

Viking CCS Pipeline

2.2 Explanatory Memorandum to the Draft Development Consent Order

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Applicant: Chrysaor Production (U.K.) Limited,
a Harbour Energy Company
PINS Reference: EN070008
Planning Act 2008 (as amended)
The Infrastructure Planning (Applications: Prescribed Forms
and Procedure) Regulations 2009 - Regulation 5(2)(c)
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1 Explanatory Memorandum

1.1 Introduction

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

1.2 Purpose of the Order

- 1.2.1 Chrysaor Production (U.K.) Limited (incorporated under company number 00524868) and having its registered office at 23 Lower Belgrave Street, London, England, SW1W 0NR, (the “**undertaker**”), is applying to the Secretary of State under section 37 of the Planning Act 2008 (“**the 2008 Act**”) for a development consent order for the construction, operation and decommissioning of a pipeline that will transport captured carbon dioxide (CO₂) from Immingham to the Theddlethorpe Facility, together with associated development within the meaning of section 115 of the 2008 Act (the “**authorised development**” for the purpose of the Order).
- 1.2.2 A detailed description of the authorised development is included in chapter 03 of the Environmental Statement [**EN070008/APP/6.2.3**].
- 1.2.3 The Order seeks to confer upon the undertaker powers of compulsory acquisition of land or rights over land which is required for the authorised development, or to facilitate, or is incidental to the authorised development within the meaning of section 122 of the 2008 Act.

1.3 Nationally Significant Infrastructure Project

- 1.3.1 The authorised development is a Nationally Significant Infrastructure Project (“**NSIP**”) for the purposes of sections 14(1)(g) and 21 of the 2008 Act because it comprises 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:
- 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;
 - would (but for section 33(1) of the 2008 Act) require authorisation under section 1(1) of the 1962 Act; and
 - is within section 21(2)(a) of the 2008 Act, as both ends of the pipeline will be situated in England.
- 1.3.2 As the authorised development is an NSIP, development consent must be obtained from the Secretary of State to authorise it, and an application for a development consent order (“**DCO**”) must be made to the Secretary of State, care of the Planning Inspectorate, under section 37 of the 2008 Act.
- 1.3.3 The main components of the authorised development are summarised below:

- Work Nos. 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 and 43: consists of the NSIP, being the buried onshore pipeline, approximately 55.5km in length.
- Work No. 1: the Immingham Facility, consisting of a central control room, local equipment room, analyser house and various pipework, valves, pipeline inspection equipment, safety protection systems and a 25 m high vent.
- Work Nos. 14, 21, 31: Three Block Valve Stations required along the pipeline to enable sections to be isolated for operational and maintenance reasons. Block Valve Stations will comprise a kiosk, block valve, bypass valves, pipework and a local vent approximately 4m high.
- Work No.42 or Work No.44: the Theddlethorpe Facility, consisting of a local equipment room, analyser house and various pipework, valves, pipeline inspection equipment, safety protection systems and a 25 m high vent.

1.4 Associated Development

- 1.4.1 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.
- 1.4.2 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:
- 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;
 - associated development should not be an aim in itself; and
 - associated development should be proportionate to the nature and scale of the NSIP.
- 1.4.3 The Order seeks consent for a number of permanent and temporary works, which the undertaker considers to comprise associated development, namely:
- permanent and temporary accesses;
 - temporary construction compounds, including office, welfare and security facilities, car parking and storage areas;
 - temporary logistics and construction materials storage hubs;
 - bailey bridge crossings;
 - electrical connections for above ground infrastructure and block valve sites.
- 1.4.4 The undertaker 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.
- 1.4.5 It should be noted that the undertaker has chosen not to differentiate the NSIP and associated development works in Schedule 1 (Authorised Development) 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.

1.5 Ancillary Matters

- 1.5.1 The Order also authorises ancillary works within the Order Limits. These are works that do not constitute development but are required to facilitate the construction of the authorised development.
- 1.5.2 In addition to providing for the construction and operation of the authorised development, the Order will, in accordance with section 122, section 120(3) and Schedule 5 of the 2008 Act, authorise the acquisition of land and rights over land, and the extinguishment of, or interference with, interests in or rights over land. The Book of Reference **[EN070008/APP/3.3]** sets out a description of the land and interests included in the Order. The Order and the Book of Reference should be read together with the Statement of Reasons **[EN070008/APP/3.4]** which accompanies the Application and sets out the justification for the acquisition of or interference with the Order Land.
- 1.5.3 Other ancillary matters include the application and disapplication of legislation, the power to undertake works to streets, and the ability to take temporary possession of land.

1.6 The Draft Order

- 1.6.1 The Order draws on the model provisions set out in Schedule 1 to the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (“**the 2009 Order**”), as well as relevant precedents. Whilst the 2009 Order has been repealed, Planning Inspectorate Advice Note 13 ‘*Preparing the draft Order and Explanatory Memorandum*’ (v3 February 2019) explains that the model provisions were intended as a guide for developers in drafting Orders, rather than a rigid structure, but aided consistency and assisted developers to draft a comprehensive set of lawful provisions. The model provisions were used as a starting point when drafting the Order, as there are no specific model provisions for pipeline development. Some elements of the model provisions 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.
- 1.6.2 The Localism Act 2011 (“**the 2011 Act**”) removed the requirement for the decision maker to have regard to the 2009 Order 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 2009 Order, although it is noted that the “Legislation” page of the Planning Inspectorate’s website states: “... *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.*”
- 1.6.3 Paragraph 1.5 of the Planning Inspectorate’s Advice Note 15, ‘Drafting Development Consent Orders’ (July 2018) also states: “*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 authorised 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.*”
- 1.6.4 Where there is a departure from the model provisions, 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:

- Southampton to London Pipeline Development Consent Order 2020 (SI 2020/1099) (“SLP 2020”); and,
- The Thorpe Marsh Gas Pipeline Order 2016 (2016/297) (“Thorpe Marsh 2016”),
- and other recent orders:
- Hornsea Three Offshore Wind Farm Order 2020 (SI 2020/1656) (“Hornsea Three 2020”);
- Norfolk Vanguard Offshore Wind Farm Order 2022 (SI2022/138) (“Norfolk Vanguard 2020”);
- Norfolk Boreas Offshore Wind Farm Order 2021 (SI 2021/1414) (“Norfolk Boreas 2021”);
- River Humber Gas Pipeline Replacement Order (SI 2016/853) (“River Humber 2016”);
- Reinforcement to the North Shropshire Electricity Distribution Network Order 2020 (SI 2020/325) (“North Shropshire 2020”);
- National Grid (Richborough Connection Project) Development Consent Order 2017 (SI 2017/817) (“Richborough Connection Project 2017”);
- A19/A184 Testo’s Junction Alteration Order (SI 2018/994) (“Testo’s Junction 2018”);
- Silvertown Tunnel Order 2018 (SI 2018/574) (“Silvertown 2018”); and
- A14 Cambridge to Huntingdon Improvement Order 2016 (SI 2016/547).

1.6.5 The purpose and effect of the provisions of the Order are now explained in sequence.

Part 1 - Preliminary

Article 1 – Citation and commencement

1.6.6 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.

1.6.7 This article did not appear in the model provisions. However, it is a standard article that is included in all DCOs.

Article 2 – Interpretation

1.6.8 Article 2(1) defines the terms used in the Order. It is a standard article and was included in the model provisions as article 1.

1.6.9 Definitions to note include:

- A definition of “commence” has been added to the Order, which excludes certain site preparation works. This makes it clear that a number of works that would constitute a ‘material operation’ are not to be taken to mean that the authorised development has ‘commenced’. This enables the undertaker to undertake certain preparatory works prior to the submission of relevant details for approval under the requirements, which the undertaker considers to be proportionate given the nature and scale of the authorised 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. The

undertaker 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 authorised development on those affected. This is a widely precedented approach in other made DCOs, see, for example, the SLP 2020 on which the definition in the Order is based, and Thorpe Marsh 2016.

