

1 Introduction

1.1 Overview

- 1.1.1. This memorandum accompanies an application for development consent ("**Application**") by the Highways Agency (the "**Agency**") (which has now become the Highways England Company Limited, known as "**Highways England**"). The memorandum explains the purpose and effect of each article of, and Schedule to, the proposed M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order ("**Order**") as required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009.
- 1.1.2. It also highlights and explains the purpose and effect of any departures from the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 ("**Model Provisions**") as recommended by Planning Inspectorate Advice Note 13 Preparation of a draft order granting development consent and explanatory memorandum. It is noted that this advice does not constitute formal guidance to which regard must be had under section 50 of the Planning Act 2008 ("**PA 2008**") and that the Localism Act 2011 removed the requirement for the decision-maker to have regard to the prescribed Model Provisions in deciding an application for development consent. Nevertheless, as stated by the Planning Inspectorate in Advice Note 13, the Model Provisions are intended as a guide for applicants in drafting orders, rather than a rigid structure, and have been treated as such.
- 1.1.3. The Order is based on the Model Provisions but occasionally departs from those clauses and draws from and reflects the drafting used in previous development consent orders.

1.2 The Purpose of the Order

- 1.2.1 Highways England is applying to the Secretary of State for Transport ("**Secretary of State**") for development consent to authorise the improvement of the M4 Motorway between Junctions 3 and 12 to upgrade it to a smart motorway ("**Scheme**"). The Scheme is 51km (32 miles) in length, between junctions 3 and 12, and will have a number of principal elements:
 - a) conversion of the hard shoulder to a permanent running lane and, where no hard shoulder is in place at present, the construction of a new lane. This will mainly take place between junctions 4b and 8/9;

- b) replacement of overbridge structures that are too narrow to accommodate the improved motorway;
- c) extension of underbridges and other structures such as culverts and subways to accommodate the improved motorway;
- d) changes to junctions and slip roads needed to accommodate the improved motorway, and use of the hard shoulder as a running lane, as well as allowing "through junction running";
- e) provision of new gantries and signs to allow the motorway to function as a smart motorway with a variable speed limit, and to provide messages to road users; and
- f) other infrastructure needed for the improved motorway, such as enhanced communication systems, closed circuit television and electrical supplies, as well as works to accommodate statutory undertakers and other parties who may be affected by the Scheme.

1.2.2 As of 1 April 2015, the functions of the Agency were transferred to Highways England, a government owned company with the Secretary of State as sole shareholder. Consequently, the Order has been drafted with Highways England as the named undertaker with the benefit of the Order (the "**undertaker**").

1.2.3 The Order seeks powers compulsorily, or by agreement, to acquire land or rights in land pursuant to section 120 of the PA 2008.

1.2.4 The Order also seeks powers under sections 120(3) and (4) and Part 1 of Schedule 5, paragraph 2, to the PA 2008 to authorise the creation, extinguishment and interference with interests in or rights over land.

1.2.5 The Scheme lies wholly within England and includes the alteration and improvement of a highway for which the Secretary of State is the highway authority. The area of development for the Scheme is greater than 15 hectares, and the improvement of the highway is likely to have a significant effect on the environment. As such, the Scheme is classified as a nationally significant infrastructure project ("NSIP") for the purposes of sections 14(1)(h) and 22 of the PA 2008. Under section 37 of the PA 2008, an application for development consent is required to authorise the alteration or improvement of such a highway. Consequently, Highways England has made the Application to the Secretary of State (by way of the Planning Inspectorate) of which the Order forms part.

1.2.6 Schedule 1 to the Order contains a list of numbered works comprising the Scheme.

1.3 Compulsory acquisition powers

1.3.1 The Order also seeks powers of compulsory acquisition of land required for the Scheme or to facilitate, or that is incidental to, the Scheme under section 122 of the PA 2008. It also seeks associated powers including the acquisition of rights to construct and maintain the Scheme. A justification for these powers is set out in full in the Statement of Reasons that accompanies the Application.

1.3.2 The Order also seeks to apply and modify statutory provisions in relation to the compulsory acquisition of land. For this reason, under sections 117 and 120(5) of the PA 2008, the Order must be made by Statutory Instrument. The Order is, therefore, drafted in that form and complies with current requirements for formatting of Statutory Instruments.

PART 1 - PRELIMINARY

Articles 1 and 2 of the Order contain preliminary provisions.

Article 1 (Citation and Commencement) provides for the commencement and citation of the Order.

Article 2 (Interpretation) provides for the interpretation of the Order. Amongst other things, this Article defines "maintain" as including inspect, repair, adjust, alter, remove, clear, refurbish, reconstruct, decommission, replace and improve. This provides for greater clarity elsewhere in the Order in relation to the powers of the undertaker. A definition of "commence" has also been inserted to clarify the preliminary works that may be carried out before the authorised development can be said to be commenced.

The 'Order land' is defined so as to include the words "or used permanently or temporarily". This is the usual term for land involved in the Scheme, some of which may only be used temporarily rather than acquired. A definition of 'slip roads' has been included. This is based on the definition used in Temporary Traffic Regulation Orders and is therefore accepted drafting practice.

Article 2(2) expands the definition of rights over land and clarifies the purpose of the power within the Order to impose restrictive covenants.

Article 2(3) defines 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 DCO, then there is no issue over whether the works are permitted by the DCO. As such, this provision allows for a small tolerance with respect to any distances and points, although all works will take place within the limits of deviation. It is commonplace to include such a provision in an Act or instrument authorising linear infrastructure and there is longstanding precedent - see, for example, section 56(5)(c) of the Crossrail Act 2008. In addition, the Rookery South (Resource Recovery Facility) Order 2011 includes this provision at Article 2(4), as does the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 at Article 2(3).

