and any other enactment, contract, deed or other rule of law. It follows the well-established principle of equivalence that a claimant is compensated for no more and no less than their loss.

- 6.191 This is not a model provision but has precedent in numerous DCOs, including the River Humber Gas Pipeline Replacement Order 2016 (article 31) and the Thorpe Marsh Gas Pipeline Order 2016 (article 36). The ability to impose this restriction is provided for under section 120(5)(a) of the 2008 Act.

*Article 48 – Arbitration*

- 6.192 This article is based on article 42 of the GMP and governs what happens when two parties disagree in the implementation of any provision of the Order. The matter is to be settled by arbitration, and if the parties cannot agree on who the arbitrator should be, this is decided by Secretary of State. It is common practice for DCOs to specify that the Secretary of State should

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<sup>6</sup> SI 2018/994

perform this function – see, for example, the River Humber Gas Pipeline Replacement Order 2016 (article 46) and the Thorpe Marsh Gas Pipeline Order 2016 (article 42).

## **7 Schedule 1 – Authorised Development**

- 7.1 Schedule 1 describes the authorised development, which should be read in conjunction with the Works Plans. In addition to the numbered works, provision is also made for the carrying out of the associated works listed in lettered works (a) to (q) of Schedule 1.

## **8 Schedule 2 - Requirements**

- 8.1 The requirements in Schedule 2 are the equivalent of planning conditions. Approvals are to be sought from the relevant planning authority, following consultation with any other relevant bodies. This is consistent with the processes and procedures employed by the promoters of other linear DCO schemes.
- 8.2 Whilst a number of the General Model Provisions in respect of Requirements (“**GMPR**”) have been followed, a structure for the requirements has been developed which reflects Esso’s current expectations in terms of the control documents that will be prepared.
- 8.3 Turning to the purpose and effect of requirements 1 to 17:
- a) Requirement 1 (interpretation): this provides definitions for key terms used throughout Schedule 2;
  - b) Requirement 2 (time limits): this specifies the time limit for commencing the proposed development as five years from the date of the Order, as provided in regulation 6 of the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015;
  - c) Requirement 3 (stages of the authorised development): this provides for the production and submission to relevant planning authorities of a written scheme setting out all stages of the authorised development before development commences. Unlike the GMPR, requirement 2 only provides for the *submission* of the relevant part of the staging plan to relevant planning authorities, not those authorities’ agreement to the plan. This accords with the approach taken and approved in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014;
  - d) Requirement 4 (scheme design): this adapts the GMPR and provides for above ground installations such as the pigging station, valves and pressure transducer and temporary construction facilities such as compounds and logistic hubs to be carried out in general accordance with the indicative layout drawings. This is so as to allow the necessary but proportionate degree of flexibility in the construction of these important elements of this nationally significant infrastructure project as, at this stage, it is not possible to produce definitive designs for such above ground facilities and subsequent approval of detailed designs is not considered to be necessary given the small or temporary nature of the installations. The proposed

development will not be in general accordance with the indicative layout drawings if any departure from them would give rise to any materially new or materially different environmental effects from those assessed in the environmental statement. This wording was included and approved in the National Grid (Hinkley Point C Connection Project) Order 2016;

- e) Requirement 5 (code of construction practice): this adapts requirements 18 and 19 of the GMPR by providing that construction works shall be carried out in accordance with a code of construction practice ("**CoCP**") which is submitted with the application unless agreed otherwise with the relevant planning authority. Changes to the CoCP must either be necessary or desirable to reflect a change or update in legislation, guidance or good practice or confined to a specific location along the route of the authorised development and in either case must not give rise to any materially new or materially different environmental effects to those assessed in the environment effects and must not result in a variation to the measures set out in the HRA commitments schedule which adversely affects the findings of the Habitats Regulations Assessment;
- f) Requirement 6 (construction and environmental management plan): requirement 6 modifies requirement 17 of the GMPR. It provides that no stage of the proposed development may commence until a construction environmental management plan ("**CEMP**"), in accordance with the outline CEMP, has been submitted to and approved by the relevant local planning authority following consultation with the Lead Local Flood Authority and / or the Environment Agency as regards any water mitigation and management measures relevant to that stage. The outline CEMP has been provided during examination and it is Esso's intention that this document would be certified by the Secretary of State for the purposes of this Order;
- g) Requirement 7 (construction traffic): requirement 7 is not a model requirement though does include those matters referred to in requirement 10 of the GMPR. It provides that no stage of the proposed development must commence until a construction traffic management plan ("**CTMP**"), in accordance with the outline CTMP, has been submitted to and approved in writing by the relevant highway authority following consultation with the relevant planning authority. The outline CTMP has been provided during examination and it is Esso's intention that this document would be certified by the Secretary of State for the purposes of this Order;
- h) Requirement 8 (vegetation): this requirement applies to the retention and removal of vegetation, on the one hand, and the reinstatement of vegetation, on the other. For any stage of the authorised development that would affect any vegetation, the retention and removal of that vegetation must be undertaken in accordance with: (a) a written vegetation retention and removal plan submitted to the relevant planning authority prior to the commencement of that stage of the authorised development and which implements the requirements of the landscape and ecological management plan ("**LEMP**"); or (b) where applicable, the site specific plans (see Requirement 17 below) or such changes to those plans as may be

