

# Lower Thames Crossing

## 3.2 Explanatory Memorandum (Clean version)

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**NATIONAL HIGHWAYS**  
**LOWER THAMES CROSSING**  
**THE A122 (LOWER THAMES CROSSING) DEVELOPMENT CONSENT ORDER**  
**202[ ]**  
**EXPLANATORY MEMORANDUM**

## 1 SUMMARY

- 1.1 This memorandum explains the purpose and effect of each article of, and the Schedules to, the draft A122 (Lower Thames Crossing) Development Consent Order 202[ ] (the Order), as required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009. Regulation 5(2)(c) requires explanatory memoranda to explain “*the purpose and effect of provisions in the draft Order*”. As the Project includes gas pipeline NSIPs, Annex 1 of this document also contains the information required under Regulation 6(4) of those regulations.

## 2 PURPOSE OF THE ORDER

### *Background*

- 2.1 National Highways Company Limited (National Highways) is applying to the Secretary of State for an Order to construct the A122 Lower Thames Crossing (the Project). The Project is a new road connecting Kent, Thurrock and Essex through a tunnel beneath the River Thames, and its main proposals include:
- 2.1.1 approximately 14.5 miles (23km) of new road, with a maximum speed limit of 70mph, connecting to the existing road network from the A2/M2 to the M25;
  - 2.1.2 two tunnels, one southbound and one northbound;
  - 2.1.3 improvements to the M25, A2 and A13, where the Project would connect to the road network;
  - 2.1.4 new structures and changes to existing ones (including bridges, buildings, tunnel entrances, viaducts and utilities) along the length of the new road;
  - 2.1.5 a free-flow charging system, where drivers do not need to stop but pay remotely, similar to that at the Dartford Crossing; and
  - 2.1.6 the diversion of electricity transmission overhead lines (including a 2.4km diversion of an overhead electricity transmission line near the A13), and the diversion of high pressure gas mains.
- 2.2 A more detailed description of the Project is contained in Chapter 2 of the Environmental Statement (Application Document 6.1). To provide specific focus for the Project, there are objectives covering transport, the economy, community and the environment. In particular, the Scheme Objectives are:
- 2.2.1 to support sustainable local development and regional economic growth in the medium to long term;
  - 2.2.2 to be affordable to Government and users;
  - 2.2.3 to achieve Value for Money;

- 2.2.4 to relieve the congested Dartford Crossing and approach roads and improve their performance by providing free-flowing north–south capacity;
- 2.2.5 to improve resilience of the Thames crossings and the major road network;
- 2.2.6 to improve safety; and
- 2.2.7 to minimise adverse impacts on health and the environment.

Further information on (and compliance with) the Scheme Objectives is provided in the Need for the Project (Application Document 7.1).

*Nationally Significant Infrastructure Project*

- 2.3 The Planning Act 2008 (the 2008 Act) makes a distinction between three different types of highway Nationally Significant Infrastructure Projects (NSIPs) as set out in section 22(1)(a)-(c): construction, alteration and improvement. For a project to be a “construction” or “alteration” NSIP, the area of development must be greater than the relevant limits set out in section 22(4) of the 2008 Act.
- 2.4 Under section 22(1) an NSIP falls within one of the three categories specified in the aforementioned subparagraphs ((a) to (c)). These subparagraphs are treated as alternatives. The Project is an NSIP within sections 14(1)(h) and section 22(1)(a) as it involves the “construction” of a highway within the meaning of section 22(1)(a); the Project satisfies section 22(2) in that the highway will (when constructed) be wholly located in England, National Highways as strategic highways company will be the highway authority for the highway, and the area of development is greater than the relevant limit set out in subsection (4), which in this case is 12.5 hectares (see subsection (4)(b)), as the Project involves the construction of a highway, other than a motorway, where the speed limits for any class of vehicle are expected to be 50 mph or greater.
- 2.5 The Project also involves the installation of an electric line above ground near the A13 (i.e., Work No. OH7 as described in Schedule 1 of the Order). Accordingly, as this installation is “wholly within England” (as per section 16(1) of the 2008 Act), this element of the Project is also an NSIP under sections 14(1)(b) and 16(1)(a). None of the exceptions set out in section 16(3) apply to exclude the installation of the electric line above ground as an NSIP: the nominal voltage is above 132kV; the length is greater than 2km, the distance between the existing line and a new support will be greater than 60m. In addition, the electric line would not (when installed) be within premises in the occupation or control of a person responsible for its installation and it does fall under a category of work which would not require a consent under section 37(1) of the Electricity Act 1989 by virtue of the Overhead Lines (Exemption) (England and Wales) Regulations 2009 (as amended).
- 2.6 Work Nos. OH1, OH3 to OH6 and OH8 (as set out in Schedule 1 of the Order) are not NSIPs under section 16 of the 2008 Act on the basis that those works

are less than 2km in length (and therefore excluded under section 16(3)(aa) of the 2008 Act) or because section 37(1) of the Electricity Act 1989 applies to those works by virtue of the Overhead Lines (Exemption) (England and Wales) Regulations 2009 (as amended) (and are therefore excluded as NSIPs under section 16(3)(c) of the 2008 Act). Work No. OH2 is not an NSIP under section 16 of the 2008 Act on the basis that it entails the removal of an existing overhead line and does not therefore constitute the installation of an electric line above ground for the purposes of section 14(1)(b) of the 2008 Act. Annex 2 of this document provides further information. National Highways has worked closely with National Grid who have confirmed their agreement with the interpretation and application of section 16 presented in Annex 2.

- 2.7 In addition, Works Nos. G2, G3, and G4 are each NSIPs under section 20 of the 2008 Act. This is because those works entail the construction of a gas pipe-line, are to be constructed wholly in England, are each likely to have a significant effect on the environment, have a design operating pressure of more than 7 bar gauge and, when constructed, will convey gas for the supply (directly or indirectly) to at least 50,000 customers, or potential customers, of one or more gas suppliers. These works are expected to be constructed by National Grid Gas Plc (the current operator of the gas pipelines to be diverted) who is a “gas transporter” (as it holds a licence under the Gas Act 1986) and would be transferred the relevant powers to carry out the works under article 8 of the Order. Accordingly, for each of these works, each of the conditions in sections 20(2) to (5) of the 2008 Act is satisfied.
- 2.8 In order to apply the test contained in section 20(3)(b), National Highways has prepared a screening assessment of the environmental effects of those pipe-lines with more than a 7 bar gauge (see further Appendix 1.3 of the Environmental Statement (Application Document 6.3)).
- 2.9 Works Nos. G1a to G1b, G5 to G10, and TFGP1 are not NSIPs under section 20 of the 2008 Act, on the basis that such works:
- 2.9.1 do not involve the construction of pipe-lines which are more than 800mm in diameter and more than 40km in length or because the construction of each work would not be likely to have a significant effect on the environment (and are therefore excluded as NSIPs under section 20(3) of the 2008 Act); or
- 2.9.2 do not have a design operating pressure of more than a 7 bar gauge (and are therefore excluded as NSIPs under section 20(4) of the 2008 Act).
- 2.10 As the Project includes 3 gas pipe-line NSIPs under section 20, National Highways has prepared a compliance table which meets the requirements of Regulation 6(4) of the 2009 Regulations. This is appended to this Memorandum in Annex 1. The presence of utilities NSIPs also informs which National Policy Statements must be considered (see further Planning Statement (Application Document 7.2)).

- 2.11 As the Project is comprised of multiple NSIPs, 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.