Article 2(4) provides that areas given in the book of reference are approximate, since these are not covered in Article 2(3). This is intended to clarify the position of the areas in the book of reference, and the purpose and effect is the same as set out in the previous paragraph.

Article 2(5) provides that references in the Order to plots of land are to plots identified on the land plans and in the book of reference.

Article 2(6) provides that references in the Order to numbered works are references to the works as numbered in Schedule 1 to the Order.

OPERATIVE PROVISIONS

Articles 3 to 43 of the Order contain provisions for and relating to the authorised development, the compulsory acquisition of land and rights, and miscellaneous and general provisions.

PART 2 - PRINCIPAL POWERS

Article 3 (Development consent etc. granted by the Order) grants development consent for the authorised development within the Order limits thereby authorising the construction and operation of the authorised development. The authorised development

means the development under sections 14(1)(h) and 22 of the PA 2008. In identifying the development authorised by this Order, this Article also makes provision for the works authorised by this Order to be constructed in the lines or situations shown on the works plans and for the numbered works specified in Schedule 1 to the Order to be constructed within the limits of deviation shown on the works plans. The authorised development is also to be carried out in accordance with the requirements set out in Part 2 of Schedule 1 (authorised development).

Article 4 (Maintenance of authorised development) provides for the maintenance of the authorised development. This Article supplements the maintenance powers under the Highways Act 1980 and Infrastructure Act 2015 and ensures that the undertaker is afforded the necessary powers to maintain the authorised development.

The definition of "maintain" is provided in Article 2(1), as detailed above.

Article 5 (Planning permission) permits certain development authorised by a planning permission granted under the Town and Country Planning Act 1990 ("**1990 Act**") that is within the Order limits to be carried out pursuant to the terms of the planning permission without breaching the Order. This provision is not a Model Provision, but ensures that the undertaker does not breach section 161 of the PA 2008 in carrying out certain development pursuant to a grant of planning permission.

Article 6 (Limits of deviation) provides in carrying out scheduled works for a lateral deviation from the lines and situations on the works plans of the authorised development within the Order limits in respect of linear and non-linear works, and vertical deviation subject to a maximum deviation of 0.5 metres upwards or downwards. The power to deviate to these maximum limits is disapplied where a deviation in excess of these limits would not give rise to materially new or worse adverse environmental effects from those assessed in the environmental statement. This is not a Model Provision but is required so that the undertaker has the necessary, but proportionate, degree of flexibility when carrying out the authorised development. An

equivalent article was included in the A556 (Knutsford to Bowden Improvement) Development Consent Order 2014.

Article 7 (Benefit of the Order) overrides section 156(1) of the Planning Act 2008 (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. The purpose of paragraph (2) is to clarify the expectations where the Order will benefit others, e.g. rights for statutory undertakers, and mitigation works outlined in the Schedule 1 description of works. Without this provision, only the undertaker could benefit from these works. An equivalent article was included in the A556 (Knutsford to Bowden Improvement) Development Consent Order 2014.

Article 8 (Consent to transfer benefit of the Order) allows powers under the Order to be transferred, permanently or for a fixed period, to others by the undertaker. This is based on the Model Provisions.

PART 3 - STREETS

Article 9 (Application of the 1991 Act) provides for the application of the New Roads and Street Works Act 1991. There is precedent for these provisions in respect of other development consent orders, such as the A556 (Knutsford to Bowden Improvement) Development Consent Order 2014.

Paragraphs (1) and (2) provide that certain works carried out under the authority of the Order shall be "major highway works" for the purposes of the 1991 Act. The effect of this is to clarify that the cost-sharing provisions relevant to the diversion of utility apparatus (which would apply to such works under the 1991 Act if carried out by the highway authority) will apply in respect of the works authorised by the Order.

Paragraph (3) provides that certain provisions of the 1991 Act do not apply to works executed under the Order. 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 to the undertaker and the specific provisions in the Order which regulate the carrying out of the authorised development. The disapplied provisions are:

- section 56 (power to give directions as to timing of street works), which allows a street authority to direct an undertaker as to the times when it is permitted to carry out street works;
- section 56A (power to give directions as to placing of apparatus), which allows a street authority to direct an undertaker not to place apparatus in a specified street;
- section 58 (restriction on works following substantial road works), which allows a street authority to restrict street works in a highway following the completion of substantial road works in that highway;
- section 58A (restriction on works following substantial street works), which allows a street authority to restrict street works on a highway;
- section 73A (power to require undertaker to re-surface street), which allows a street authority to require an undertaker to re-surface a street;
- section 73B (power to specify timing etc of re-surfacing), which provides for the details that may be contained in a re-surfacing notice issued by a street authority to an undertaker;
- section 73C (materials, workmanship and standard of re-surfacing), which allows a street authority to prescribe requirements that the undertaker must comply with when carrying out the required re-surfacing;
- section 78A (contributions to costs of re-surfacing by undertaker), which provides for a street authority to contribute to the costs incurred by an undertaker where the street authority has requested the undertaker to carry out re-surfacing works; and
- Schedule 3A (restriction on works following substantial street works), which, if notice is served by the street authority following an application to carry out substantial works by an undertaker, restricts the works that may be carried out for a specified period.