requested by the undertaker and agreed by the relevant planning authority in accordance with Requirement 17. In accordance with Requirement 8(1)(b), any written vegetation and removal plan submitted under sub-paragraph 8(1)(a)(i) which relates to the area of the South Downs National Park Authority (“SDNPA”) must also be drafted in accordance with the SDNP Schedule (as defined by Requirement 1) or such changes to that Schedule as may be agreed by the SDNPA. Under sub-paragraph (1)(c), the reinstatement of all vegetation must be undertaken in accordance with a written plan of reinstatement, which would form part of the LEMP to be submitted for the approval of the relevant planning authority for each stage of the authorised development under Requirement 12. Esso will replace any vegetation which is part of an approved reinstatement plan that, with a period of five years beginning with the date of planting, is removed, uprooted, destroyed, dies or becomes seriously damaged or defective;

- i) Requirement 9 (surface and foul water drainage): this provides that no stage of the proposed development must commence until a surface and foul water drainage plan for permanent works relevant to that stage, in accordance with the outline surface and foul water drainage plan, has been submitted to and approved by the relevant drainage or sewerage authority or, where applicable, the Environment Agency or the Lead Local Flood Authority. An outline surface and foul water drainage plan has been provided during examination and it is Esso’s intention that this document would be certified by the Secretary of State for the purposes of this Order;
- j) Requirement 10 (contaminated land and groundwater): this requirement modifies requirement 15 of the GMPR. It requires that the local planning authority is notified in the event that contamination is found at any time when carrying out the authorised development. An investigation and risk assessment must then be carried out in accordance with a scheme approved by the local planning authority. Where remediation is required to control or prevent the release or potential release of contamination as a result of the works, a detailed remediation scheme must be prepared and approved by the relevant planning authority and the remediation carried out in accordance with the scheme;
- k) Requirement 11 (archaeology): requirement 11 builds on requirement 16 of the GMPR and provides that the proposed development must be constructed in accordance with the archaeological mitigation strategy. Construction of any stage of the proposed development must not commence until a written scheme of investigation of areas of archaeological interest relevant to that stage has been submitted to and approved in writing by the relevant planning authority. The written scheme must reflect the archeological mitigation strategy and must identify areas where archaeological works are required and the measures to be taken to protect, record or preserve any significant archaeological remains that may be found and must include an implementation timetable. Any archaeological works carried out under the scheme must be carried out by a suitably qualified and registered person or body and approved by the relevant planning authority and must be carried out in accordance with the approved scheme.

- l) Requirement 12 (LEMP): requirement 12 builds on requirement 17 of the GMPR and provides that the construction of any stage of the proposed development must not commence until a LEMP, in accordance with the outline LEMP and the SSSI working plans, has been submitted to and approved in writing by the relevant planning authority. This requirement does not apply to those stages of the authorised development in respect of which any ecological and landscape measures are to be implemented by the undertaker, as identified in the environmental statement. An outline LEMP has been provided during examination and it is Esso's intention that this document would be certified by the Secretary of State for the purposes of this Order;
- m) Requirement 13 (protected species): requirement 13 modifies requirement 34 of the GMPR. It provides that a written scheme for the protection of and mitigation measure for any protected species must be prepared and implemented in the event that any protected species not previously identified in the environmental statement are found during the carrying out of the authorised development. The authorised development may not continue until any necessary licences are obtained to enable mitigation measures to be implemented;
- n) Requirement 14 (construction hours): requirement 14 builds on requirement 24 of the GMPR and confirms the permissible hours during which construction activities may be undertaken. In common with other made DCOs, provision is made for undertaking specified activities outside of these standard construction hours;
- o) Requirement 15 (community engagement plan): requirement 15 provides that no stage of the authorised development must commence until a community engagement plan for that stage, in accordance with the outline community engagement plan, has been submitted to and approved by the relevant planning authority. An outline community engagement plan has been provided during examination and it is Esso's intention that this document would be certified by the Secretary of State for the purposes of this Order;
- p) Requirement 16 (existing fuel pipeline): this requirement provides that the undertaker must ensure that the existing fuel pipeline is no longer capable of commercial operation once the pipeline works (Works Nos. 1A to 1H) have been commissioned;
- q) Requirement 17 (site specific plans): this requirement provides that the authorised development must be undertaken in accordance with the site specific plans or with such changes to those plans as agreed by the relevant planning authority. Changes to the site specific plans must either be necessary or desirable to reflect a change or update in legislation, guidance or good practice or confined to a specific location along the route of the authorised development and in either case must not give rise to any materially new or materially different environmental effects to those assessed in the environment effects and must not result in a variation to the

measures set out in the HRA commitments schedule which adversely affects the findings of the Habitats Regulations Assessment. The site specific plans describe the Applicant's methodology for working at key locations along the route of the authorised development and it is Esso's intention that these plans would be certified by the Secretary of State for the purposes of this Order;