### **3 ASSOCIATED DEVELOPMENT**

- 3.1 The Order also seeks consent for the development which would constitute associated development under section 115 of the 2008 Act, and which is included in the “authorised development” listed in Schedule 1.
- 3.2 Guidance on associated development has been issued by the Secretary of State for Communities and Local Government. In this guidance associated development is described as being ‘*typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project*’ (paragraph 6) and ‘*requires a direct relationship between associated development and the principal development. Associated development should therefore either support the construction or operation of the principal development, or help address its impacts. Associated development should not be an aim in itself but should be subordinate to the principal development*’ (paragraph 5).
- 3.3 Annex B of the above-mentioned guidance listed the following as examples of associated development for highway NSIP schemes:
- 3.3.1 Replacement roadside facilities where this becomes necessary due to the elimination of an existing facility by highway improvement;
  - 3.3.2 Infrastructure associated with cycle/pedestrian access;
  - 3.3.3 Offsite landscaping, habitat creation and other environmental works;
  - 3.3.4 Offsite drainage works;
  - 3.3.5 Alteration/diversion/stopping up of local roads, accesses and other rights of way; and
  - 3.3.6 Offsite diversion of statutory undertakers’ equipment.
- 3.4 In some cases, it should be recognised that there may be some overlap, or the absence of a clear boundary, between associated development and works which form part of the NSIP. As such, there is a danger that separating associated development out in the Order could potentially lead to an error defining it one way or another, given this potential for overlap between the two categories. For instance, there may be some on-highway, and some off-highway, diversion of the same piece of statutory undertaker equipment.
- 3.5 For this reason, and noting that there is no requirement for a DCO to distinguish between these two categories, there is no explicit differentiation in Schedule 1 to the Order of the NSIP and associated development works (though an

explanation of the different NSIPs has been provided above (which refers to the assessment in connection with section 20(3)(b) in Appendix 1.3 of the Environmental Statement)), and a description of the authorised works is also provided in the Environmental Statement. Ultimately, all elements of the Project either constitute part of the NSIP or are “associated development” within the meaning of section 115(2) of the 2008 Act, and so can properly be authorised by the Order. For the avoidance of doubt, this is an accepted approach adopted across National Highways’ DCO portfolio (e.g. Schedule 1 to the A428 Black Cat to Caxton Gibbet Development Consent Order 2022) and there are no reasons for departing from approach for the Project.

- 3.6 In order to ensure that the authorised development is constructed efficiently and without impediment, the Order contains the powers to carry out the ancillary works listed in Schedule 1. Each item listed under “ancillary works” is required in connection with a “numbered work”. The use of such measures was explicitly approved in the A19/A184 Testo’s Junction Alteration Development Consent Order 2018 and extensive provisions were used in both the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and the Silvertown Tunnel Order 2018.
- 3.7 National Highways has ensured that these ancillary works can only be carried out where they do not give rise to materially new or materially different environmental effects as compared with the environmental statement by including a proviso in the preamble to these ancillary works. In any event, the Order requires that the Project is designed in accordance with the engineering drawings and sections and general arrangements (see Requirement 3 below); the rights and restrictive covenants which can be acquired are limited for the plots and purposes in Schedule 8; and temporary possession powers are limited to the purposes specified in Schedule 11 for plots listed therein. These controls, amongst others, therefore, impose further limitation on the use of the ancillary works powers.

## **RELATED HOUSING DEVELOPMENT**

- 3.8 The Project would involve demolition of the Gammon Field Travellers site which lies within the Order Limits. The residents of Gammon Field have requested that the replacement travellers’ site is located within the surrounding area close to existing schools, healthcare and community facilities and has a similar pitch orientation. The proposed travellers’ site is located east of the existing site area, and accessible to existing facilities. The replacement travellers’ site would have the same access off Long Lane or Gammonfields Way as at present with pedestrian access to public transport which runs along the A1013. The site would be designed to ensure safe access and egress onto the road network and is not located within the flood zone. The replacement site would have essential services provided before it is occupied. The replacement site is equivalent to the existing in terms of size, quality and access arrangements from Long Lane. The likely effect has, therefore, been assessed as neutral and not significant.

3.9 The replacement travellers' site is "related housing development" for the purposes of section 115(1)(c). The replacement site meets the tests set out in section 115(4B) namely:

*(a) consists of or includes the construction or extension of one or more dwellings,*

*(b) is on the same site as, or is next to or close to the part of the project forming the nationally significant infrastructure project (and is also otherwise associated with that development)*

*(c) is to be carried out wholly in England*

3.10 It also meets the criteria in section 115(4C) as it relates to a site in England.

3.11 Under the Government's guidance, related housing development is permitted where there is a "a functional need for the housing in terms of the construction or operation of a project" or where "the housing is not functionally linked to the infrastructure project but is in geographical proximity to the project".

3.12 The proposed replacement site for the travellers falls into the second category as it is geographically proximate to the Project. There is also a functional need for the replacement because the existing site is proposed to be used and acquired in connection with the Project.

3.13 In terms of other elements of the Government's guidance on housing development, in general terms it is worth noting that the focus of that guidance is on new housing development, but that does not limit it to such development. The proposals for the replacement site fully accord with that guidance, in particular:

3.13.1 Paragraph 13: "An application for development consent that includes housing may also include other development associated with that housing, such as local infrastructure. Any such development should be integral to the housing proposed and be proportionate to the scale of housing for which consent is sought." – in general terms, the replacement site is equivalent to the existing in terms of size, quality and access arrangements from Long Lane. The Design Principle relating to the travellers' site includes associated amenity structures and landscaping which are directly related to the housing elements proposed.

3.13.2 Paragraphs 17 and 18 limit the number of dwellings permitted to 500. The replacement site would provide 21 residential pitches (please see responses in respect of Requirement 13 below which explain how this is secured). Requirement 13 limits the number of caravans on the site to 42 (i.e., 2 caravans on each pitch).

3.13.3 Paragraph 28 sets out the factors to be considered; we address each in turn:



- (a) The justification for any housing where it is being provided to meet a functional need – this is provided above.
- (b) The amount of housing being proportionate – the amount of housing being provided reflects the number of existing pitches on the site, and is secured under the terms of the Design Principles.
- (c) The location – the location is geographically proximate to the existing site.

3.13.4 Paragraph 30: *“Policies in the development plan are also likely to be an important and relevant consideration for the Secretary of State when deciding whether to grant development consent for the housing element of the scheme.”* National Highways notes that Appendix C of the Planning Statement (at pages 83-4) (Application Document 7.2) shows how the proposals accord with Policy CSTP3 of the Thurrock Local Plan, where the site is situated.

3.13.5 Paragraph 33: *“Engagement with local authorities and local communities on any proposed infrastructure projects that will involve housing is essential.”* National Highways notes that the replacement for the travellers’ site was consulted on in the pre-application consultation. At the Supplementary Consultation (in 2020), National Highways specifically consulted on two potential locations for the relocation of the travellers’ site. In addition, National Highways has had extensive engagement with Thurrock Council, with 12 meetings specifically discussing the location and design of the travellers’ site. Due to the COVID-19 pandemic and restrictions in place prior to, and throughout, the RIBA Stage 2 design phase, it was not possible to physically consult with the Travellers in person. The Project and Thurrock Council discussed the situation and agreed how the consultation should take place. There was no suitable facility available near the existing travellers’ site, where a physical consultation could take place that would meet the requirements of social distancing. Therefore, it was agreed to set up a private Facebook group where the Project could post a series of videos, which included diagrams, drawings and voiceovers, to obtain feedback and comments from the Travellers. This video was supplemented by phone calls to individuals who were known to not be on Facebook or have no internet access. National Highways has also engaged with the Essex Police on the replacement site. National Highways has been encouraged that the plan which is included in the Design Principles has been agreed at the officer level, though we are still awaiting formal approval from Thurrock Council.

3.13.6 Paragraph 38: *“Where housing is being provided on the basis of geographical proximity, the developer should provide an assessment of the impact of the housing proposed in terms of local plan provision and local housing supply”* – as this site is a replacement of the existing

travellers' supply, it is not considered that this paragraph is directly applicable.

- 3.14 We would further note that Policy G of the Planning policy for traveller sites states that *“Local planning authorities should work with the planning applicant and the affected traveller community to identify a site or sites suitable for relocation of the community if a major development proposal requires the permanent or temporary relocation of a traveller site. Local planning authorities are entitled to expect National Highways to identify and provide an alternative site, providing the development on the original site is authorised.”* This guidance clearly deals with a situation under the conventional planning regime, but National Highways considers that it stands for the general proposition that travellers' sites should be replaced where appropriate.
- 3.15 For all of the reasons above, the travellers' site replacement also falls squarely within section 120(3) on the basis that it mitigates an adverse impact of the Project.