- The definition of “maintain” has been added to the Order to make clear what is authorised under article 5. This is based on the wording used in SLP 2020, which was in turn based on the drafting of Thorpe Marsh 2016 and Silvertown 2018. The list of maintenance activities is considered appropriate since it affords the flexibility required to enable the undertaker to respond to the range of maintenance activities that may need to be undertaken during the lifetime of the authorised development. 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 precedented in article 2, Thorpe Marsh 2016. The power to divert the authorised development may be necessary in case of urgent maintenance works.
- “Order Limits” which means the red line boundary for authorised development as shown on the Works Plans **[EN070008/APP/4.2]** and the Lands Plans **[EN070008/APP/4.3]**.
- “scenario 1” and “scenario 2”. The scenario definitions have been included to set out clearly on the face of the Order the optionality that exists within the Order, Works Plans **[EN070008/APP/4.2]** and the Lands Plans **[EN070008/APP/4.3]** for the location of the Theddlethorpe Facility. The use of scenario definitions throughout the Order will provide clarity on what the undertaker needs to do to comply with the pre-commencement requirements. The definitions are also used in Part 1 (authorised development) of Schedule 1 to the Order to identify which works will be undertaken in each scenario.
- “Theddlethorpe Facility (Option 1)” and “Theddlethorpe Facility (Option 2)”. These definitions define the location of the two options for the Theddlethorpe Facility by reference to the Works Plans **[EN070008/APP/4.2]** and are referred to in the scenario definitions.

1.6.10 Article 2(2) expands the definition of rights over land. This was included in the model provisions as article 1(2).

1.6.11 Articles 2(3) and 2(4) define measurements as approximate. The purpose of this is to ensure that if upon construction of the works it transpires that the distances are marginally different to those listed in the Order, there is no issue over whether the Order permits the works. This provision therefore allows for a small tolerance, although all works will take place within the limits of deviation. It is now common practice to include such provision in development consent orders; the model provisions included similar wording in article 1(3) and similar wording is used in Hornsea Three 2020 and Norfolk Boreas 2021.

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

Part 2 - Principal powers

Article 3 – Development consent etc. granted by the Order

1.6.13 Article 3(1) grants the development consent by giving the applicant the power to construct the authorised development and any ancillary works within the Order Limits. Schedule 1 describes the authorised development.

1.6.14 Development consent is granted subject to the provisions of the Order, including the requirements listed in Schedule 2.

Article 4 – Operation and Use of the authorised development

- 1.6.15 Article 4 provides the principal power to use and operate the authorised development for the purpose for which it is designed. Article 4(2) provides authorisation to use the existing LOGGS pipeline for the conveyance of carbon dioxide. 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. The undertaker is the pipeline owner of the LOGGS pipeline.
- 1.6.16 Section 157(2) of the 2008 Act expressly allows the authorisation for use of a “building” for the purpose for which it is designed. However, the authorised development includes key elements, such as the pipeline, which are not buildings and therefore the clarification provided in this article is necessary. This wording was used in River Humber 2016.
- 1.6.17 This article confirms that the provisions of the Order shall not relieve the undertaker from the requirements of the Pipeline Safety Regulations 1996.

Article 5 – Maintenance of the authorised development

- 1.6.18 This provision adapts article 3 of the model provisions and authorises the undertaker to maintain the authorised development. The definition of “maintain” is explained above.
- 1.6.19 As noted at paragraph 6.9 above, this list of maintenance activities:
- is consistent with other made DCOs (see, in particular, the Thorpe Marsh Gas Pipeline Order 2016 and SLP 2020);
 - includes a number of the activities that could have been included in a pipeline construction authorisation under the 1962 Act; and
 - 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.

Article 6 - Limits of deviation

- 1.6.20 This article is broadly based on the wording of SLP 2020, with project specific changes.
- 1.6.21 Article 6 allows for both lateral and vertical limits of deviation in respect of the works. 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.
- 1.6.22 This article provides the undertaker with a proportionate degree of flexibility in constructing the authorised development, reducing the risk that the authorised 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 worse adverse environmental effects. The Environmental Statement considers the impact of the authorised development within the limits of deviation proposed.
- 1.6.23 The corridor of land within which the pipeline may be constructed, maintained or diverted under the Order is shown on the Works Plans **[EN070008/APP/4.2]** and constitutes the lateral limits of deviation for the pipeline works, as specified in Article 6(1)(a). The lateral limits of deviation which are sought under the Order attempt to strike a balance between minimising impacts on landowners, communities and important landscapes, archaeological and ecological features throughout the route of the authorised development on the one hand and the need for flexibility in selecting the final route of the pipeline on the other which is dependent, amongst other things, upon ground conditions in any given location.
- 1.6.24 The lateral limits of deviation (as shown on the Works Plans) are often contiguous with the Order Limits, although that is not always the case. typically extend to the approximately

100m wide. Notwithstanding the lateral limits of deviation shown on the works plans, it should also be noted that the undertaker has committed to a narrower working width in which construction will take place (generally 30m and generally 50m at crossings). The working arrangements to install the pipeline are more fully described in Chapter 3 of the Environmental Statement [EN070008/APP/6.2.3]. For the avoidance of doubt, no matter where the pipeline is located within the lateral limits of deviation, the working construction width will be fully located within the Order Limits.

- 1.6.25 The Works Plans do not include a 'centre line' in relation to the pipeline route. This is deliberate, as the applicant considers that a centre line would not serve any useful purpose on the Works Plans. The current preferred pipeline route does not follow the centre at certain locations within the Order Limits. It is considered that the lateral limits of deviation are sufficiently clear from areas shown on the Works Plans.
- 1.6.26 The lateral limits of deviation for valve works are the works area only. They may not extend outside the works area shown on the Works Plans [EN070008/APP/4.2]. The lateral limits of deviation for valves is based upon the need to locate the valve compound over the pipeline and thus the final location of the valve compound is not known at this time and will be dependent upon where the pipeline is installed within the lateral pipeline limits deviation.
- 1.6.27 There are two classes of vertical limits of deviation for the pipeline works: upwards and downwards.
- 1.6.28 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.
- 1.6.29 The downwards vertical limit of deviation in respect of those sections of the pipeline works which may be constructed using trenched construction methods is 5 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 deeper trenching will be required. These limits represent the lowest depths to which a trenching machine can excavate.
- 1.6.30 The downwards vertical limit of deviation in respect of those sections of pipeline works which may be constructed using trenchless construction methods is generally 6 metres below the surface of the ground to allow for the use of auger bore drilling and to pass safely beneath surface features such as roads, rivers and railways.
- 1.6.31 However, it is considered that several crossings may need to be deeper to protect the surface features or avoid interference with existing infrastructure. The undertaker's intention is to use auger bore as a trenchless crossing technique where possible, but there may be some instances where horizontal direction drilling is required. For example, crossings at North Beck Drain near Keelby and Louth Canal/River Ludd, near Alvingham, amongst others, will be up to a maximum of 20m depth. These deeper limits are required in order to allow the undertaker the flexibility to select the appropriate construction methodology, including trenchless techniques, most suitable to the location and constraints.
- 1.6.32 In respect of the valve works, the upwards vertical limits of deviation are as described in Schedule 1 to the Order. This article also allows a potential extension to the limits of deviation specified 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 worse environmental effects in comparison with those reported in the Environmental Statement. This provision appears in other made DCOs (see for example article 6 of the Testo's Junction 2018) and allows for unexpected ground conditions that

make it dangerous or unduly difficult to install within the stated limits of deviation. Any such exemption, if granted, would be constrained laterally by the Order Limits.