Paragraphs (4) and (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to streets which are to be temporarily stopped-up, altered or diverted under the Order. This prevents confusion regarding whether works in respect of a temporarily stopped-up street are "street works" for the purposes of the 1991 Act and simplifies the implementation of the works by providing for a single process in respect of streets which are stopped-up, etc., and those which are not. The provisions listed in paragraph (5) are:

- section 54 (advance notice of certain works), which requires an undertaker to give advance notice of proposed street works to the street authority;
- section 55 (notice of starting date of works), which requires an undertaker to give not less than seven working days' notice to a street authority where the undertaker is proposing to breakup or open the street, or any sewer, drain or tunnel under it, or to tunnel or bore under the street;
- section 57 (notice of emergency works), which provides for an undertaker to carry out emergency works without having to give advance notice to a street authority;
- section 59 (general duty of street authority to co-ordinate works), which requires a street authority to use best endeavours to co-ordinate the execution of works;
- section 60 (general duty of undertakers to co-operate), which requires an undertaker to use best endeavours to co-operate with the street authority and with other undertakers;
- section 68 (facilities to be afforded to street authority), which requires an undertaker to afford a street authority reasonable facilities for ascertaining whether the undertaker is complying with its duties;
- section 69 (works likely to affect other apparatus in the street), which requires an undertaker, where works are likely to affect another person's apparatus, to take all reasonably practicable steps to:
 - give the apparatus' owner facilities for monitoring the execution of the works; and

- comply with requirements reasonably necessary for the protection of the apparatus or for securing access to it;
- section 75 (inspection fees), which requires the undertaker to pay a prescribed fee to the street authority for inspecting the works;
- section 76 (liability for cost of temporary traffic regulation), which allows for costs to be recovered from the undertaker that have been incurred in respect of a temporary restriction or prohibition of traffic; and
- section 77 (liability for cost of use of alternative route), which provides for the undertaker to indemnify the highway authority in respect of its costs incurred strengthening or repairing alternative routes being used as a result of the works.

Paragraph (7)(a) provides that nothing in Article 12 of the Order (which provides that the streets constructed, altered or diverted under the Order shall be maintained by the highway authority) shall affect the ability of the local highway authority (under s.87 of the 1991 Act) to apply Part 3 of the 1991 Act (which addresses street works in England and Wales) to such streets in advance of those streets becoming publicly maintainable. Paragraph (7)(b) limits the operation of Article 9 to off-street works.

Article 10 (Power to alter layout etc. of streets) is not a Model Provision but is based on Article 11 of the National Grid (North London Reinforcement Project) Order 2014 and Article 11 of the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014, amongst others. This Article confers a power on the undertaker to alter the layout of existing streets within the Order limits for the purpose of constructing and maintaining the authorised development. This is subject to the consent of the street authority who must be given the specified period of notice in advance of exercising the powers. This consent is deemed given if the street authority does not respond to the undertaker's consent request within 28 days.

Paragraph (2) requires the undertaker to restore any street that has been temporarily altered to the reasonable satisfaction of the street authority.

Paragraph (5) provides that paragraphs (2), (3) and (4) do not apply where the undertaker is the street authority for the street in which the works are being carried out.

It is self-evident that Highways England may carry out these works to the mainline of the M4. It is considered appropriate to provide a power for Highways England as a Strategic Highways Company to enter and carry out works to side roads that would otherwise be within the purview of the local highway authorities. It is unnecessary to list the affected roads, since their location and extent is self-evidence from the works, land and rights of way plans.

This Article is necessary under section 120(5)(c) of the 2008 Act to give full effect to Articles 3 (*Development consent etc granted by the Order*) and 4 (*Maintenance of authorised development*).

Article 11 (Street works) allows the undertaker to interfere with and execute works in or under the streets within the Order limits for the purposes of the authorised development. 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 New Roads and Street Works Act 1991. Certain provisions of the 1991 Act apply to works carried out under this Article. This is based on the Model Provisions.

Article 12 (Construction and maintenance of new, altered or diverted streets) is included because under the Highways Act 1980 the Secretary of State (through Highways England, i.e. the undertaker) is the highway authority for, and therefore responsible for maintaining trunk roads provided under the Order. For other streets, paragraphs (1) and (2) determine the body that will be liable for maintenance. Liability for maintenance transfers to the local highway authority (for new roads constructed) and to the street authority (for parts of existing streets altered or diverted) on completion of the works.

Paragraphs (1) and (2) are subject to paragraphs (3) and (4), which make specific maintenance provision in relation to the structure and surfaces of new bridges that carry public and private rights of way.

Paragraphs (5) and (6) provide that in any action for damages against the undertaker alleging failure to maintain a street, the undertaker will have the defence that it had taken such care as was reasonably required to ensure that the street was not dangerous to traffic.

This is not based on the Model Provisions but an equivalent article was included in the A556 (Knutsford to Bowden Improvement) Development Consent Order 2014.

Article 13 (Permanent stopping up of streets) is based on the Model Provisions and allows streets detailed in Schedule 3 (permanent stopping up of streets) to be stopped-up (i.e. to have the right of way along such streets extinguished). The street cannot be stopped-up unless the new street that is being substituted for it has been completed to the reasonable satisfaction of the street authority or unless a temporary alternative route is provided until the new street has been provided.

Paragraph (4) allows for a person who has suffered loss due to the stopping up to be compensated.

The powers in this Article are subject to Article 32.

Article 14 (Temporary stopping up of streets) is based on the Model Provisions and allows generally for the temporary stopping-up, alteration, diversion or restriction of streets for the purposes of the authorised development. Access for pedestrians must be provided to premises abutting a street affected (but not otherwise) and where the undertaker is not the street authority, consent to any such stopping up or restriction must be sought.

Paragraph (2) confers a power on the undertaker where the use of a street has been temporary stopped-up under this Article to use it as a temporary working site. This is not derived from the Model Provisions but is preceded in the Network Rail (North Doncaster Chord) Order 2012 and the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013.