#### **4 ANCILLARY MATTERS**

- 4.1 The Order also contains several ancillary matters, i.e. provisions not consisting of development.
- 4.2 The main ancillary matter is a power to acquire land or rights over land compulsorily in accordance with section 120(4) of the 2008 Act, required for the authorised development, or to facilitate, or that are incidental to the authorised development under section 122 of the 2008 Act. Justification for these powers is set out in the Statement of Reasons (Application Document 4.1) that accompanies the application.
- 4.3 The Order seeks to apply and modify statutory provisions in relation to the compulsory acquisition of land. It is for this reason that, under sections 117 and 120(5) of the 2008 Act, the Order must be made by way of Statutory Instrument. The Order is therefore in that form.
- 4.4 Other ancillary matters include provisions for road user charging, the diversion and stopping up of lengths of existing highways in the vicinity of the route, the classification and re-classification of highways including trunking and the application of speed limits, the stopping up of private means of access and the creation of new private means of access, and the application and disapplication of legislation relating to the Project.

#### **5 DRAFT ORDER**

##### **Approach**

- 5.1 National Highways has provided below an enhanced level of appropriate and proportionate Project-specific rationale for the inclusion of the provisions below without prejudice to the requirement to do the same on any of its other projects.

Nonetheless, National Highways is mindful that across a number of recent highways DCOs, the Secretary of State has made clear that there should be a degree of consistency across made highways DCOs (see, for example, the reference to “maintain[ing] consistency with highways DCOs” in the M25 Junction 28 decision letter, the rationale for refusing a correction in relation to the A303 Stonehenge scheme was “the Secretary of State’s preferred drafting and ensures a consistency of approach across transport development consent orders”).

- 5.2 Although the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (the Model Provisions) has been repealed, the Order draws on the Model Provisions, as well as precedent set by DCOs that have been made and particularly those relating to highways NSIPs, as well as Orders made under Transport and Works Act 1992 relating to underground / tunnel projects.
- 5.3 With the exception of the bespoke provisions on road user charging, and the provisions on the acquisition of third party rights under article 31 and 32 (which are justified in relation to the Project), the provisions are widely precedented. National Highways has taken the approach of providing cross-references to specific DCOs below which incorporate the drafting contained in the Order. Those cross-references are not intended to be comprehensive: this Explanatory Memorandum does not refer to every single precedent which accords with the Order. This document has been drafted so that it refers to wide and broad precedents to underscore the fact that it is based on broad precedent. If this document simply referred to one project DCO, it would be open to criticism for overreliance on that project. If this document stated every precedent for a provision, it would be unwieldy, undermining its fundamental purpose to provide an explanation of the provisions for the public.
- 5.4 The purpose and effect of the provisions of the Order are now explained in sequence. For completeness, references to “National Highways” below should be read as references to its agents and contractors, and to any other persons who have the benefit of the Order or any statutory rights transferred them pursuant to Article 8.

## **Part 1 – Preliminary**

### *Article 1 – Citation and commencement*

- 5.5 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 comes into force. This article did not appear in the Model Provisions. However, it is a standard article that is included in all DCOs.

### *Article 2 – Interpretation*

- 5.6 The purpose of article 2(1) is to define terms used in the remainder of the Order.

5.7 The following definitions are used in articles in the remainder of the Order that are typical of highway schemes:

5.7.1 "the 1984 Act";

5.7.2 "carriageway";

5.7.3 "cycle track": this term is used interchangeably with "cycle way" in the application documents and both are intended to have the meaning defined in this article (i.e., a way intended for use by cyclists);

5.7.4 "footway" and "footpath";

5.7.5 "street";

5.7.6 "street authority"; and

5.7.7 "trunk road".

5.8 Other definitions to note include the following:

5.8.1 "Order land", which comprises all of the land to be acquired or used permanently or temporarily as shown on the Land Plans (Application Document 2.2), and described in the Book of Reference (Application Document 4.2).

5.8.2 "the Order limits", which references the limits of land to be acquired or used permanently or temporarily shown on the Land Plans and Works Plans (Application Document 2.6) within which the authorised development may be carried out.

5.8.3 "maintain" includes inspect, repair, adjust, alter, improve, landscape, preserve, remove, reconstruct, refurbish or replace, provided such works do not give rise to any materially new or materially different environmental effects to those identified in the environmental statement and any derivative of "maintain" is to be construed accordingly. The inclusion of "adjust" or "alter" is justifiable on the basis that during maintenance operations changes to existing specifications may be required. Similarly, "remove" is included as it may be necessary to remove something in order to repair, clean or replace it, for example. The proper maintenance of the highway is an essential part of ensuring the safety of road users. It is therefore appropriate to ensure that National Highways can carry out the maintenance activities it needs to in order to ensure continued public safety.

National Highways considers this is appropriate and has precedent in made DCOs to date, such as the M42 Junction 6 Development Consent Order 2020 and the A428 Black Cat to Caxton Gibbet Development Consent Order 2022 (both of which have the same definition of 'maintain'). It should be kept in mind that the power to maintain in the Order is expressed as relating to the authorised

development; in other words, it does not extend to matters beyond the development as authorised. In addition, activities that would give rise to materially new or materially different environmental impacts in comparison with those reported in the environmental statement are excluded from the ambit of permissible maintenance activities for the purposes of this definition, which means there are effective limits on the extent of the powers.

- 5.8.4 “the tunnel area” includes both “the tunnels” and “the tunnel approaches” which are also defined in article 2. All of these definitions refer to the Tunnel Area Plan (Application Document 2.12) which sets out the extent of the tunnel area (and, for clarity, the “tunnels” are shown as the “tunnel” on that plan). National Highways has defined these elements by reference to where it considers it appropriate (and indeed necessary) for control measures, such as the byelaws, to apply. The drafting of these definitions is based on similar drafting in the Silvertown Tunnel Order 2018.
- 5.9 Article 2(2) provides that a broad definition of “rights over land” applies to the Order.
- 5.10 Article 2(3) provides that measurements are 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 works are permitted by the Order. Thus, this provision allows for a small tolerance with respect to any distances and points, although works will take place within the limits of deviation. It is commonplace to include such provision in an Act or instrument authorising linear infrastructure (see, for example, the M1 Junction 10a (Grade Separation) Order 2013 at article 2(3), the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013 at article 2(3) and the A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 at article 2(3)).
- 5.11 Article 2(4) provides that references to the acquisition and creation of rights are to include a reference to acquiring rights in favour of third parties directly, and to any statutory undertaker for the purpose of their undertaking. This ensures that those who are intended to benefit from any compulsory acquisition of rights over land (such as statutory undertakers in respect of their apparatus, or landowners who are intended to have the benefit of replacement land or new accesses) are able to benefit from such acquisition directly. This provision is included in the M42 Junction 6 Development Consent Order 2020 (article 2(3)) and the Great Yarmouth Third River Crossing Development Consent Order 2020 (article 2(3)).
- 5.12 Article 2(5) provides that areas given in the Book of Reference are approximate as these are not covered by article 2(3). This is intended to clarify the status of the area measurements in the Book of Reference, and the purpose and effect of the term “approximately” in this context is the same as set out in paragraph 5.10 above. The term “approximately” is required to be read in to all plot area

measurements in the Book of Reference, as these measurements are given in square metres, and each measurement is rounded up to the nearest whole square metre.

- 5.13 Article 2(6) and 2(7) tie references to lettered/numbered points and numbered works in the Order to the relevant plans referenced and Schedule 1 of the Order, respectively.
- 5.14 Article 2(8) clarifies that references to any statutory body or registered company in article 8 includes that body's or registered company's successors from time to time.
- 5.15 Article 2(9) confirms that the expression "includes", when used in the Order, is to be construed without limitation.