- 1.6.33 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

- 1.6.34 Article 7 overrides section 156(1) of the 2008 Act (as permitted by section 156(2)) to give the benefit of the Order to the undertaker, rather than anyone with an interest in the land. This is appropriate because the Order includes powers of compulsory acquisition that need to be backed by assurances regarding the ability of the undertaker to cover any compensation payable. In any event, it would be impractical for a variety of landowners to implement the Order.
- 1.6.35 This article allows the benefit of the Order to be transferred or leased to others by the undertaker. This article is necessary to allow the undertaker commercial freedom to sell or lease the authorised development while ensuring that the Secretary of State can control such sale or lease through the need to obtain their consent. Without the ability to transfer the benefit, no party but the undertaker could operate the authorised development without committing a criminal offence. This article is therefore necessary to ensure that the authorised development is fundable and could be sold or leased in the future.
- 1.6.36 The exercise of any transferred benefits or rights is subject to the same restrictions, liabilities and obligations as would apply under the Order if those benefits or rights were exercised by the undertaker.
- 1.6.37 This article is based on articles 4 and 5 of the model provisions.

Part 3 - Streets

Article 8 – Street works

- 1.6.38 This article provides that the undertaker may undertake works in, on or under the streets identified in Schedule 3 and which are within the Order Limits, for the purposes of the authorised development. The consent of the street authority is not required for these works. Article 8(1) sets out a non-exhaustive list of the street works that may be carried out by the undertaker.
- 1.6.39 The authority given by this article is a statutory right for the purposes of section 48(3) (streets, street works and undertakers) and section 51(1) (prohibition of unauthorised street works) of the New Roads and Street Works Act 1991 (the “**1991 Act**”), which means that the Order replaces the need to apply for a street works licence under that Act.
- 1.6.40 Articles 8(3) and 8(4) provide that, subject to the consent of the street authority, the undertaker may enter on so much of any other street whether or not within the Order limits, for the purposes of carrying out the works. Article 8(5) confirms that where a street authority fails to respond to an application for consent under article 8(4) within 28 days of the application being made, it is deemed to have given that consent. These provisions are considered necessary to enable the undertaker 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 authorised development, as provided for under section 120(5) of the 2008 Act.
- 1.6.41 Article 8(6) defines “apparatus” for the purposes of article 8. This has the same meaning as in part 3 of the 1991 Act, but is expanded to expressly include 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 8(1).

1.6.42 Article 8 is based on article 8 of the model provisions and is adapted with similar wording to that included in SLP 2020, River Humber 2016, and Thorp Marsh 2016.

Article 9 – Power to alter layout, etc. of streets

1.6.43 This article is not included in the model provisions but does appear in a similar form in a number of made DCOs (see for example SLP 2020 and River Humber 2016). The article is provided for under section 120(3) and (4) of the 2008 Act together with paragraph 15 of Part 1 of Schedule 5 to the 2008 Act, namely the carrying out of civil engineering or other works.

1.6.44 Article 9(1) would permit the undertaker to temporarily alter the layout of the streets listed in Schedule 3 (streets subject to street works) to the Order, in connection with the carrying out of the authorised development. The article also provides a power to carry out works in any of these streets.

1.6.45 Article 9(2) provides broader powers available for those streets not listed in Schedule 3, subject to the consent of the street authority, with such consent not to be unreasonably withheld or delayed as set out in 9(4). This enables the undertaker to acquire the necessary flexibility to alter streets which, at the date on which the Order is made, are not listed within Schedule 3. Article 9(2) also sets out a broad range of works that the undertaker 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). These provisions are considered necessary to enable the undertaker 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 authorised development, as provided for under section 120(5) of the 2008 Act. The range of activities provided for in article 9(2) can be found in other DCOs, for example SLP 2020 and River Humber 2016.

1.6.46 Article 9(3) ensures that any street temporarily altered must be restored to the reasonable satisfaction of the street authority.

1.6.47 Article 9(5) provides that where consent for the exercise of powers under paragraph (2) is not provided within 28 days of notification, the undertaker is to be treated as having been granted deemed consent.

Article 10 – Application of the 1991 Act

1.6.48 Article 10 provides for the application of the 1991 Act.

1.6.49 Paragraph (4) provides that certain provisions of the 1991 Act listed in that paragraph will not apply. In many cases, the exercise of the disapplied powers would be inappropriate to a project authorised by a DCO. For example, one of the powers is to direct undertakers to locate their works in a different street than that proposed (s56A). Where works are being carried out under permitted development rights that is not commonly problematic, however works under the Order are constrained by the Order Limits and what has been assessed in the Environmental Statement, and no consent would be in place to move the works outside of that envelope. It is therefore appropriate to be clear within the Order that this power cannot be applied in this case.

1.6.50 The disapplication of these provisions (which are designed primarily to regulate the carrying out of street works by utility companies in respect of their apparatus) is appropriate given the scale of works proposed under the Order, the specific authorisation given for those works by the Order and the specific provisions in the Order which regulate the carrying out of the Order works.

1.6.51 Although not included in the model provisions, this wording can be found in other DCOs, such as Hornsea Three 2020, SLP and 2020, Norfolk Boreas 2021 and Norfolk Vanguard 2022.

Article 11 – Temporary Restriction of public rights of way

1.6.52 This article is based on article 11 of the model provisions and allows for the temporary stopping up, alteration, diversion or restriction of public rights of way for the purposes of the authorised development. Similar wording can be found in SLP 2020.

Article 12 - Temporary Restriction of Use of Streets

1.6.53 This article allows for the temporary alteration, diversion or restriction of streets for the purposes of authorised development, whilst ensuring that essential pedestrian access to and from premises along that street is maintained if necessary (paragraph (3)). This power is required because may be necessary to be able to restrict the use of the street in order to allow installation of the pipeline. Closures and traffic management will also be required to facilitate the creation or improvement of junctions. Where possible and safe, closures for access junction works will be partial only and not close the full width of the carriageway. Further details on the access strategy and proposed mitigations, including notification of the general public, can be found in the Transport Assessment [EN070008/APP/6.4.12.4] and the Construction Traffic Management Plan [EN070008/APP/6.4.12.5].

1.6.54 Paragraph (2) confers a power on the undertaker where a street has been temporarily stopped up under this article to use it as a temporary working site. It is not anticipated that any street would be used as a working site except when undertaking works affecting the carriageway itself.

1.6.55 Paragraph (6) provides a right to compensation for any person suffering loss due to the suspension of a private right of way under this article. The undertaker is not aware of any private rights of way in streets however this article is retained as a precaution in the case that unidentified, extant title rights to take access exist along the same lines as the current public highway.

1.6.56 Paragraph (7) states that where the street authority fails to notify the undertaker of its decision in respect of an application for consent within 28 days of the application being made is deemed to have given its consent. This time limit is considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by the undertaker in a timely fashion. As a NSIP, the authorised development should not be at risk of being held up due to a failure to respond to an application for consent.

1.6.57 This provision has been included in numerous previous orders including River Humber 2016, North Shropshire 2020, Norfolk Vanguard 2022, Hornsea Three 2020, Richborough Connection Project 2017.

Article 13 – Access to Works

1.6.58 This article is adapted from article 12 of the model provisions and provides a general power to form and layout means of access to public highways within the Order Limits, with the consent of the street 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 authorised development.

1.6.59 Article 13(2) 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 the undertaker of its decision by the end of the period of 28 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 authorised development can be delivered by the undertaker in a timely manner.