- r) Requirement 18 (removal of above-ground infrastructure): this requirement provides for the removal by Esso of any above-ground infrastructure following the permanent abandonment of the authorised development, including any aerial markers, cathodic protection test posts, cathodic protection rectified cabinets and field boundary markers. Sub-paragraph (2) defines terms used in sub-paragraph (1);
- s) Requirement 19 (written approval): this follows requirement 36 of the GMPR and confirms that any written approval or agreement must be given in writing;
- t) Requirement 20 (amendments to approved details): this modifies requirement 37 of the GMPR and provides that any details approved pursuant to any requirement shall be taken to include any amended details which are subsequently approved, provided that any amendments to or deviations from the approved details are within the scope of the assessment set out in the Environmental Statement. A similar provision was included in the Thorpe Marsh Gas Pipeline Order 2016. Requirement 20 includes provision for consent to amendments to any approved details to be deemed in the event that the relevant planning authority fails to notify Esso of its decision before the end of the period of 42 days beginning with the date on which the application was made;
- u) Requirement 21 (anticipatory steps towards compliance with any requirement): this departs from the GMPR and provides that any steps taken towards compliance with any provision under the Requirements is to be taken into account for the purpose of determining compliance with that provision; and
- v) Requirement 22 (register of requirements): this requirement provides that Esso must, prior to the formal submission of any application for approval under Part 2 of Schedule 2, establish and maintain in an electronic form suitable for inspection by members of the public a register of requirements. Paragraph (2) confirms that this register must set out in relation to each requirement the status of the requirement for each stage of the authorised development, in terms of whether any approval has been applied for or given in relation to that stage. Under paragraph (3), the register must be retained by Esso for a period of three years following completion of the authorised development. This requirement is based on Requirement 22 of the A14 Cambridge to Huntingdon Improvement Scheme DCO 2016.

8.4 Part 2 of Schedule 2 provides a clear procedure for the discharge of requirements and appeals. It sets out clear time limits for decisions to be made and makes provision for circumstances

where the discharging authority requires further information to be provided in relation to an application for the discharge of a requirement. The timeframes provided for reflect the status of the proposed development as an NSIP supported by the relevant National Policy Statements and in respect of which a critical need has been identified.

- 8.5 Part 2 as drafted broadly reflects the discharge of requirements provisions approved in a number of previous 'made' DCOs, including the Hinkley Point C (Nuclear Generating Station) Order 2013 and the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014.

**9 Schedule 3 (Streets subject to alteration of layout)**

Sets out the streets, referred to in article 10, the layouts of which will be subject to temporary alteration.

**10 Schedule 4 (Streets subject to street works)**

Sets out the streets, referred to in article 11, which are to be subject to street works.

**11 Schedule 5 (Streets and public rights of way to temporarily stopped up, altered, diverted or restricted)**

Sets out the streets and public rights of way which are to be subject to temporary stopping up, alteration, diversion or restriction under article 13, including those for which a diversion is to be provided (Part 1) and those for which no diversion is to be provided (Part 2).

**12 Schedule 6 (Modification of compensation and compulsory purchase enactments for creation of new rights and imposition of restrictive covenants)**

Pursuant to article 26, sets out the modifications to the statutory provisions application to compensation and compulsory purchase under the Order where new rights are to be acquired or restrictions are to be imposed.

**13 Schedule 7 (Land of which temporary possession may be taken)**

Sets out the land referred to in article 30 which Esso may temporarily possess (albeit noting the wider temporary possession power in respect of the Order land) and the purpose for which that temporary possession may be taken.

**14 Schedule 8 (Trees subject to tree preservation orders)**

Sets out the trees subject to tree preservation orders further to article 43.

**15 Schedule 9 (Protective provisions)**

Sets out the provisions for the protection of statutory undertakers affected by the proposed development. Engagement with the bodies to whom these provisions apply is ongoing.



**16 Schedule 10 (Removal of important hedgerows)**

Sets out the important hedgerows which are to be removed further to article 42.

**17 Schedule 11 (Documents to be certified)**

Lists the documents which are to be submitted to the Inspectorate with the DCO application and certified by the Secretary of State.

**END**