***"Materially new or materially different" (Article 2(10))***

- 5.16 Article 2(10) is an interpretive provision applying to all references in the Order to "materially new or materially different" environmental effects. There are provisions in the draft DCO where activities are constrained to those which do not give rise to materially new or materially different environmental effects or where variations are permissible provided they do not give rise to such effects (e.g. the definition of maintenance, article 6(2), paragraph 3 of Schedule 2 to the draft DCO). The interpretive provision confirms that references to materially new or materially different environmental effects in comparison with those reported in the Environmental Statement shall not be construed so as to include the avoidance, removal or reduction of an adverse environmental effect that was reported in the Environmental Statement as a result of the authorised development.
- 5.17 National Highways does not consider that the interpretive provision changes the meaning of "materially new or materially different"; instead, it seeks to confirm the position that references to "materially new or materially different" are not intended to prevent variations within the terms of the DCO being progressed where they would entail an environmental betterment. This interpretive provision is intended to ensure certainty and clarity on this issue in a transparent way.
- 5.18 The drafting is acceptable and necessary because a contrary interpretation would lead to:
  - 5.18.1 Restricting the ability to take opportunities that emerge through the detailed design of the Project to deliver it in a way that is less harmful to the environment, and/or gives rise to greater beneficial environmental effects.
  - 5.18.2 Operating in tension with the pressures to adopt a conservative approach to EIA which results in assessed effects being precautionary, meaning the ability to make improvements which are not materially different is therefore restricted. National Highways has necessarily undertaken an environmental impact assessment which conforms to

the “Rochdale envelope” approach (as explained in Advice Note 9 and R. v Rochdale MBC ex parte Milne (No. 1) and R. v Rochdale MBC ex parte Tew [1999] and R. v Rochdale MBC ex parte Milne (No. 2) [2000]). The purpose of such an assessment is to ensure that a reasonable worst-case scenario is adopted so that mitigation measures which protect the environment on that basis are incorporated. The proposed provision (article 2(10)) in the draft DCO is consistent with that approach; and the requirement to ensure an appropriately precautionary assessment should not be read as requiring the delivery of that worst case scenario. Instead, that requirement is properly understood as setting an envelope in which activity and works can be carried out.

5.18.3 Undermining relationships with important stakeholders as a result of the constraints on National Highways’ ability to improve environmental effects.

5.18.4 Constraining National Highways’ ability to comply with the conditions of its licence which oblige it to “*minimise the environmental impacts of operating, maintaining and improving its network and seek to protect and enhance the quality of the surrounding environment*”. The compliance with this obligation in the licence is a legal requirement imposed upon it under the Infrastructure Act 2015. The absence of a clear ability to carry out activity or works with environmentally better outcomes puts it at risk of not being able to comply with that obligation.

5.19 In addition to the reasons provided above, National Highways considers the drafting to be acceptable for four reasons.

5.19.1 It positively addresses the aforementioned section 51 advice from the Inspectorate which sets out:

*“...the Planning Inspectorate noted that the judgement of ‘materially different’ within the DCO would benefit from being clearly defined”*

The provision therefore clarifies that reductions and removals of adverse effects are not to be taken as materially new or materially different, providing further certainty as to the interpretation of the “materially new or materially different” test, where relevant.

5.19.2 The amendment confirms that where a proposed change or activity avoids, removes or reduces adverse environmental effects that were reported in the Environmental Statement, a material or non-material amendment to the Development Consent Order is not required. Requiring a material or non-material amendment to the Development Consent Order would introduce significant delay and therefore disincentivises appointed Contractors from delivering the Project in a manner with environmentally better outcomes. National Highways does not consider it is the Secretary of State's intention to place barriers to delivering improved environmental outcomes in relation to

the sensitive environment in which the Project is situated. It is to be noted that the Secretary of State confirmed that it was not the intention to avoid environmentally better outcomes in the correction notice issued in connection with the A19/A184 Testo's Junction Alternation Development Consent Order. In particular, the Secretary of State confirmed that:

*"It is the Secretary of State's view that the recommended wording would allow the necessary scope for changes that are better for the environment providing such changes do not result in significant effects that have not already been previously identified and assessed in the Environmental Statement."*

- 5.19.3 National Highways would further note that a recent DCO confirmed that the Secretary of State had no in principle objection to what is intended: the A57 Link Roads DCO uses the phrase "materially new or materially worse". National Highways has elected on this occasion not to utilise that drafting as we are mindful that the precedented "materially new or materially different" drafting *"reflects the Secretary of State's preferred drafting and ensures a consistency of approach across transport development consent orders"*.
- 5.19.4 National Highways is fully aware of, for example, DCO decision letters which give a clear steer as to preferred approaches. The interpretive provision does not conflict with decision letters which confirm that "materially new or materially different" is the *"wording preferred by the Secretary of State"* (see the decision letter dated 24 September 2020 for the Great Yarmouth Third River Crossing).
- 5.19.5 The drafting directly responds to "Getting Great Britain building again: Speeding up infrastructure delivery" (DLUHC, 2023) which sets out that *"Under the status quo, developers are required to apply for additional planning permission if they propose project amendments that have 'materially new or materially different environmental effects'"*. It further notes that Government wants to *"make sure that project changes that will deliver positive impacts for projects, communities, and the environment can be approved more quickly"*. That is precisely what this provision enables.
- 5.19.6 The drafting positively responds to other government policy which is *"to make the NSIP system more effective and deliver more certainty in the process and better, greener and faster outcomes"* (Action Plan, 2022). The interpretive provision enables faster decisions in the context of environmentally better outcomes and therefore accords with this policy. Government has also endorsed *"increasing flexibility to make changes to a DCO once it has been submitted"* (Growth Plan, 2022). Again, as the provision would enable flexibility inside the scope of the environmental assessment envelope post-submission of the DCO, it is considered proportionate and necessary and consistent with that Government policy.



- 5.19.7 The drafting responds to a known and pervasive issue in infrastructure delivery. The National Infrastructure Planning Association has published research which shows that “nearly 50% of participants highlighting potentially beneficial post consent changes were not pursued because of the time, complexity, expense and delay in seeking those post consent changes” (NIPA Insights 3, 2023). The omission of this interpretive provision would exacerbate this issue.
- 5.20 It is acknowledged that the London Borough of Havering has raised a concern relating this interpretive provision. In particular, they raise “a hypothetical example” where “mounds may ... be needed to be at a certain height for noise mitigation and without them there might be an adverse noise effect. Nonetheless, because the reduction of the mounds resulted in the reduction of an adverse effect identified in the ES, it would be sanctioned by this provision irrespective of the collateral noise impacts.” For the avoidance of doubt, the effect nor the intention, of this provision to allow variations which would give rise to such impacts. National Highways does not consider this to be the effect of the provision; “collateral noise effect” referenced in the hypothetical example would in fact be a separate “materially new or materially different” environmental effect.
- 5.21 They request that “provided that there is no new or materially different adverse environmental effect in comparison with those identified in the environmental statement caused by the avoidance, removal or reduction of such adverse environmental effect” be added to the end of the interpretive provision. Leaving aside the fact that the underlying rationale for such wording is flawed for the reasons explained in the paragraph above, the specific additional wording proposed by LBH also specifically uses the phrase “new or materially different adverse environmental effect” which the Secretary of State has indicated is not their preferred drafting practice. In addition, the wording would prevent environmentally better solutions because it uses the phrase “materially different adverse environmental effect”. For example, in a hypothetical scenario where a reduction of a landscape effect was entirely avoided by a variation, but there was also an associated reduced (but ‘different’) noise effect (which would still be adverse because it merely reduced the effect from ‘major’ to ‘moderate’), LBH’s suggested provision would perversely preclude that variation. It is for this reason that the Applicant has resisted the insertion, and stated the proposed variation would obviate the need and rationale for the provision itself.