Paragraph (4) allows for the stopping up of streets specifically identified in Schedule 4.

The consent of the street authority is required where the undertaker is not the street authority. Paragraph (6) states that a street authority, which 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 for consenting was imposed in the Network Rail (North Doncaster Chord) Order 2012 and the M1 Junction 10a (Grade Separation) Order 2013. It is considered necessary to minimise delay and provide that the authorised development is delivered in a timely fashion.

Paragraph (7) provides that compensation is payable to those suffering loss by the suspension of a private right of way under this Article.

Article 15 (Access to works) allows works accesses to be created for the purposes of the authorised development. The undertaker has a general power to form or improve means of access, the intention being to provide equivalent powers to those available to the undertaker for schemes authorised under the Highways Act 1980. This is based on the Model Provisions, with minor amendments.

Article 16 (Powers in relation to relevant navigations or watercourses) provides that the undertaker may carry out specified activities relating to navigations specified in paragraph (5) or watercourses. The undertaker must use reasonable endeavours (except in the case of emergency) to notify the owner of any mooring affected by the exercise of powers conferred by paragraph (1)(b). Paragraph (3) provides that compensation is payable to those affected by the exercise of powers conferred by paragraph (1)(b). This Article is not in the Model Provisions but is a bespoke Article, the inclusion of which is essential to ensure the undertaker can carry out the authorised development expeditiously.

PART 4 - SUPPLEMENTAL POWERS

Article 17 (Discharge of water) provides that the undertaker may drain water into any watercourse, drain or public sewer for the

carrying out or maintenance of the authorised development. Paragraph (1) allows the undertaker to lay down, take up and alter pipes within the Order limits.

Paragraph (3) provides that the undertaker must not discharge water into a watercourse, drain or public sewer without the consent of its owner. Paragraph (9) provides that this consent is deemed given if the owner does not respond to the undertaker's consent request within 28 days.

Paragraph (4) requires that the undertaker can only make an opening into a public sewer or drain in accordance with plans approved by its owner, who must also be offered the opportunity to supervise the making of the opening. This is based on the Model Provisions.

Paragraphs (5) and (6) provide that the undertaker must meet certain conditions in exercising its powers under this Article, whilst paragraph (7) provides that a separate environmental permit may be required.

Article 18 (Protective work to buildings) enables the undertaker to carry out protective works to any building within the Order limits as may be necessary or expedient subject to certain limitations and conditions being met (paragraphs (2), (5) and (6)). Compensation is payable for loss and damage in circumstances prescribed in paragraphs (7), (8) and (9). This is based on the Model Provisions.

Article 19 (Authority to survey and investigate land) confers upon the undertaker a power to survey and/or investigate land. The power includes an ability to make trial holes (subject to conditions), to use and leave apparatus on the land and to enter on land. This Article provides that the undertaker must give 14 days' notice before exercising the powers of entry, and that compensation is payable for any loss or damage caused. This is based on the Model Provisions.

PART 5 - POWERS OF ACQUISITION

Article 20 (Compulsory acquisition of land) authorises the acquisition of land by compulsory purchase. It grants the power to acquire such of that land as is required for the authorised development

or to facilitate it, or is incidental to it. This is based on the Model Provisions with minor amendments.

Article 21 (Time limit for exercise of authority to acquire land compulsorily) affords the undertaker 5 years from the date that the Order is made to issue 'notices to treat' or to execute a 'general vesting declaration' to acquire the land that is subject to the power of compulsory acquisition contained in the Order.

Paragraph (2) provides that exercise of the powers under Article 29 (*Temporary use of land for carrying out the authorised development*) must also be exercised within this 5 year period. This is based on the Model Provisions.

Article 22 (Compulsory acquisition of rights) provides for rights in land to be acquired as well as the land itself, and for new rights to be created over land. This Article provides for rights to be acquired by the undertaker over land which it is authorised to acquire under Article 20 (*Compulsory acquisition of land*). This is a departure from the Model Provisions but a provision of this nature is usual in Transport and Works Act Orders and Hybrid Bills, and has been used in a number of DCOs, such as the Network Rail (North Doncaster Chord) Order 2012 and The Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013.

Paragraph (2) provides that for the land described in column 1 of Schedule 5, the powers of compulsory acquisition are limited to the acquisition of such rights, and the imposition of such restrictive covenants, as may be required for the purposes set out in column 2 of Schedule 5.

Paragraph (3) provides that where the undertaker needs only to acquire rights over land, it shall not be obliged to acquire any greater interest in the land.

Paragraph (3) and Schedule 6 impose modifications to the compulsory purchase and compensation provisions in general legislation. The amendments do not affect entitlement to compensation, but ensure that the compensation procedure applies to the creation of new rights and the imposition of restrictive covenants. For the purpose of section 126(2) of the PA 2008, the relevant compensation provisions are modified

only to the extent necessary to ensure that they apply properly to the acquisition of rights, and not to affect the amount of compensation to which landowners would be entitled. The power to impose restrictive covenants pursuant to paragraphs (2) and (3) will enable the undertaker to, for example, restrict planting in the vicinity of utility apparatus which is installed as part of the authorised development

Article 23 (Power to override easements and other rights) authorises the undertaker to take land discharged of the benefit of restrictive covenants and instances where land subject to third party rights is acquired by agreement, in addition to the power to take free from all rights, trusts and incidents conferred by Article 22 of the Order (Compulsory acquisition of rights).