1.6.60 This provision has precedent in other made development consent orders, including SLP 2020, Norfolk Boreas 2021.

Article 14 – Agreements with street authorities

- 1.6.61 This article is a provision relating to, or to matters ancillary to, the authorised development under section 120(3) of the 2008 Act and provides that the undertaker and street authorities may enter into agreements relating to various works on streets and bridges.
- 1.6.62 This list reflects article 14(1) of the model provisions, 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 River Humber 2016 and SLP 2020.
- 1.6.63 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.
- 1.6.64 Article 16(2) outlines what matters these agreements may address. This list covers the same matters as article 14(2) of the model provisions.

Article 15 – Use of private roads

- 1.6.65 This article authorises the temporary use 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 authorised development, without the need for the undertaker to acquire a permanent right of way over that land. Paragraph (2) clarifies that the undertaker will be liable for any loss or damage a person may suffer by reason of the exercise of this power.
- 1.6.66 This article does not create a right of the undertaker to exclude other users. This article has been based on article 13, SLP 2020.

Article 16 – Traffic regulation

- 1.6.67 This article provides that the undertaker may, with the consent of the relevant traffic authority, for the purposes of, or in connection with, the construction of the authorised development impose temporary and permanent traffic regulation orders (“TROs”). Paragraph (5) permits the removal of said TROs by the undertaker from time to time by subsequent exercise of the same power. Article 16(1) enables the undertaker to impose TROs in respect of any road for the purposes of the authorised 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.
- 1.6.68 Articles 16(2) and (3) set out a notification process whereby the applicant 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 the River Humber 2016.
- 1.6.69 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 the undertaker 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 the undertaker at any time, by subsequent exercise of those powers.
- 1.6.70 Article 16(7) confirms that where a traffic authority fails to respond to an application for consent under paragraph (1) within 28 days of receiving the application, it is deemed to have given its consent. This is to ensure that the undertaker can impose the TROs within a necessary timeframe to suitably control traffic along the specified roads, as necessary, during construction. As elsewhere, it is considered necessary to enable the undertaker 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.

1.6.71 Similar wording to this article is included in both River Humber 2016 and SLP 2020.

Part 4 - Supplemental powers

Article 17 – Discharge of water

1.6.72 This article establishes statutory authority for the undertaker to discharge water into any watercourse, public sewer or drain in connection with the carrying out or maintenance of the authorised development, subject to first obtaining the consent of the owner, who may impose reasonable conditions. Such consent cannot be unreasonably withheld. For the avoidance of doubt, this article does not permit the undertaker to discharge into private drains or sewers.

1.6.73 Paragraph (6) of the article requires the undertaker to take reasonably practicable steps to ensure that any water that is discharged is as free as may be practicable from gravel, soil or other solid substance, oil or matter in suspension.

1.6.74 This article is based on the model provisions and can be found in other DCOs including article 18 SLP 2020, article 15 North Shropshire 2020, and article 15 Norfolk Vanguard 2022.

Article 18 – Maintenance of drainage works

1.6.75 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 authorised development do not affect the existing allocation of responsibility for maintenance of those drains, unless this is agreed between the undertaker 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.

1.6.76 This provision does not feature in the model provisions but is well precedented (see for example article 5 SLP 2020, article 4 of the A14 Cambridge to Huntingdon Improvement Order 2016 and article 5 of the Testo's Junction Alteration Order 2018).

Article 19 – Authority to survey and investigate the land

1.6.77 This article is based on the model provisions and gives the undertaker the power to enter land for the purpose of surveying and investigating. It provides that the undertaker must give 14 days' notice before exercising the powers of entry. This is the same notice period as the model provisions provided for and aligns with the notice period in section 53(4) of the 2008 Act.

1.6.78 The power in the model provisions is extended to include 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 model provisions but reflects wording of section 53(3A) of the 2008 Act.

1.6.79 Trial holes cannot be made on a public highway without the consent of the highway authority or on a private street without the consent of a street authority, not to be unreasonably withheld or delayed.

1.6.80 Paragraph (6) sets out that compensation will be available for those owners and occupiers of the land for any loss or damage arising by reason of the exercise of the authority conferred by this article.

1.6.81 Paragraph (9) applies section 13 of the Compulsory Purchase Act 1965, thereby providing an enforcement mechanism (by way of a warrant) where entry onto land under the article is refused. This paragraph was included in article 16 the Silvertown Tunnel Order 2018 (Silvertown Tunnel) and article 19 of The Port of Tilbury Expansion Order 2019 (Port of Tilbury) as well as more recently in article 17 in each of Hornsea Three 2020 and article 16 of Norfolk Boreas 2021.

1.6.82 Similar wording to this article is approved in article 16 of Silvertown 2018, article 17 in Hornsea Three 2020, article 20 of the SLP 2020 and article 16 of Norfolk Boreas 2021.

Article 20 – Protective work to buildings

1.6.83 The purpose of this article is to allow the undertaker 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.

1.6.84 Paragraph (7) clarifies that compensation will be available to the owners and occupiers of any building or land in relation to which powers under this article have been exercised for any loss or damage arising to them by reason of the exercise of this article.

1.6.85 Paragraph (11) applies section 13 of the Compulsory Purchase Act 1965, thereby providing an enforcement mechanism (by way of a warrant) where entry onto land under the article is refused.

1.6.86 The drafting of this article has been based on article 15 of the model provisions, article 19 SLP 2020, and Richborough Connection Project 2017

Article 21 – Removal of human remains

1.6.87 This article requires the undertaker, before it carries out any development or works which will or may disturb any human remains, to remove those remains. This article is included on a precautionary basis in case human remains are discovered while carrying out the authorised development.

1.6.88 Without this article, authorisation from the appropriate Minister would be required to remove remains. The article sets out a process of notification of the discovery of remains and for their removal and reinternment or cremation. The removal of any remains is required to be carried out in accordance with any directions which may be given by the Secretary of State.

1.6.89 Article 21 follows article 17 of the model provisions and was included in Norfolk Boreas 2021 as article 17.

Part 5 - Powers of acquisition and possession of land

1.6.90 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 this Part of the DCO.

Article 22 – Compulsory acquisition of land

1.6.91 This article authorises the acquisition of land which is required to carry out, or facilitate or is incidental to, the authorised development. The land to be acquired is listed in the book of reference. The power of acquisition is qualified by articles 24 (compulsory acquisition of rights and restrictive covenants) and 33 (temporary use of land for carrying out the authorised development).

1.6.92 This article is based on article 28 of the model provisions and article 20 SLP 2020.

Article 23 – Time limit for exercise of authority to acquire land compulsorily

1.6.93 This article gives the undertaker five years to issue notices to treat or to execute a general vesting declaration to acquire the land that may be compulsorily acquired under the Order. These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should the Order be made. The article also sets a five-year time limit on the power to take temporary possession of land under article 26, although it does not prevent the undertaker from remaining in possession of land after that time so long as possession was taken within the five-year limit.