## **Part 2 – Principal powers**

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

- 5.22 Article 3(1) grants the development consent by giving National Highways the power to carry out and operate the authorised development, which is described in Schedule 1. This article makes the consent subject to the requirements that are listed in Schedule 2. This provision differs from some made highways Orders in two respects. First, it explicitly includes development consent for operation of the authorised development. This is in response to requests from

statutory undertakers, who have sought express confirmation that development consent is granted for the operation of their utilities assets. The inclusion of an express reference to the grant of development consent for the operation of the authorised development is consistent with the approach taken in energy DCOs (see e.g., article 5 of the Millbrook Gas Fired Generating Station Order 2019). It is also relevant to note that there is precedent for including development consent for operation in highways DCOs (see e.g. article 3(1) of the A1 Birtley to Coal House Development Consent Order 2021). Second, the provision differs from some made highways Orders since it does not refer to development consent being granted “*within the Order limits*”. This is because the Order provides for certain activities to be carried out beyond the Order limits (e.g. articles 20 (protective works to buildings and land) and 21 (authority to survey and investigate land)). These articles are routinely included in DCOs, are necessary to support the delivery of the authorised development and also serve to reduce in scope the amount of land required for temporary powers of possession and/or compulsory acquisition, since the land would otherwise need to be included within the Order limits. The approach therefore reflects the clear intention that such activities should benefit from development consent and should not be subject to a requirement for further planning approval outside the DCO process. National Highways notes that the Secretary of State has explicitly endorsed the removal of the phrase “within the Order limits” in the A303 Amesbury to Berwick Down Correction Order “in recognition that the Order provides powers to carry out limited activities beyond the Order limits”. This drafting approach does not affect the limits of deviation for the works which are controlled under article 6.

- 5.23 Article 3(2) introduces Part 2 of Schedule 1 which sets out the further details of the works permitted to be carried out to scheduled monuments. This does not limit the powers under Article 3(1) but has been included in response to feedback from Historic England to provide further information in the Order regarding the works required to be undertaken to heritage assets. A similar provision is included in article 39 of the A1 Birtley to Coal House Development Consent Order 2021.
- 5.24 Article 3(3) states that any enactment applying to land within the Order limits has effect subject to the provisions of the Order. Article 3(2) has been included and is necessary in order to ensure that there are no acts of a local or other nature that would hinder the construction and operation of this NSIP. National Highways has carried out a proportionate search of local legislation that applies within reasonably close proximity to land within the Order limits, but no search can be completely exhaustive and there remains the possibility that a local act or provision may have been overlooked. Including this article ensures that the construction and operation of the Project are not jeopardised by any incompatible statutory provisions which might exist, i.e. a provision which would be an absolute restriction that could not be dealt with unless by statutory amendment. The provision would prevent delay in this situation by ensuring that the Project could be constructed without impediment. Specific local enactments identified through National Highways’ proportionate search of local legislation are disapplied under article 55 (Application of local legislation). This is a widely precedented article (see most recently article 3(2) of the A19/A184 Testo’s

Junction Alteration Development Consent Order 2018 and article 3(2) of the M42 Junction 6 Development Consent Order 2020). It is to be noted that, unlike those made Orders, the phrase “land within, adjoining or sharing a common boundary with the Order limits” is used (rather than “land within or adjacent to the Order limits”). This drafting reflects a request made by the Port of London Authority and follows the Silvertown Tunnel Order 2018. National Highways considers the drafting does not affect the legal effect of the provision, and is without prejudice to its other Orders. This is also subject to article 3(4) which contains a list of enactments which are not caught by article 3(3). Article 3(4) was requested by the Port of Tilbury London Limited.

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

- 5.25 This article authorises National Highways to maintain the development. “Maintain” is defined in article 2(1) as including “inspect, repair, adjust, alter, remove or reconstruct”, with these terms bearing their common-sense meanings. Maintenance of the authorised development, within the meaning that would be authorised by this article, has been assessed in the Environmental Statement, and the power is constrained, through the definition of “maintain”, by the proviso that maintenance works must not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement (Application Documents 6.1, 6.2 and 6.3).
- 5.26 Article 4 supplements the maintenance powers under section 329 of the Highways Act 1980 and ensures that National Highways has the necessary powers to maintain the Project. It is considered necessary and appropriate to adopt the definition, which is consistent with article 4 of the A19/A184 Testo’s Junction Alteration Development Consent Order 2018 and article 4 of the M42 Junction 6 Development Consent Order 2020.
- 5.27 It should be noted that powers of maintenance are subject to other provisions in the Order, in particular article 10, which makes provision in relation to maintenance by highway authorities.

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

- 5.28 The purpose of this article is to make it clear that any realignment of drainage or other works to them that are carried out as part of the Project do not affect the existing allocation of responsibility for maintenance of those drains, unless this is agreed between National Highways 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.
- 5.29 This provision is well precedented (see for example article 4 of the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016, article 5 of the A19/A184 Testo’s Junction Alteration Development Consent Order 2018 and article 5 of the M42 Junction 6 Development Consent Order 2016).

## *Article 6 – Limits of deviation*

- 5.30 Since the authorised development involves linear works, article 6 provides for limits of deviation to allow for a lateral deviation from the lines and situations of the authorised development within the limits of deviation shown on the Works Plans, and vertical deviation of the highway linear works subject to a maximum deviation of 0.5 metres upwards or 1m downwards. Separate limits of deviation apply in respect of the tunnels and these limits are shown on the tunnels limits of deviation plans (Application Document 2.15), and the utilities works listed in article 6. Paragraph (1) deals with lateral limits of deviation, and paragraph (2) deals with vertical limits of deviation.
- 5.31 The ability to deviate within the prescribed limits of deviation is important to ensure that, if the precise “as built” alignments or elevations are different to those indicatively shown on the application plans, no question arises as to whether or not the works are permitted by the Order. As further detailed design will take place, the limits of deviation therefore ensure that National Highways (or, where any powers are transferred, other statutory undertakers or persons) have sufficient flexibility to design and construct the authorised development post consent.
- 5.32 The limits of deviation set out in article 6 have been developed through the design and Environmental Impact Assessment process for the authorised development. As such, the article is an adaptation of the article set out in the Model Provisions and, in terms of principle, it accords with the majority of DCOs made to date (for example article 6 of the A19/A184 Testo’s Junction Alteration Development Consent Order 2018, and article 8 of the A30 Chiverton to Carland Cross Development Consent Order 2020). Further justification for these particular limits of deviation is contained in section 12 of the Introduction to the Application (Application Document 1.3), which confirms that the limits of deviation are grounded in precedent and provide for a proportionate level of flexibility.
- 5.33 Paragraph (3) confirms that the maximum limits of deviation set out in paragraph (1) and (2)(a) to (o) (i.e., excluding (p)) do not apply where it is demonstrated to the Secretary of State’s satisfaction (and the Secretary of State has certified accordingly following consultation with the relevant planning authority and, where relevant, a local highway authority) that such deviation would not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement (Application Documents 6.1, 6.2 and 6.3).
- 5.34 The purpose of this provision is to provide National Highways with a proportionate degree of flexibility when constructing the Project, reducing the risk that the Project as approved cannot later be implemented for unforeseen reasons but at the same time ensuring that any flexibility will not give rise to any materially new or materially different environmental effects.
- 5.35 This is not an impermissible “tailpiece” provision as the limits of deviation referred to in this article and shown on the application plans have been taken

into account in the preparation of the Environmental Statement (Application Documents 6.1, 6.2 and 6.3) and the potential impacts of a deviation within the permitted limits have been assessed. National Highways is only permitted to exceed the limits specified in this article if it can demonstrate to the Secretary of State's satisfaction that no materially new or materially different environmental effects would arise. Paragraph (3) is identical to article 6(2) of the M42 Junction 6 Development Consent Order 2020 (and is otherwise heavily precedented), but has been amended to require consultation with a local highway authority where a variation is sought for a road other than a trunk road or special road (as per the A428 Black Cat to Caxton Gibbet Development Consent Order 2022).

- 5.36 Paragraph (4) clarifies that the process set out in Part 2 of Schedule 2 to the Order, which applies in relation to applications to discharge any of the requirements in Part 1 of Schedule 2, will also apply to any application to the Secretary of State for certification under paragraph (1), as though it were an application for approval under the requirements. This ensures there is a clear, defined process in place for applications to the Secretary of State under this article. Paragraph (4) is identical to article 6(2) of the A19 Downhill Lane Junction Development Consent Order 2020.