The power on which reliance is placed to authorise extinguishment, etc., is section 120(3) and (4) and paragraphs 2 (creation, suspension, extinguishment, etc of interests in or rights over land) and 3 (the abrogation or modification of agreements relating to land) of Schedule 5 to the PA 2008. In reliance on this power, section 237(1) of the 1900 Act has been applied in an amended form in order to reflect the provisions of that section as inserted by Schedule 9, paragraph 4 of the PA 2008. As such, there is no requirement for separate drafting analogous to sub-sections (1) and (1A) of section 237 of the 1900 Act. The relevant activities equivalent to these sections are set out in Article paragraph (2).

Paragraph (1) provides for the statutory successors of the undertaker to benefit from this power as well as persons deriving title under them.

Paragraph (2) is notable for including sub-paragraph (c). This means that the change of use of the land subject to the provision to enable its use for (amongst other things) a public highway, is also covered by this Article. This reflects the text inserted by the PA 2008 into section 237 of the 1900 Act.

Paragraph (3) reflects section 237(2) of the 1900 Act. No drafting is included analogous to section 237(3) of the 1900 Act, because it may be necessary to alter the apparatus of statutory undertakers using the powers of this Order. Protective

provisions should be sought by affected statutory undertakers should they be concerned about the effect of this provision.

Paragraph (4) is included for the purposes of clarity.

Paragraph (5) deals with compensation and is drawn from and reflects section 237(4) of the 1990 Act.

Drafting reflecting sub-sections 237(5) and (6) of the 1990 Act has not been included in this Article. This is because it is not appropriate, where the undertaker parts with its undertaking in respect of the authorised development, for it to retain a residual liability.

The Article includes text at paragraph (6) which reflects the drafting in section 237(7) of the 1990 Act.

Paragraph (7) has been inserted to clarify that this power does not apply to section 106 or section 278 Agreements under the 1990 Act.

This is not a Model Provision but has been preceded in similar forms in the National Grid (King's Lynn B Power Station Connection) Order 2013 and the Rockery South (Resource Recovery Facility) Order 2011.

Article 24 (Private rights over land) is based on the Model Provisions but applies to private rights generally and not just to rights of way. It also provides for the extinguishment of private rights on Order land already owned by the undertaker when any activity authorised by the Order interferes with or breaches those rights.

Article 25 (Application of the Compulsory Purchase (Vesting Declarations) Act 1981) provides for the application, with modifications, of the Compulsory Purchase (Vesting Declarations) Act 1981, which contains vesting procedures for land subject to compulsory acquisition, and is based on the Model Provisions with minor amendments.

Article 26 (Acquisition of subsoil or air-space only) allows the undertaker to acquire land below the surface or above the surface, rather than having to acquire all of the land. This Article is based on the Model Provisions but is extended to apply to air-space, and is preceded in the Northumberland County Council (A1-South

East Northumberland Link Road (Morpeth Northern Bypass) Development Consent Order 2015.

This Article allows the undertaker the flexibility to minimise the extent of interests to be acquired, with consequently less impact on landowners. It is in the public interest to provide this flexibility at the point at which the undertaker begins to acquire the land rather than the point at which the Order is made.

Article 27 (Acquisition of part of certain properties) enables the undertaker to acquire a part rather than the whole of properties subject to compulsory acquisition and contains a procedure enabling the relevant owner in certain circumstances to require the whole to be taken, with disputes being determined by the Lands Chamber of the Upper Tribunal. This provision would substitute section 8(1) of the Compulsory Purchase Act 1965. This Article is based on the Model Provisions.

Article 28 (Rights under or over streets) provides that the undertaker may use a street for the authorised development without being required to acquire any part of the street or any easement or right in the street, subject to certain provisions for compensation. Paragraph (3) contains circumstances when the exercise of this power would be prohibited. Paragraph (4) affords a right of compensation. Paragraph (5) provides for an exception to the right of compensation under paragraph (4).

This Article is based on the Model Provisions.

Article 29 (Temporary use of land for carrying out the authorised development) allows the land set out in Schedule 8 to be occupied temporarily while the works are carried out. This land is required during construction of the authorised development, but is not required to be acquired permanently. This Article also allows for the temporary occupation of any of the land for permanent acquisition that has not yet been taken possession of, and for the occupation of land without having to acquire it immediately.

This Article provides for the permanent works set out in column (4) of Schedule 8, and any other mitigation works, to be left on the land that has been temporarily occupied, rather than the land having to be acquired for this purpose.

Paragraph (11) provides clarity about what land the undertaker is allowed to take temporary possession of. This Article is based on the Model Provisions with minor amendments.

Article 30 (Temporary use of land for maintaining authorised development) provides that the undertaker may take temporary possession of land required for the purpose of maintaining the authorised development and to construct temporary works for that purpose for a period of 5 years from the date on which that part of the authorised development is first used. Provision is also made for notice and compensation to be provided. The powers under this Article do not apply with respect to houses, gardens or any other occupied buildings. This Article is based on the Model Provisions.

Article 31 (Statutory undertakers) allows the undertaker to extinguish the rights of statutory undertakers and to remove and reposition their apparatus. This applies to the Order land in its entirety so that it is not restricted to apparatus that has been shown on the land plans and described in the book of reference, as it is impracticable to show and describe all such apparatus.

The land where this power may be exercised is shown on the land plans and the beneficiaries of such rights are described in the book of reference. Therefore, the requirements of regulations 5(2)(i)(iii) and 7(1)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 are met.

An equivalent article was included in the A556 (Knutsford to Bowden Improvement) Development Consent Order 2014.

Article 32 (Apparatus and rights of statutory undertakers in stopped up streets) provides for statutory undertakers to retain their rights in respect of their apparatus that is under streets that are stopped up pursuant to Article 13 (permanent stopping up of streets). Without this Article, the statutory undertaker would not have access to the apparatus, because the right of way along the street will have been extinguished. The undertaker may require such a statutory undertaker to relocate the apparatus and the Article provides for compensation in such circumstances.