1.6.94 This article is included in the model provisions as article 20.

Article 24 – compulsory acquisition of rights and restrictive covenants

- 1.6.95 This article permits the undertaker to acquire such rights over land, or impose such restrictive covenants affecting the land, as may be required for any purpose for which that land may be acquired under article 22 (compulsory acquisition of land). These rights can be acquired by creating new rights, or acquiring pre-existing rights.
- 1.6.96 Paragraph (2) provides that for land described in Schedule 8, the undertaker's powers of compulsory acquisition are limited to the acquisition of such rights and the imposition of such restrictive covenants, as set out in that Schedule. Paragraph (3) provides that where the undertaker only needs to acquire rights over land it is not obliged to acquire any greater interest in that land.
- 1.6.97 Paragraph (4) applies Schedule 9, which imposes modifications to the compulsory purchase and compensation provisions under general legislation. They do not affect the entitlement to compensation, but generally ensure that the compensation code applies to the additional categories of acquisition covered by the Order and the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories (done to allow lesser land interests to be acquired).
- 1.6.98 The flexibility afforded by this article allows the undertaker to reduce the amount of freehold that that is acquired, where new, permanent rights can be relied on instead. The flexibility is also appropriate to allow for continued negotiations with owners of the Order Land. The provision broadly follows the model provisions and is a provision that is usual in Transport and Works Act Orders. An example can be found in Article 20 Norfolk Boreas 2021. The power to impose restrictive covenants will allow for the possibility of reducing the land subject to outright acquisition and thus enable a more proportionate exercise of compulsory powers. It is therefore in the public interest.
- 1.6.99 Article 24 is based on article 21 of the model provisions. It differs from the model provisions in the following respects:
- Paragraph (1) allows the undertaker to acquire existing rights and create new rights over any of the Order Land. Although the undertaker has sought to identify all of the plots which are to be subject to the acquisition or creation of rights and has set these out in Schedule 7, this provision ensures that the undertaker retains the flexibility to acquire or create rights over land where that land might otherwise have to be acquired outright.
 - Paragraph (2) is included to clarify that the land identified in Schedule 8 may only be subject to the acquisition or creation of rights or imposition of restrictive covenants, and may not be subject to outright acquisition.
 - Paragraph (3) refers to Schedule 2A of the Compulsory Purchase Act 1965, as modified by Schedule 8, rather than section 8 of the Compulsory Purchase Act 1965.

The effect is to limit the possible exceptions to this article to cases where part only of a house, building, factory, park or garden belonging to a house is being acquired.

- Paragraph (4) confirms that Schedule 9 has effect for the purpose of modifying compensation provisions to ensure that they apply to the compulsory acquisition or creation of rights, or imposition of restrictive covenants, under this article.
- Paragraphs (5) and (6) set out a mechanism for the transfer of rights to statutory undertakers with the consent of the secretary of state in circumstances where Order Land is required for the diversion or relocation of their apparatus.

Article 25 - Statutory authority to override easements and other rights

1.6.100 This article provides that by virtue of section 158 of the 2008 Act in carrying out or using the development authorised by the Order and doing anything else authorised by the Order, the undertaker may interfere with any easement, liberty, privilege, right or advantage annexed to land and affecting other land, including any natural right to support. It also provides that by virtue of section 152 of the 2008 Act compensation may be payable under section 10 of the Compulsory Purchase Act 1965 for any such interference or breach. This is not a model provision but is added to clarify the position regarding rights burdening land required for the authorised development.

1.6.101 Whilst not a model provision, this article has been approved in article 19 of North Shropshire 2020; article 25 of River Humber 2016 and article 19 of the Immingham Open Cycle Gas Turbine Order 2020.

Article 26 – Compulsory acquisition of land – minerals

1.6.102 This article incorporates Parts 2 and 3 of Schedule 2 (minerals) to the Acquisition of Land Act 1981 to any land acquired by the undertaker that may contain mines and minerals. The effect of this provision is that the undertaker is prevented from acquiring the rights to any mines and minerals underneath the acquired land, unless expressly purchased, and provides mine owners with the ability to work the mines and extract minerals, subject to restrictions.

1.6.103 This article is based on article 19 of the model provisions, and has been approved in a number of DCOs, including article 22 of SLP 2020.

Article 27 – Private rights

1.6.104 This article provides for the extinguishment of private rights over land that is subject to compulsory acquisition pursuant to the Order. In so far as the undertaker acquires land or creates new rights over land under the Order, where the continuance of private rights over that land would be inconsistent with the exercise of the right being acquired or created then the private rights in question will be extinguished.

1.6.105 Paragraph (2) provides that rights over the Order Land that is already owned by the undertaker are extinguished on commencement of any activity authorised by the Order which interferes with or breaches those rights.

1.6.106 Paragraph (3) provides that all private rights over land which the undertaker takes temporary possession of under the Order will be suspended and unenforceable for as long as the undertaker remains in lawful possession of the land.

1.6.107 Paragraphs (4) to (8) make provision for compensation and for circumstances where rights are preserved.

1.6.108 Article 27 is based on article 22 of the model provisions. It differs from the model provisions in the following respects:

- It applies to all private rights, not just private rights of way. This is to reflect the broad nature of private rights that may exist over the Order Land including easements.
- Paragraph (2) is included to confirm that where land is subject to the acquisition or creation of rights or the imposition of restrictive covenants, any other rights in that land are extinguished if their continuance would be incompatible with the right or covenant being acquired or created by the undertaker.

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

Article 28 – Application of the 1981 Act

1.6.110 This article applies (with minor modifications to ensure consistency between the terms of the Order and the 1981 Act) the provisions of the Compulsory Purchase (Vesting Declarations) Act 1981 to compulsory acquisition under the Order so that the undertaker has the option to acquire land via the vesting declarations procedure.

1.6.111 Vesting declarations are one of two ways of acquiring land that is subject to compulsory purchase (the other being by means of a notice to treat). They allow several parcels to be acquired at once and therefore more efficiently than under the notice to treat procedure.

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

- Paragraph (3) modifies section 1(2) so that section 1 applies to the undertaker.
- Paragraph (4) modifies section 5 to remove the reference to situations where the compulsory purchase order is subject to special parliamentary procedure.
- Paragraph (5) omits section 5A, on the basis that the Order prescribes the time limit for compulsory acquisition in article 23.
- Paragraph (6) modifies the statutory reference in section 5B(1), on the basis that the 2008 Act contains equivalent provisions that apply in respect of development consent orders. The cross-reference to section 5A is also modified, to reflect that the time limit is set out in article 23.
- Paragraph (7) modifies the statutory references in section 6(1)(b), on the basis that the 2008 Act contains equivalent provisions that apply in respect of development consent orders.
- Paragraph (9) modifies paragraph 1(2) of Schedule A1 to change the reference to compulsory purchase orders excluding land that is 9 metres or more below the surface from the counter-notice procedure.
- Paragraph (10) clarifies that references to the Compulsory Purchase Act 1965 in the 1981 Act are to be construed as references to the 1965 Act as applied by section 125 of the 2008 Act and as modified by article 29, on the basis that both section 125 and article 29 modify the provisions of the 1965 Act.

1.6.113 Article 28 is based on article 23 of the model provisions. Due to extensive changes to the relevant provisions of the 1981 Act since the model provisions came into force, the wording of this article departs significantly from the model provisions. The drafting of this article follows article 22 of Hornsea Three 2020, article 22 of Norfolk Boreas 2021 and article 22 of Norfolk Vanguard 2022.

Article 29 - Acquisition of subsoil or airspace only

1.6.114 This article allows the undertaker to acquire, or acquire or create rights in, the subsoil below land or the airspace over land, rather than having to acquire the land itself. In certain cases, it may be necessary only to acquire a stratum of land below the surface and in the absence of this article the undertaker would be obliged to acquire the whole interest in the land. This

article also authorises the undertaker to acquire interests in or rights over airspace a certain height above ground.

1.6.115 The purpose of article 29 is to give the undertaker the flexibility to minimise so far as is possible the extent of interests to be acquired, with consequently less impact on landowners, which is in the public interest.

1.6.116 This article is based on article 24 of the model provisions in relation to subsoil acquisition but differs by the inclusion of airspace. This approach is preceded in article 28 of SLP 2020, and article 24 of each of Norfolk Boreas 2021 and Norfolk Vanguard 2022.

Article 30 – Modifications of Part 1 of the 1965 Act

1.6.117 This article applies Part 1 of the Compulsory Purchase Act 1965 to the Order with certain modifications in relation to section 125 of the 2008 Act. This provision reflects changes introduced by the Housing and Planning Act 2016. Paragraphs (1) to (3) amend the provisions of the Compulsory Purchase Act 1965 so that they are consistent with the terms of the Order. In addition, the article also reflects recent amendments to the Compulsory Purchase Act 1965 providing that where the making of the Order is subject to a statutory challenge, the deadline for the exercise of compulsory acquisition powers under the Compulsory Purchase Act 1965 is increased by a period equivalent to the period beginning with the day the application is made, and ending on the day it is withdrawn or finally determined (or if shorter, one year).