#### *Article 7 – Benefit of Order*

- 5.37 Article 7 overrides section 156(1) of the 2008 Act (as permitted by section 156(2)) to give the benefit of the Order to National Highways rather than anyone with an interest in the land. Under section 156 of the 2008 Act, an order granting development consent in respect of any land has effect for the benefit of the land and all persons for the time being interested in the land, unless contrary provision is made in the Order. This article makes such contrary provision, overriding section 156 (as permitted by section 156(2)) to restrict the benefit of the Order to National Highways (subject to paragraph (2) and article 8) rather than anyone with an interest in the land. It would be impracticable for a variety of landowners to be afforded powers to implement parts of the Order in an uncoordinated manner, which might be the case if section 156(1) were to remain.
- 5.38 The purpose of paragraph (2) is to clarify the exceptions where the Order will self-evidently benefit others, e.g. in relation to the construction of a new private means of access. Absent this provision, there would be a contradiction since strictly speaking only National Highways could benefit from these works. The same wording has been accepted and approved by the Secretary of State in other orders, for instance the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 (see article 8(2)) and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 (see article 7(2)).
- 5.39 Paragraph (1) is based on article 4 of the Model Provisions, amended to clarify that it is subject to paragraph (2) and that it is National Highways that benefits from the provisions of the Order, rather than particular articles applying for the benefit of other specified parties.

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

- 5.40 This article allows the benefit of the Order to be transferred or leased to others by National Highways. The exercise of any transferred benefits or statutory rights (e.g. the power of compulsory acquisition of land or rights) is subject to the same restrictions, liabilities and obligations as would apply under the Order if those benefits or rights were executed by National Highways. The consent of the Secretary of State is required for a transfer or grant, except where it is made to specified companies in relation to certain utility diversion works under paragraph (5).
- 5.41 The removal of the need for later consent by the Secretary of State under paragraph (5) is justified by the fact that such consent is sought for the purposes of this application for development consent; thus interested parties, the Examining Authority and ultimately the Secretary of State will have an opportunity to consider the appropriateness of this power as part of this application, and therefore avoid unnecessary administrative burden. Further justification for this approach (and the absence of setting out specific works, on which see directly below) is that paragraph (5) makes clear that the liability for any compensation payable in respect of the compulsory acquisition of land or rights would rest with the undertaker. Paragraph (7) provides that references to companies in paragraph (5) include any associated holding companies or subsidiaries carrying out the same undertaking as the company listed in paragraph (5). Paragraph (7) is required as statutory undertakers often transfer responsibilities within group companies and ensures that the Project can be delivered expeditiously and without administrative burden in such circumstances.
- 5.42 This article is based on article 5 of the Model Provisions. It differs in that it allows as noted a transfer or grant to certain specified companies to take place without the Secretary of State's consent, on the basis that it is appropriate for those companies to be able to carry out those works without the Secretary of State needing to consider at a later date whether or not consent should be granted (for the reasons set out above). This provision too is precedented (see, for example, the A30 Chiverton to Carland Cross Order 2020). In addition, unlike other DCOs, paragraph (4) does not itemise particular work numbers in respect of which transfers to named statutory undertakers without the consent of the Secretary of State can take place. The itemised approach may be appropriate for a comparatively smaller scheme requiring a smaller number of rights to be acquired for the benefit of third parties, and where the detailed scheme design has been further advanced, but it is not feasible in relation to this Project as some utilities works will be carried out under the "lettered" works in Schedule 1 to the Order, rather than specific numbered works. Nonetheless, the Order provides appropriate control over the powers which can be transferred without the Secretary of State's consent by making clear that the works which are the subject of a proposed transfer must relate to the undertaking of the relevant undertaker. This provides comfort, therefore, that no powers unrelated to a statutory undertakers' undertaking may be transferred to a body named in Paragraph (5).

- 5.43 Paragraph (6) provides the consent of the Secretary of State is not required where the powers to acquire permanent rights or impose restrictive covenants are transferred to a statutory undertaker under article 28. This is based on article 50(4) of the draft A303 (Amesbury to Berwick Down) Development Consent Order 2020. The provision is justified further below.

### **Part 3 – Streets**

#### *Article 9 – Application of the 1991 Act*

- 5.44 Article 9 modifies the application of the New Roads and Street Works Act 1991 (the 1991 Act) to works carried out under the powers of the Order.
- 5.45 Paragraph (1) provides that works carried out under the powers of the Order which match the description of "major highway works" in the 1991 Act will be treated as major highways works for the purposes of the 1991 Act. The effect of this is to clarify that the provisions for sharing the burden of dealing with apparatus in the street (under sections 84 and 85 of the 1991 Act), which would normally apply only to major works carried out by the highway authority, will apply in respect of the works authorised by the Order irrespective of who in fact carries them out. Paragraph (1) applies to works "executed" under the Order rather than works constructed or maintained for clarity, and such drafting is precedented (see, for example, article 9 of the M54 to M6 Link Road Development Consent Order 2022).
- 5.46 Paragraph (2) relates to "major highway works" which are defined at section 86 of the 1991 Act. The definition includes, at sub-sections 86(3)(b) and (f), works undertaken under powers conferred by sections 64 and 184 the Highways Act 1980. As that would not be relevant in this context (where the works will be undertaken under the powers of the Order), these sub-sections are omitted from paragraph (1)(a). Works equivalent to works undertaken under those sections of the Highways Act 1980, but carried out under powers conferred by the Order, are included through paragraph (1)(b). The effect is that any works which would be "major highway works" under the 1991 Act if carried out by a highway authority in relation to one of its streets are also "major highway works" if carried out under the powers of the Order regardless of who carries them out.
- 5.47 Paragraph (3) provides that certain provisions of the 1991 Act listed in that paragraph will not apply. 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 (particularly article 3 and Schedule 1), and the provisions in the Order (including the requirements) which would regulate the carrying out of the Order works.

- 5.48 Paragraphs (4) to (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to any streets which are temporarily closed, altered, diverted or restricted under the Order. This is for two reasons: first, it prevents any confusion as to whether works in respect of a temporarily closure, alteration, diversion or restriction are "street works" for the purposes of the 1991 Act and, secondly, it simplifies the implementation of the works by providing for a single process in respect of streets which are temporarily closed, altered, diverted or restricted and those which are not.
- 5.49 Paragraph (7)(a) provides that nothing in article 10 shall affect the ability of the local highway authority (under section 87 of the 1991 Act) to declare a street in its area a maintainable highway, which would make maintenance of the street (once completed) the responsibility of the local highway authority, and would mean that the 1991 Act would apply to street works carried out in that street.
- 5.50 Paragraph (7)(b) confirms that National Highways is not to be taken to be the street authority for a street for the purposes of Part 3 of the 1991 Act merely by being under a duty to maintain it under article 10. National Highways is the highway authority for the strategic road network and is under a duty to maintain that network. Accordingly, it is also the street authority for the strategic road network. Other bodies are responsible for other parts of the road network, and responsibility is allocated in article 10. However, article 10 also allows National Highways to agree a different maintenance position with the local highway authority in writing on a case-by-case basis, and this power may be used from time to time in respect of specific works, or parts thereof. This provision therefore ensures that, if National Highways and the local highway authority did enter into such an agreement, National Highways would not be taken to be the street authority for roads other than those forming part of the strategic road network for the purposes of the 1991 Act.
- 5.51 Paragraph (7)(c) clarifies that the provisions relating to responsibility for maintenance of streets in article 10 do not affect the application of Part 3 of the 1991 Act in respect of maintenance works which are street works for the purposes of the 1991 Act.
- 5.52 These modifications reflect those made in other highway DCOs, for example article 9 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016, article 9 of the A19/A184 Testo's Junction Alteration Development Consent Order 2018 and article 7 of the Lake Lothing (Lowestoft) Third Crossing Order 2020.
- 5.53 Paragraph (8) confirms that any permit schemes will apply in connection with the construction of the authorised development, subject to the same disapplications of the 1991 Act in paragraph (3) and the qualifications in (9) to (10). It should be noted that some Orders have proposed the outright disapplication of permit schemes (e.g. the A38 Derby Junctions Development Consent Order). In response to feedback from local highways authorities, National Highways has not proposed to follow that approach here. Instead, the provisions have sought to balance the use of the permit schemes without delaying the delivery of the Project. To that end, whilst National Highways would



apply the permit schemes in carrying out the Project, the provisions make clear that conditions cannot be imposed on the grant of a permit under a scheme which would cause a breach of the Order. In addition, the disapplication of the provisions of the 1991 Act (in paragraph (3) explained above) would be carried over. It is not appropriate for these provisions to apply simply because a permit scheme has been made. Whilst these provisions are not contained in all highways DCOs (e.g. because permit schemes may not have been made or be relevant to the works), they are appropriate here given the interface with the local road network. These provisions find precedent in some made DCOs (e.g. paragraphs (8) to (10) are based on article 10 of the M25 Junction 28 Development Consent Order 2022) except that paragraph (9) confirms that the principle of the development cannot be a ground for refusing a permit and paragraph (10) permits the use of an appeals process in the case of a refusal of a permit or the grant of a permit subject to conditions.