Paragraph (7) provides that for those parts of the Scheme that involve major highway works the compensation calculations under the 1991 Act will apply instead. This is based on the Model Provisions.

Article 33 (Recovery of costs of new connections) provides that if any statutory undertaker's apparatus is removed, and service is thereby interrupted, then the cost of obtaining a new service can be claimed from the undertaker. This is based on the Model Provisions.

Article 34 (Compulsory acquisition of land - incorporation of the mineral code) provides that a modified form of Parts 2 and 3 of Schedule 2 to the Acquisition of Land Act 1981 are incorporated into the Order. This is a Model Provision.

Article 35 (Special category land) provides that the special category land within the Order limits which the undertaker requires for the purposes of the authorised development is discharged from all rights, trusts and incidents to which it was previously subject.

This is subject to paragraph (2), which requires a scheme for the provision of replacement land as a common to be provided in relation to certain plots to be acquired, before those plots are discharged from the rights, trusts and incidents to which they were subject.

The plots of special category land to which the article relates are specified in paragraph (3) and the replacement land to be provided pursuant to paragraph (2) is defined as the land identified on the replacement land plan, which is Appendix B to the Statement of Reasons.

This Article is based on the Model Provisions, but has been amended in accordance with the particular circumstances of the Scheme.

PART 6 - OPERATION

Article 36 (Power to operate and maintain the authorised works) confers a specific power on the undertaker to operate and maintain the authorised works. This is not a Model Provision but is given precedent by various Transport and Works Act Orders.

Article 37 (Restriction on executing works) restricts the rights of any person to break open Work Nos. 1a and 1b (the main improvement works to the east and westbound carriageways), any slip road, or any other scheduled work including any carriageway, footway, verge or embankment comprised in them for the purposes of installing any main, pipe or wire or carrying out works to the scheduled works. Except in relation to Work Nos. 1a, 1b and any slip road, such works may occur if the undertaker consents, and such consent cannot be unreasonably withheld. This is not a Model Provision but is necessary to prevent the undertaking being interrupted for reasons other than for the transport of vehicular traffic. This provision is preceded in the River Mersey (Mersey Gateway Bridge) Order 2011 made under the Transport and Works Act 1992.

Article 38 (Existing powers and duties of the undertaker) provides that nothing in the Order is to prejudice the operation of, and the power and duties of the undertaker under, the 1980 Act, the 1991 Act and the Town and Country Planning (General Permitted Development) (England) Order 2015 (the "**2015 Order**"). This is not a Model Provision but its inclusion is essential to ensure that the undertaker's functions under the 1980 Act, 1991 Act and 2015 Order are unaffected by the Order.

PART 7 - MISCELLANEOUS AND GENERAL

Article 39 (Felling or lopping of trees) provides for any tree or shrub that is proximate to 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 development or endanger anyone using it. Compensation is payable for any loss or damage caused by the undertaker. This is based on the Model Provisions.

Article 40 (Trees subject to tree preservation orders) acts as consent for the undertaker to carry out certain works to trees, specified in Schedule 9, protected by tree preservation orders. This is a Model Provision.

Article 41 (Operational land for purposes of the 1990 Act) provides that, for the purposes of section 264(3)(a) of the 1990 Act, the development consent granted by the Order shall be treated as

specific planning permission. This is based on the Model Provisions and is preceded in other DCOs.

Article 42 (Defence to proceedings in respect of statutory nuisance) amends the terms of the defence contained in section 158 of the PA 2008 in the case of fumes, gas, dust, steam, smell, accumulations, or deposits which are prejudicial to health or a nuisance, artificial light, noise or any other statutory nuisances.

The defence is available if nuisance relates to:

- (a) the construction or maintenance of the authorised development, and is in accordance with any controls imposed by the local authority, or cannot reasonably be avoided; or
- (b) the use of the authorised development and cannot reasonably be avoided.

This Article is based on the Model Provisions with minor amendments.

Article 43 (Protection of interests) gives effect to Schedule 10 (protective provisions).

Article 44 (Temporary prohibition of traffic) gives effect to Schedule 11 (temporary prohibition of traffic) which acts as a temporary traffic regulation order to prohibit motor vehicles entering into certain areas of the motorway during the prohibited period that is specified in that Schedule. This is not a Model Provision but is included pursuant to the undertaker's power to do so under section 150 of the 2008 Act.

Article 45 (Certification of plans, etc.) requires the undertaker to submit to the Secretary of State, following the making of the Order, copies of land plans, works plans, engineering drawings and sections, the book of reference, the environmental statement, the outline environmental management plan, the outline construction environmental management plan, the engineering and design report, the environmental masterplan, the drainage strategy report and the replacement land plan for certification as true copies.

Article 46 (Service of notices) provides for how notices to be served under the Order are to be deemed to have been served properly. It

allows service by email with the consent of the recipient (otherwise personal delivery or the postal service must be used) and provides for service on an unknown landowner.

This is not a Model Provision but it is common to have such an article in a development consent order. The Article is preceded in a number of development consent orders, such as the Network Rail (North Doncaster Chord) Order 2012 and the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013, and an equivalent article was included in the A556 (Knutsford to Bowden Improvement) Development Consent Order 2014. The provision is necessary because the service of notice provisions under sections 229 and 230 of the PA 2008 Act do not apply to notices served under a development consent order.

Article 47 (Arbitration) provides for differences arising under any provision of the Order, other than those referred to in the Lands Chamber of the Upper Tribunal, and unless agreed between the parties, to be settled by arbitration.