1.6.118 This article appears in many DCOs, an example of which is article 26 SLP 2020.

Article 31 - Rights under or over streets

1.6.119 The purpose of this article is to allow the undertaker to appropriate and use land above or below streets within the Order Limits, without having to acquire the street or any right or easement in it. The exercise of this power, without acquisition, is prohibited in the circumstances set out in paragraph (3). Compensation is payable for any loss or damage caused to an owner or occupier of land affected by the power of appropriation where no acquisition has taken place.

1.6.120 The authorised development crosses streets and creates new accesses onto existing streets in several places. This article allows those works to be undertaken without interfering with the ownership of land under and above streets which is often separately held from the highway authority interest in the street itself.

1.6.121 This article was included in the model provisions as article 27 and is generally included in DCOs, including in article 29 of SLP 2020 and article 25 of each of Norfolk Boreas 2021.

Article 32 – Temporary use of land for carrying out the authorised development

1.6.122 The purpose of this article is to allow the land set out in Schedule 9 to be occupied temporarily while the works are carried out. This is land which is required during construction of the authorised development but which is not required permanently. Article 32 also allows for the temporary occupation of any of the land intended for permanent acquisition that has not yet been acquired.

1.6.123 The article is based on article 28 of the model provisions, with a number of modifications:

- First, the ability to occupy land temporarily that is subject to powers of permanent acquisition but that has not yet been acquired (paragraph (1)(a)(ii)) has been added. This allows the undertaker to occupy land without having to acquire it immediately and allows for permanent acquisition of land for the as-built scheme. This enables a more proportionate exercise of compulsory powers and is therefore in the public interest.
- Secondly, paragraph (1)(e) has been added so that permanent works specified in column (2) of Schedule 7, and any other permanent mitigation works in connection

with the authorised development, may be left on land that has been temporarily occupied, rather than having to acquire such land for this purpose. The intended scope of 'mitigation works' is any permanent works necessary and appropriate to mitigate the impacts of the authorised development (e.g. landscaping or ecological mitigation works).

- Thirdly, paragraph (2) requires at least 28 days' notice of entry to be served on the owners and occupiers, which is an extension on the 14-day period included in the model provisions.

Article 33 – Temporary use of land for maintaining the authorised development

1.6.124 This article provides that the undertaker may take temporary possession of land within the Order Limits, as required for the purpose of maintaining the authorised development.

1.6.125 Paragraph (1)(b) authorises the construction of such temporary works and buildings on the land as may be reasonably necessary for that purpose. Under paragraph (5) all temporary works must be removed before the undertaker gives up possession under this article and the land must be restored to the reasonable satisfaction of the owners.

1.6.126 This power does not apply in relation to houses, gardens or any other buildings for the time being occupied (paragraph (2)).

1.6.127 Paragraph (3) requires at least 28 days' notice of intended entry to be served on the owners and occupiers of the land in question.

1.6.128 Paragraphs (6) to (8) provide for compensation to be paid to owners and occupiers of land of which temporary possession is taken under this article.

1.6.129 This article was included in the model provisions as article 29 and in Hornsea Three 2020 as article 27 and Norfolk Vanguard 2022 as article 27.

Article 34 – Statutory undertakers

1.6.130 This article allows the undertaker to extinguish rights of statutory undertakers and remove and reposition their apparatus. Reference is made to the Order Land so that this power is not restricted to apparatus which has been specifically shown on the Land Plans **[EN070008/APP/4.3]** and described in the Book of Reference **[EN070008/APP/3.3]**. In practice it is impractical to show and describe all such apparatus and so a general power for the extinguishment of rights and the removal or relocation of apparatus belonging to statutory undertakers over or within any of the Order Land is required.

1.6.131 As the land over which this power may be exercised is shown on the Land Plans **[EN070008/APP/4.3]**, and the beneficiaries of such rights are described in the Book of Reference **[EN070008/APP/3.3]** the requirements of Regulations 5(2)(i)(iii) and 7(1)(c) of the APFP Regulations are satisfied.

1.6.132 This article is based on article 31 of the model provisions. It differs from the model provisions in that the article is expressed to be subject to the protective provisions in Schedule 10 of the Order.

Article 35 – Recovery of costs of new connections

1.6.133 This article provides that if any statutory undertaker's apparatus is removed and this halts a supply from that apparatus to owners or occupiers of premises such that they have to seek a connection to other apparatus, then their reasonable costs in obtaining a new supply can be claimed from the undertaker.

1.6.134 This article was included in the model provisions as article 33.

Part 6 - Miscellaneous and general

Article 36 - Application and modification of legislative provisions

- 1.6.135 This article provides for the disapplication of certain requirements which would otherwise apply under public general legislation, as well as local legislation as authorised by section 120(5)(a) of the 2008 Act (what may be included in order granting development consent). Section 120(5)(a) of the 2008 Act 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.
- 1.6.136 Article 36(1)(a) to (d) disapplies the requirement for various consents which would otherwise be required from the Environment Agency and relevant drainage authorities. Specifically, these are the requirements for consents for the placing of structures on, over or under rivers, the construction of culverts, together with the requirements for approval under flood defence and land drainage byelaws. These are consents for activities which may be a necessary part of constructing the authorised development. To provide certainty that the authorised development can proceed, the Order disapplies the requirement for separate statutory consents to be obtained in relation to these activities. These provisions were included in Hornsea Three 2020, Norfolk Boreas 2021 and Norfolk Vanguard 2020.
- 1.6.137 Article 36(1)(e) disapplies the provisions of the Neighbourhood Planning Act 2017 (the “**2017 Act**”) relating to the temporary possession of land. This is on the basis that the temporary possession of land is dealt with by articles 32 and 33 and the wording of those provisions is well established. The 2017 Act provisions differ from those in the Order and are untested, as they are not yet in force. It is therefore necessary to disapply them in case they should come into force in the future. This disapplication was approved in SLP 2020, Hornsea Three 2020 and Norfolk Boreas 2021.

Article 37 – Defence to Proceedings in respect of Statutory Nuisance

- 1.6.138 Section 158 of the 2008 Act confers statutory authority for the purposes of a defence in civil or criminal proceedings for nuisance. This article provides a defence to proceedings brought in a magistrates’ court under section 82(1) of the Environmental Protection Act 1990 in relation to certain nuisances set out in paragraph 79(1) of that Act.
- 1.6.139 A broad defence to civil and criminal proceedings for nuisance is provided by section 158 of the 2008 Act. However, the view taken under the NSIP regime is that section 158 does not extend to the rare situation by which if, somebody considers that the local authority ought to be tackling a nuisance using its statutory nuisance powers, but it is not, that person may apply to the magistrates’ court under section 82 of the Environmental Protection Act 1990. Accordingly, this article is seeking to fill in a legislative gap by extending the effect of section 158.
- 1.6.140 As section 158 does not distinguish between different types of nuisance, the logical position is that this article should apply to all categories of nuisance. However, as a matter of practice other NSIPs have been more discriminating and have asked whether there is any possibility of a statutory nuisance occurring, leading to specific types of nuisance being referred to. The undertaker has followed this approach by seeking to restrict the application of this article so that it only applies to nuisances that have been identified as potentially resulting from the authorised development, as set out in the Statutory Nuisances Statement (EN070008/APP/6.6) accompanying the application. This ensures that this article is focused only on those nuisances that may be of relevance, whilst also reflecting the logic and correct interpretation of section 158.
- 1.6.141 The defence is available if the nuisance relates to:
- the use of premises by the undertaker for the purposes of or in connection with the construction or maintenance of the project and is attributable to the carrying out of the

project in accordance with a notice served, or consent given, under the Control of Pollution Act 1974; or

- the construction, maintenance or use of the project and cannot reasonably be avoided.