- 5.54 Paragraph (11) clarifies that any lane rental charging scheme which may be brought forward by the local highway authority will not apply to the Order. It is not appropriate for National Highways to be subject to such charges as a public body delivering nationally significant infrastructure. This provision is precedented (see article 10 of the M25 Junction 28 Development Consent Order 2022 and article 12 of the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022).

*Article 10 – Construction and maintenance of new, altered or diverted streets and other structures*

- 5.55 The standard position in respect of maintenance of highways is that National Highways is responsible for maintaining trunk roads and special roads (i.e., roads forming part of the strategic road network, rather than any local road network). Other highways are to be maintained by the local highway authority. This is reflected in paragraphs (1) and (2). These provisions are subject to any agreement to the contrary between National Highways and the relevant highway authority.
- 5.56 Paragraph (3) makes specific maintenance provision in relation to any new bridges carrying a highway over a trunk road or special road. For these assets, National Highways is responsible for the maintenance of the bridge structure while the local highway authority is responsible for the maintenance of the highway surface. Paragraph (4) makes specific maintenance provision in relation to any new bridges carrying a highway over the local road network. In these circumstances, the maintenance liability for both the surface and the structure lies with the local highway authority.
- 5.57 Paragraph (5) makes specific maintenance provision in relation to streets which are not intended to be public highways. Such streets must be completed to the reasonable satisfaction of the authority, body or person having the management or control of the street unless otherwise agreed. These streets are also subject to a maintenance period in which National Highways will maintain them for 12 months from completion of construction, alteration or diversion of the street, following which the responsibility passes to the street

authority. This provision is intended to apply, *inter alia*, to non-highway streets which are not publicly maintainable by the local highway authority.

- 5.58 The effect of paragraphs (6) and (7) is that, in any action for damages against National Highways alleging failure to maintain a street, National Highways will have the defence that it had taken such care as was reasonably required in the circumstances to secure that the street was not dangerous for traffic. This extends the provision in section 58 of the Highways Act 1980 to National Highways and draws on the approach taken in article 21 of the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 and repeated in article 9 of the A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016, article 12 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016, article 10 of the A19/A184 Testo's Junction Alteration Development Consent Order 2018 and article 14 of the M42 Junction 6 Development Consent Order 2020.
- 5.59 While National Highways would benefit from the equivalent defence in the Highways Act 1980 in respect of trunk roads, for which it is the highway authority, the Project includes roads which are not trunk roads and so this article is needed to ensure National Highways is covered by this defence in respect of all the roads that comprise the authorised development.
- 5.60 Paragraph (8) provides assurance that the planting and vegetation on a green bridge is not caught by the provisions which provide that maintenance liability rest with local highway authorities. The work numbers referenced in this provision reflect green bridges.

#### *Article 11 – Access to works*

- 5.61 This article allows works accesses to public highways to be created. It provides National Highways with a general power to form and lay out means of access, or improve (which includes altering) existing means of access, within the Order limits which are required for the purposes of the authorised development. These powers are equivalent to those available to National Highways when implementing schemes under the Highways Act 1980.
- 5.62 The provisions of this article are broadly similar to the powers contained in the Highways Act 1980, which allows a highway authority to provide '*a new means of access to any premises*' where it considers it '*necessary or expedient in connection with the construction, improvement or alteration of a highway*' to do so. The inclusion of this article is considered to be appropriate as it will help to ensure that the authorised development can be carried out expeditiously by allowing National Highways to create new (and improve existing) accesses as and where required, particularly in response to requests from landowners, occupiers and other affected parties.
- 5.63 This power does not obviate the requirement to comply with the requirements in Schedule 2 to the Order, in particular requirement 4 which secures compliance with the measures in the Code of Construction Practice, and (the updated) requirement 10 which requires compliance with the outline Traffic

Management Plan for Construction. Accesses are indicatively shown in the latter document.

- 5.64 This is a heavily precedented provision (e.g. article 17 of the A1 Birtley to Coal House Development Consent Order 2021 and article 14 of the M54 to M6 Link Road Development Consent Order 2022).

*Article 12 – Temporary closure, alteration, diversion and restriction of the use of streets*

- 5.65 This article allows for the temporary closure, alteration, diversion or restriction of the use of streets for the purposes of the authorised development.
- 5.66 Paragraph (2) differs from the Model Provisions and confers a power on National Highways where the use of a street has been temporarily closed, altered, diverted or restricted under this article to use it as a temporary working site.
- 5.67 Paragraph (3) states that reasonable access for pedestrians going to or from properties abutting a temporarily closed, altered, diverted or restricted street must be provided.
- 5.68 Without limitation on the scope of paragraph (1), paragraph (4) provides for the temporary closure, alteration, diversion or restriction of streets specified in Schedule 3, subject to the provision of temporary closures, alteration, diversions or restrictions as specified in that Schedule.
- 5.69 Paragraph (5) confirms that, in respect of streets for which it is not the street authority, National Highways must not close, alter, divert or restrict those streets listed in Schedule 3 without first consulting the street authority and, in respect of any other street, without the consent of the street authority (such consent not to be unreasonably withheld or delayed).
- 5.70 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.
- 5.71 Paragraph (7) confirms that any temporary diversion provided under paragraph (4) in respect of the streets closed, diverted, altered or restricted listed in Schedule 3 is not required to be of a higher standard than the temporarily closed, altered, diverted or restricted street.
- 5.72 Paragraph (8) states that a street authority which fails to notify National Highways 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. It is considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by National Highways in a timely fashion. This deemed consent will only be operational where the application submitted includes a statement (pursuant to subparagraph (9)) notifying the relevant authority that the deemed consent provision applies.

- 5.73 The article is a standard provision in highways DCOs (see, for example, article 11 of the A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016) although the article has been updated to reflect National Highways' practice of no longer referring to "temporary stopping up" (the particular drafting used in the Order reflects the Southampton to London Pipeline Development Consent Order 2020 and accepted by the Secretary of State for Transport in the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022). In addition, unlike previous DCOs, paragraph (1) and (4) refer to restrictions on use for "vehicles, or classes of vehicles, or pedestrians" in order to allow more targeted and proportionate restrictions, thereby minimising disruption to road users.

*Article 13 – Use of private roads*

- 5.74 This article authorises the temporary passage by National Highways (or other persons who are transferred this statutory right pursuant to article 8) – in common with other permitted users – of private roads within the Order limits by persons or vehicles, for the purposes of, or in connection with, the construction and maintenance of the authorised development, without the need for National Highways to take temporary possession of the land under article 35 of the Order.
- 5.75 This article therefore creates a power to "use" a private road for a temporary period that is proportionate to the limited nature of the use, rather than extinguishing, suspending or permanently interfering with the private rights of a landowner (through the acquisition of a permanent right). This is akin to the powers for temporary use under article 35 (temporary use of land for carrying out the authorised development) of the Order; however, it is distinguished because National Highways does not require the exclusive use and possession of the private roads while exercising this power. The article is necessary because National Highways will need to use private roads inside the Order limits (e.g., Station Road to Low Street Lane, and Green Lane from Stifford Clays Road to Fen Lane)
- 5.76 Paragraph (2) provides that National Highways will be liable to compensate any person who has suffered loss or damage as a result of the exercise of this power. Paragraph (3) is included to clarify that any dispute as to a person's entitlement to compensation, or as to the amount of such compensation, is to be determined under Part 1 of the Land Compensation Act 1961.
- 5.77 There is precedent for this article, for example in the Port of Tilbury (Expansion) Order 2019 (article 16) and the Lake Lothing (Lowestoft) Third Crossing Order 2020 (article 14).