An equivalent article was included in the A556 (Knutsford to Bowden Improvement) Development Consent Order 2014.

Article 48 (Traffic Regulation) is not a Model Provision but is necessary to provide the undertaker with the power to make traffic regulation orders in relation to roads for which it is not the highway authority, so that it can implement traffic management measures that are necessary to construct the authorised development.

This Article would, at any time prior to 12 months following the opening of the authorised development for public use, allow the undertaker to:

- (a) revoke, amend or suspend in whole or in part any order made under the Road Traffic Regulation Act 1984;
- (b) permit, prohibit or restrict the stopping, waiting, loading or unloading of vehicles on any road;
- (c) authorise the use as a parking place of any road;
- (d) make provision as to the direction or priority of vehicular traffic; and
- (e) permit or prohibit vehicular access to any road.

An equivalent article was included in the A556 (Knutsford to Bowden Improvement) Development Consent Order 2014.

Article 49 (Procedure in relation to certain approvals etc.) provides that any consent or approval from a discharging authority or the Secretary of State required by the provisions of the Order shall be given in writing and not unreasonably withheld.

Paragraph (2) gives effect to Schedule 12 (procedure for discharge of certain approvals by discharging authorities). Schedule 12 sets out the appeal process in relation to such matters and where an appeal can be made to the Secretary of State to discharge consents or approvals required under the Order from bodies such as street authorities or the owner of a sewer, watercourse or drain.

This article and associated Schedule 12 (discharge of requirements) reflect the approach taken in the National Grid (North London Reinforcement Project) Order 2014 (article 45 and Schedule 3) which in turn reflects the approach adopted in the Hinkley Point C (Nuclear Generating Station) Order 2013. This appeal process is considered proportionate and justified in light of the size and scale of the authorised development proposed by the DCO and the number of consents that may be required to ensure the delivery of the authorised development.

By the terms of Article 49, and the definition of 'discharging authority' in that Article, Schedule 12 does not apply to the discharge of requirements by the Secretary of State, which is addressed in Schedule 2 to the Order.

Article 50 (Application of section 91(3A) and 3(B) of the 1990 Act) applies the provisions of those sections of the 1990 Act, to extend the time limit specified in requirement 2 for the commencement of the authorised development. The relevant provisions of the 1990 Act provide that the period before the end of which development is required to be begun is extended by one year if any proceedings are begun to challenge the validity of a grant of planning permission.

This Article is not a Model Provision, nor is it preceded in other DCOs. However, it is considered appropriate to apply such a provision in the context of NSIPs under the PA 2008, to

ensure the undertake has sufficient time to commence the authorised development in circumstances where a legal challenge is brought against the DCO. It is considered that this Article is necessary to ensure the delivery of the authorised development.

SCHEDULES

SCHEDULE 1 - AUTHORISED DEVELOPMENT

This schedule specifies the authorised development comprising the scheduled works, separating the various works into sections depending within which local authority's boundary they are to be carried out. Some works span more than one local authority boundary.

SCHEDULE 2 - PART 1: REQUIREMENTS

1. The requirements in Schedule 2 (*Requirements*) are the equivalent of planning conditions and reflect the processes and procedures usually employed by Highways England when implementing schemes such as this.
2. Approvals are drafted as to be sought from the relevant planning authority.

Requirement 1 provides for the interpretation of Schedule 2 (*Requirements*).

Requirement 2 provides that the authorised development must not commence later than 5 years from the date that the Order comes into force.

Requirement 3 requires the submission of details of the layout, scale, siting, design, dimensions and external appearance of certain specified works and earthworks and retaining structures comprised in the authorised development if they do not accord with the approved planning drawings, and for the authorised development to be carried out in accordance with either the approved details or planning drawings.

Requirement 4 requires certain gantry designs to be approved by the relevant planning authority.

Requirement 5 requires resurfacing of certain areas to include provision of thin surface course.

- Requirement 6* requires the authorised development to be carried out in accordance with the approved plans submitted with the application for the Order, unless otherwise approved by the relevant planning authority.
- Requirement 7* requires the submission of an Environmental Management Plan ("**EMP**") and for the development to be carried out in accordance with the EMP.
- Requirement 8* requires the submission of a Construction Environmental Management Plan ("**CEMP**") substantially in accordance with an Outline CEMP and for the authorised development to be carried out in accordance with the approved CEMP. This requirement also requires the conversion of the CEMP into a Handover Environmental Management Plan, in accordance with which the authorised development must be operated and maintained.
- Requirement 9* requires the landscaping of the authorised development in accordance with an approved landscaping scheme that reflects the mitigation measures included in the environmental statement and sets out details of all proposed hard and soft landscaping.
- Requirement 10* requires fencing that is part of the authorised development to be constructed in accordance with the Highways Agency's Manual of Contract Documents for Highway Works, Volume 1 - Specification for Highway Works.
- Requirement 11* requires that ecological mitigation of the authorised development set out in the environmental masterplan and CEMP must be provided in accordance with the principles of guidance from the Highways Agency's Design Manual for Roads and Bridges, Volume 10, Section 4.
- Requirement 12* provides for a geotechnical design report to be produced, following the conclusion of ground investigations, to inform a written scheme to address contaminated groundwater due to landfill and that if contaminated land, including groundwater, is found during the carrying out of the authorised development, the undertaker must cease

construction, report the findings and complete a risk assessment. In relevant cases, a remediation scheme must be provided and approved.

Requirement 13 requires the completion of pre-construction surveys in respect of European or nationally protected species before the carrying out of the authorised development. This requirement makes provision for what happens if such protected species are found to be present.