1.6.142 This article is based on article 7 of the model provisions and recent orders including SLP 2020, Hornsea Three 2020 and Norfolk Boreas 2021. The references to section 65 of the Control of Pollution Act 1974 are omitted because that section has been repealed.

Article 38 – Application of landlord and tenant law

1.6.143 This article provides that any agreement for the transfer of the benefit of the Order overrides landlord and tenant law so far as it would prejudice the operation of any agreement for leasing the whole of the authorised development or the right to operate it.

1.6.144 This article follows article 35 of the model provisions and is generally included in DCOs.

Article 39 – Felling or lopping of trees and removal of hedgerows

1.6.145 This article allows any tree or shrub that is near the authorised development to be felled or lopped, or have its roots cut back, if it is considered to obstruct the construction, operation or maintenance of the authorised project or endanger anyone using it. Compensation is payable for any loss or damage caused.

1.6.146 Further, this article also authorises the removal of any hedgerow as defined in the Hedgerow Regulations 1997. The authorised project includes the removal of a number of hedgerows. This article is based on article 39 of the model provisions and recent DCOs for offshore generating stations including article 34 of Hornsea Three 2020 and article 35 of Norfolk Boreas 2021.

Article 40 – Trees subject to Tree Preservation Orders

1.6.147 This article provides that the undertaker may fell or lop or cut back the roots of any tree which is subject to a tree preservation order or shrub to prevent it obstructing or interfering with the construction, maintenance or operation of the authorised development. Compensation is provided for if loss or damage is caused.

1.6.148 The article is based on article 40 of the model provisions, save that the article applies generally to any tree subject to a tree preservation order made before and after the date of the Order coming into effect and either within or overhanging the Order Limits. Similar provision has been made in recent orders, including article 35 of Hornsea Three 2020.

Article 41 – Crown rights

1.6.149 This article was not included in the model provisions, but it reflects the terms of section 135 of the 2008 Act and is also precedented. It has been used in many made orders, including SLP 2020, Hornsea Three 2020 and Norfolk Boreas 2021.

Article 42 – Protective Provisions

1.6.150 This article gives effect to Schedule 9, which contains provisions protecting the interests of third parties. It was not included in the model provisions but is a standard article in development consent orders that include protective provisions.

Article 43 – Operational land for the purposes of the Town and Country Planning Act 1990

1.6.151 The effect of this article is that the land within the Order Limits is to be treated as the operational land of a statutory undertaker for the purposes of the Town and Country Planning Act 1990. Although section 264 of the 1990 Act is entitled “cases in which land is to be treated as not being operational land”, subsections (3) and (4) set out cases in which land is to be treated as operational land.

1.6.152 This article was included in the model provisions as article 36. This article is necessary to ensure that development is correctly classified under the Town and Country Planning Act 1990 and benefits from the appropriate permitted development rights.

Article 44 – Certification of documents, etc.

1.6.153 This article provides for various application plans and documents listed to be certified by the Secretary of State as true copies of those documents following the making of the Order. This is based on article 41 of the model provisions.

Article 45 – Service of notices

1.6.154 This article governs the service of notices required to be given under the Order. In particular it allows service by email with the consent of the recipient (paragraph (1)(c)), and deals with the situation of service on an unknown landowner (paragraph (4)).

1.6.155 This article was not included in the model provisions but is a sensible addition that has been included in previous similar orders for example, article 44 of Hornsea Three 2020 and article 43 of Norfolk Boreas 2021.

Article 46 – No double recovery

1.6.156 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.

1.6.157 This is not a model provision but has precedent in numerous DCOs, including article 31 of River Humber 2016 and article 36 of Thorpe Marsh 2016.

Article 47 Requirements, appeals etc.

1.6.158 This article provides for an appeal process for the refusal or non-determination of any details under a requirement by the relevant planning authority. It also provides a time limit for a decision by the relevant planning authority on the submission of any details submitted pursuant to a requirement. The details of the appeal procedure are provided in Schedule 2. It is required to ensure that subsequent applications for approval are determined appropriately.

1.6.159 This provision has precedent in the Hinkley Point C (Nuclear Generating Station) Order 2013 and the West Burton C (Gas Fired Generating Station) Order 2020.

Article 48 – Arbitration

1.6.160 This article governs any disagreement about any provision of the Order. Unless the Upper Tribunal (Lands Chamber) has jurisdiction the matter is to be settled by arbitration. If the parties cannot agree on who the arbitrator should be then this will be decided by the Secretary of State.

1.6.161 An arbitration article was included in the model provisions as article 42. This article departs from the model provisions in that it applies Schedule 10 which sets out more detailed rules and a process for arbitration in order to provide greater certainty to all parties involved in the process who may rely on this provision. A similar approach has been taken in recent DCOs including Hornsea Three 2020 and Norfolk Boreas 2021.

SCHEDULES

Schedule 1 – Authorised development

1.6.162 Schedule 1 specifies the authorised development, which is described in detail in Chapter 3 of the Environmental Statement [EN070008/APP/6.2.3] by reference to numbered works and the Works Plan [EN070008/APP/4.2]. Schedule 1 also includes descriptions of the associated and ancillary development for the purposes of each project.

Schedule 2 - Requirements

- 1.6.163 The requirements in Schedule 2 of the Order are the equivalent of planning conditions. They apply to the construction and operation of the authorised development and reflect the processes and procedures usually employed by the undertaker when implementing a project such as this.
- 1.6.164 The requirements provide that the various details and plans to be approved must, where appropriate, reflect the mitigation measures included in the Environmental Statement. The requirements also provide that the approved details and plans must be implemented as approved, unless further amendments to them are approved.
- 1.6.165 **Requirement 1 (interpretation):** This provides definitions for terms which are only used in the requirements and are accordingly not defined in article 2.
- 1.6.166 **Requirement 2 (time limits):** This requirement specifies that the time limit for commencing the authorised development as being five years from the date on which the Order comes into force. It is included in the model provisions and can be found as requirement 2 in SLP 2020, requirement 3 River Humber 2016.
- 1.6.167 **Requirement 3 (stages of the authorised development):** This requirement sets out that the undertaker must give notice to the relevant planning authority setting out which scheme will be implemented before the works commence. It also provides for the production and submission to the relevant planning authority of a staging plan for the authorised development which is relevant to that authority before development commences. It varies from the model provisions in so far as it only requires the submission of the relevant plan to the relevant authority rather than the agreement of the relevant authority. Similar wording can be found in requirement 3 SLP 2020, requirement 3 River Humber 2016, requirement 15 Norfolk Vanguard 2022, and requirement 6 Hornsea Three 2020.
- 1.6.168 **Requirement 4 (scheme design):** This requirement is an adaptation of the equivalent requirement in the model provisions. It provides for above ground works to be carried out in general accordance with the general arrangement plans. This allows the necessary but proportionate degree of flexibility in the construction of the authorised development. Definitive designs are not possible to produce at this stage. Similar wording can be found in requirement 4 SLP 2020, requirement 4 River Humber 2016, and requirement 5 North Shropshire 2020.
- 1.6.169 **Requirement 5 (construction environmental management plan):** This requirement is a modification of requirement 17 of the model provisions. It provides that construction works shall be carried out in accordance with a construction environmental management plan, an outline of which is submitted with the application (EN070008/APP/1.3). The construction environmental management plan implements many of the measures and commitments set out in the register of environmental actions and commitments. Similar wording can be found in requirement 6 SLP 2020, requirement 20 Norfolk Vanguard 2022, and requirement 17 Hornsea Three 2020, requirement 9 North Shropshire 2016, and requirement 5 Richborough Connection Project 2017.
- 1.6.170 **Requirement 6 (construction traffic):** This requirement provides that the authorised development must not commence until a construction traffic management plan (see [EN070008/APP/6.4.12.5]) has been submitted to and approved in writing by the relevant highway authority. This requirement is not in the model provisions, however, similar wording can be found in requirement 7 SLP 2020, requirement 15 River Humber 2016, and requirement 6 Hornsea Three 2020.
- 1.6.171 **Requirement 7 (highway access):** This requirement provides that construction of any new permanent or temporary means of access to a highway, or alteration, or use of an existing means of access to a highway, shall not commence until an access plan for that access has

been submitted to and approved by the relevant highway authority. This requirement is an adaptation of requirement 10 of the model provisions and similar wording can be found in requirement 11 Hornsea Three 2020.