Requirement 14 provides that no authorised development can commence until a survey of the existing drainage system has been completed to confirm areas where repairs or replacement of the existing drainage infrastructure is required and until written details of a surface and foul water drainage system, reflecting the mitigation measures in the drainage strategy report and including means of pollution control, and repairs or replacement required, have been submitted to and approved by the Secretary of State in consultation with the relevant lead local flood authority.

Requirement 15 provides for any archaeological remains identified when carrying out the authorised development, including for their protection and further investigation.

Requirement 16 provides for a written scheme of investigation to be submitted and approved prior to the construction of construction compound 5.

Requirement 17 provides that no authorised development can commence in the vicinity of any buildings assessed in the environmental statement to be at risk without first notifying the relevant planning authority.

Requirement 18 requires the submission of a construction traffic management plan which must be substantially in accordance with the outline construction traffic management plan annexed to the CEMP before the commencement of the authorised development.

Requirement 19 provides that the Scheme's permanent lighting cannot be installed until a written scheme has been approved by the relevant planning authority.

- Requirement 20* provides that the approved details, in accordance with which the authorised development must be carried out, include approved amendments to be details.
- Requirement 21* provides for a written scheme of noise management during construction to be approved.
- Requirement 22* provides for a scheme to install or replace acoustic barriers to be approved.
- Requirement 23* provides for a scheme of compensation works for the effects of the authorised development on Flood Zone 3 to be approved in consultation with the Environment Agency.
- Requirement 24* provides for a written strategy of biodiversity management measures to be approved in consultation with the Environment Agency and Natural England, including the provision of otter ledges, otter fencing, bat boxes, the removal/management of invasive non-native species and maximising the biodiversity potential of soft landscaping.
- Requirement 25* provides that any verge mounted road restraints to be provided as part of the authorised development must comply with Highways England's Requirement for Road Restraint Systems

SCHEDULE 2 - PART 2: PROCEDURE FOR DISCHARGE OF REQUIREMENTS

- Requirement 1* provides that, if the Secretary of State is required under a requirement to provide a consent or approval, a determination on that consent or approval will be made within eight weeks. If no determination is made within that time, the Secretary of State is taken to have granted consent unless the application is accompanied by a report that considers it likely that the subject matter of the application is to give rise to any materially new or materially worse environmental effects in comparison with the authorised development as approved. In those circumstances, the Secretary of State will be taken to have refused consent.

Requirement 2 provides that the Secretary of State may request more information in relation to any part of an application made under Schedule 2.

Requirement 3 requires the undertaker to create, in electronic form suitable for inspection by the public, a register of those requirements contained in Schedule 2 Part 1 that require approvals from the Secretary of State.

Requirement 4 provides that, where a requirement requires details to be submitted to the Secretary of State, those details must be accompanied by a summary setting out consultation undertaken by the undertaker and the undertaker's response to that consultation.

SCHEDULE 3 - PERMANENT STOPPING UP OF STREETS

This schedule sets out those streets that are to be permanently stopped up pursuant to Article 13 (Permanent stopping up of streets).

SCHEDULE 4 - TEMPORARY STOPPING UP OF STREETS

This schedule sets out those streets that are to be temporarily stopped up pursuant to Article 14 (Temporary stopping up of streets).

SCHEDULE 5 - LAND IN WHICH ONLY NEW RIGHTS ETC. MAY BE ACQUIRED

This schedule sets out land in which new rights may be required pursuant to Article 22(1) (Compulsory acquisition of rights).

SCHEDULE 6 - MODIFICATION OF COMPENSATION AND COMPULSORY PURCHASE ENACTMENTS FOR CREATION OF NEW RIGHTS

This schedule sets out the modifications of compensation and compulsory purchase enactments for the creation of new rights pursuant to article 22(2).

Paragraph 1 provides that the compulsory purchase enactments currently in force apply to the compulsory acquisition of rights, creation of new rights or imposition of restrictive covenants under the Order, save for necessary modifications in respect of compensation.

Paragraph 2 sets out modifications to the Land Compensation Act 1973 as it applies to the authorised development.

Paragraph 3 provides for the application of the Compulsory Purchase Act 1965, with necessary modifications to allow for the

creation of new rights or imposition of restrictive covenants, to compulsory acquisition under the Order.

Paragraphs 4, 5, 6, 7, 8 and 9 set out the necessary modifications to the 1965 Act.

SCHEDULE 7 - LAND OF WHICH TEMPORARY POSSESSION MAY BE TAKEN

This schedule sets out the land of which temporary possession may be taken pursuant to Article 29 (*Temporary use of land for carrying out the authorised development*).

SCHEDULE 8 - TREES SUBJECT TO TREE PRESERVATION ORDERS

This schedule sets out the trees subject to tree preservation orders in respect of which the undertaker may exercise powers pursuant to article 40.

SCHEDULE 9 - PROTECTIVE PROVISIONS

This schedule sets out any protective provisions for the benefit of Electricity, Gas, Oil, Water and Sewerage undertakers, Operators of Electronic Communications Code Networks and for the protection of Railway Interests.

SCHEDULE 10 - TEMPORARY PROHIBITION OF TRAFFIC

This schedule acts as a temporary traffic regulation order to prohibit motor vehicles entering into certain areas of the motorway during the prohibited period that is specified in that Schedule, pursuant to Article 44.

SCHEDULE 11 - PROCEDURE FOR DISCHARGE OF REQUIREMENTS

This schedule provides the procedure for the discharge of any consent or approval from consenting bodies, pursuant to Article 49.

APPENDIX A TABLE OF MITIGATION