- 1.6.172 **Requirement 8 (surface water drainage):** This provides that, where surface water drainage strategies have been produced for the listed works, those works may not commence until details of the surface water drainage system for that work has been approved by the relevant planning authority.
- 1.6.173 **Requirement 9 (contaminated land and groundwater):** The requirement 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. 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. This is a modification of requirement 15 of the model provisions. Similar drafting can be found at requirement 10 of SLP 2020.
- 1.6.174 **Requirement 10 (archaeology):** This requirement ensures that the authorised development is constructed in accordance with the Outline Archaeological Written Scheme of Investigation [EN070008/APP/6.4.8.1]. No stage of construction must commence until a written scheme of investigation for areas of archaeological interest within that stage has been submitted to and approved by the relevant planning authority. Any archaeological works carried out under the scheme must be carried out by a suitably qualified and registered person or body. This is a modification of requirement 16 of the model provisions.
- 1.6.175 **Requirement 11 (landscape and ecological management plan):** This requirement provides that no stage of the authorised development that includes landscape and ecological management measures, must commence until a landscape and ecological management plan (“LEMP”), for that stage, in accordance with the outline LEMP [EN070008/APP/6.8], has been submitted to and approved by the relevant planning authority. This is a modification of requirement 17 of the model provisions and can be found in other DCOs such as requirement 12 SLP 2020, and requirement 9 Richborough Connection Project 2017.
- 1.6.176 **Requirement 12 (ecological surveys):** This requirement provides that no stage of the authorised development may be commenced until a final pre-construction survey has been carried out for that stage to establish whether there are any European protected species present, or likely to be affected by the works. Where such species are found, licences may be required for the works and will have to be obtained under separate statutory provisions. Similar wording can be found in requirement 28 of Norfolk Vanguard 2022, and requirement 19 River Humber 2016.
- 1.6.177 **Requirement 13 (construction hours):** This requirement 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. This requirement is included in the model provisions, and the wording of this requirement can be found in other DCOs such as requirement 14 SLP 2020.
- 1.6.178 **Requirement 14 (restoration of land):** The requirement requires that any land used temporarily for construction must be reinstated to a condition fit for its former use within 12 months of the completion of the authorised development. This requirement follows requirement 35 of the model provisions. Similar wording can be found in requirement 16 River Humber 2016, requirement 20 Hornsea Three 2020. The model provisions require reinstatement of land to its “former condition”, however, like River Humber 2020 this Order provides for the reinstatement to a “condition fit for its former use”, which reflects that immaterial changes that do not affect continuance of former use do not need to be dealt

with. The requirement also allows for 12 months for reinstatement rather than 6 months, this is to allow “winterisation” to protect soil structure. This approach was also taken in River Humber 2020.

- 1.6.179 **Requirement 15 (operational and maintenance environmental management plan):** This requirement provides that the operational and maintenance environmental management plan must be submitted for the post-construction phase.
- 1.6.180 **Requirement 16 (decommissioning environmental management plan):** This requires the submission for approval of a decommissioning management plan no less than six months before the intended start of decommissioning.
- 1.6.181 **Requirements 17 to 19 – Administrative:** Requirements 17, 18 and 19 concern the administration of discharges of requirements, providing that these must be in writing (requirement 17), may be amended (requirement 18) and that any work commenced on those discharges before the Order comes into force will be valid steps for compliance with the Order (requirement 19).
- 1.6.182 **Part 2 of Schedule 2 (Procedure for Discharge of Requirements):** This Part provides a clear procedure for the discharge of requirements. It sets out how approvals are to be given, treatment of amendments, the requirement to keep a register of requirements, 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 authorised development as an NSIP. Part 2 reflects the processes that have been established in a number of other DCOs including SLP 2020, River Humber 2016, Norfolk Vanguard 2022, Hornsea Three 2020, North Shropshire 2020.

Schedule 3 - Streets subject to street works

- 1.6.183 This schedule sets out those streets which are to be subject to street works.

Schedule 4 – New means of access

- 1.6.184 This schedule lists the new private means of access which will be created as part of the authorised development. The details of new accesses from adopted highways will require to be approved by the relevant planning authority under requirement 7 before works on those accesses can commence.

Schedule 5 – Public rights of way to be temporarily restricted

- 1.6.185 This schedule lists the public rights of way, such as footpaths and bridleways, to be temporarily restricted. Where a right of way is to be temporarily stopped up, a diversion within the Order Limits will be provided wherever practical.

Schedule 6 – Land of which only temporary possession may be taken

- 1.6.186 This schedule lists the plot of which the undertaker may only take temporary possession and cannot acquire rights or ownership of the land.

Schedule 7 – Land in which only new rights etc. may be acquired

- 1.6.187 This schedule lists the plots within which the undertaker may only acquire rights and cannot acquire ownership. The rights which the undertaker may acquire are set out in Column (2). Restrictive covenants are also to be imposed to protect the pipeline, to ensure that planting or habitat works carried out by the undertaker can be retained and maintained for the required period and to prevent future construction on land required for drainage.

Schedule 8 – Modification of Compensation and compulsory purchase enactments for creation of new rights

1.6.188 This schedule modifies existing compensation legislation including the Land Compensation Act 1973 and the Compulsory Purchase Act 1965 to provide for the acquisition of rights and imposition of restrictive covenants as well as acquisition of ownership of the land.

Schedule 9 – Protective Provisions

1.6.189 This schedule sets out a number of protections for various bodies to ensure that the powers sought in the Order are exercised appropriately.

1.6.190 Protections for utilities are routinely included in orders and are set out in Part 1.

1.6.191 Protections for electronic communication code providers are routinely included in orders and are set out at Part 2.

1.6.192 The undertaker is currently negotiating additional protective protections with a number of statutory undertakers. Draft versions of each parties' protective provisions are included in Schedule 9 as set out below but are subject to further change prior to and during Examination.

- Part 1 provides for the protection of electricity, gas, water and sewerage undertakers.
- Part 2 provides for the protection operators of electronic communications code networks.
- Part 3 provides for the protection of National Grid Electricity Transmission plc as electricity undertaker.
- Part 4 provides for the protection of National Gas Transmission plc as gas undertaker.
- Part 5 provides for the protection of Cadent Gas Limited.
- Part 6 provides for the protection of Railway Interests.
- Part 7 provides for the protection of the Environment Agency.
- Part 8 provides for the protection of Northern Powergrid Limited.
- Part 9 provides for the protection of National Highways Limited.
- Part 10 provides for the protection of Anglian Water.

1.6.193 Those provisions are not yet agreed with the named parties and negotiation of those is ongoing.

Schedule 10 – Arbitration Rules

1.6.194 This Schedule provides an arbitration process. It is considered that this approach will provide greater certainty to all parties involved in the process and is preferential to the approach adopted in the model provisions. This is preceded in other recent DCOs including Hornsea Three 2020 and Norfolk Boreas 2021.