*Article 14 – Permanent stopping up of streets and private means of access*

- 5.78 This article allows streets and private means of access named in Parts 1 to 4 of Schedule 4 to be stopped up (i.e. the legal right of way along them to be extinguished). In the case of Parts 1 and 3, a substitute is to be provided. In the case of Parts 2 and 4, no substitute is to be provided. Paragraph (2) confirms

that, in respect of the streets or private means of access in Parts 1 and 3, the power under this article is not to be exercised unless:

- 5.78.1 the new street or private means of access to be substituted is open for use and has been completed to the reasonable satisfaction of the street authority; or
  - 5.78.2 a temporary alternative route for the passage of such traffic that could have used the street or private means of access to be stopped up is first provided and subsequently maintained by National Highways, to the reasonable satisfaction of the street authority, between the commencement and termination points for the permanent stopping up, until the completion and opening of the new street or private means of access.
- 5.79 In the case of streets or private means of access specified in Parts 2 or 4 of Schedule 4, they may not be stopped up unless one of the conditions referred to in paragraph (4) is met.
- 5.80 Paragraph (5) provides a right to compensation for any person who suffers loss due to the suspension or extinguishment of any private right of way under this article.
- 5.81 Since the definition of a “street” in section 48 of the 1991 Act includes highways and footways, the stopping up and diversion of footpaths and footways are also dealt with in this article and Schedule 4. The wording is based on numerous highways DCOs, see for example article 12 of the A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 and article 13 of the A19/A184 Testo’s Junction Alteration Development Consent Order 2018.

*Article 15 – Classification of roads, etc.*

- 5.82 The designation of highways and the specification of the classes of traffic authorised to use a highway are ancillary matters which may be included in a DCO. These matters are addressed by this article, which is integral to the implementation of the Project, and therefore are considered appropriate to be included in the Order as an ancillary matter under section 120(3) of the 2008 Act.
- 5.83 Paragraph (1) provides for the classification of roads described in Parts 1 to 6 of Schedule 5.
- 5.84 Paragraph (2) confirms that National Highways will be highway authority for the special roads and trunk roads and Transport for London will be the highway authority for GLA roads.
- 5.85 Paragraphs (3) to (5) provide for a procedure to vary the classification of the roads provided for in paragraph (1) (including the designation of a trunk road as a special road) without also amending the Order. This is necessary in order to provide equivalent powers as would be available were the Project proceeding under the Highways Act 1980. These provisions are precedented (see the draft

A303 (Amesbury to Berwick Down) Development Consent Order) but have been amended in response to comments from Thurrock Council to limit the power under these provisions to vary road classifications to special roads and trunk roads (i.e., those roads for which National Highways is the strategic highway authority).

- 5.86 The purpose of paragraph (6) is to confirm that the matters covered in paragraphs (1), (2) and (3) can be varied or revoked in the future using existing enactments for such matters, without the need to apply under the 2008 Act for an amendment to the Order. This may include, where appropriate, the making of a Traffic Regulation Order. It differs from the precedents mentioned below because it states that it has effect notwithstanding Schedule 1. This is to avoid the unintended consequence that the description of a particular street in Schedule 1 could, for example, prevent the use of an existing enactment in order to vary the classification of a street.
- 5.87 This article is based on similar provisions approved in a number of DCOs for highway schemes, see for example article 14 of the A30 Chiverton to Carland Cross Development Consent Order 2020 and article 16 of the M25 Junction 28 Development Consent Order 2022.

*Article 16 – Clearways, speed limits and prohibitions*

- 5.88 The purpose of this article is to impose particular restrictions or alter existing traffic regulations along roads set out in Schedule 6 (but these restrictions do not apply to military vehicles under the Road Traffic Exemptions (Special Forces) (Variation and Amendment) Regulations 2011). In particular:
- 5.88.1 paragraph 1(a) imposes speed limits along certain sections of the authorised development as described in Part 1 of Schedule 6;
- 5.88.2 paragraph 1(b) provides for variable speed limits to apply to sections of the authorised development (also set out in Part 1 of Schedule 6);
- 5.88.3 paragraph 1(c) provides for traffic restrictions to apply to sections of the authorised development as set out in Part 2 of Schedule 6; and
- 5.88.4 paragraph 1(d) varies and revokes existing Traffic Regulation Orders set out in Part 3 of Schedule 6.
- 5.89 Paragraph (1)(c) makes it unlawful for road users to stop on a section of road set out in Part 2 of Schedule 6 except upon the direction of, or with the permission of, a constable or a traffic officer in uniform, or for emergency and other unavoidable reasons (paragraph (2) lists the circumstances in which paragraph (1)(c) does not apply). The purpose is to ensure safe and proper operation of the authorised development, and to ensure the Project delivers its intended benefits. It is therefore considered appropriate to be included in the Order as an ancillary matter under section 120(3) of the 2008 Act.
- 5.90 Such traffic regulation measures are normally made by order under the Road Traffic Regulation Act 1984, with such orders subject to consultation and

publicity requirements. Inclusion within the Order is appropriate as the consultation, publicity and examination processes within the Order procedure provide a more than adequate substitute for the consultation and publicity requirements of Traffic Regulation Orders.

- 5.91 The proposed restrictions sought under this article are similar to those which would apply to a clearway established under section 2 of the Road Traffic Regulation Act 1984. This provides that a Traffic Regulation Order may make provision prohibiting, restricting or regulating the use of a road, or any part of the width of a road, by vehicular traffic, or by vehicular traffic of any class specified in the order either generally or subject to exceptions specified in the order or determined in a manner provided for it or with reference to periods of time. Paragraph (2) is well precedented (see, for example, article 15(1) of the A19 Downhill Lane Development Consent Order 2020) but has been amended to refer to stopping as well as waiting in line with Traffic Regulation Order practice and also the purpose of the provision set out directly above.
- 5.92 Further provision for variable speed limits is set out in paragraphs (4) and (5).
- 5.93 Paragraph (6) also clarifies that paragraphs (1) to (5) have effect as if made by a Traffic Regulation Order under the 1984 Act, and can be varied or revoked by an Order made under that Act or any other enactment which provides for the variation or revocation of such Orders, without the need to apply under that Act for an amendment to the Order (including, again, by means of a Traffic Regulation Order).
- 5.94 Paragraph (7) reflects the insertion in the A19/A184 Testo's Junction Alteration Development Consent Order 2018 to make it clear that "traffic officer" means an officer designated under the Traffic Management Act 2004, and further provides for definitions relating to the variable speed limit provisions.
- 5.95 The wording in this article has been approved and the principle of inclusion of traffic regulation measures accepted in the A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 (see article 14) and the A19/A184 Testo's Junction Alteration Development Consent Order 2018 (see article 15) and the provisions relating to variable speed limits are based on article 48 of the draft A303 (Amesbury to Berwick Down) Development Consent Order and the replicate the effect of variable speed limit regulations (see, for example, the M23 Motorway (Junctions 8 to 10) (Variable Speed Limits) Regulations 2020).

*Article 17 – Traffic regulation – local roads*

- 5.96 The purpose of this article is to provide National Highways with powers 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 (e.g. restrictions on the use of roads) necessary to construct, maintain and operate the authorised development. This draws on the approach taken in article 37 of the A556 (Knutsford to Bowdon Improvement) Development Consent Order

2014 and article 43 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016.

- 5.97 This article would, at any time prior to 24 months following the opening of the authorised development for public use, allow National Highways, in so far as it is necessary or expedient for the purposes of the construction, maintenance or operation of the authorised development, to:
- 5.97.1 revoke, amend or suspend in whole or in part any order made under the Road Traffic Regulation Act 1984;
  - 5.97.2 permit, prohibit or restrict the stopping, waiting, loading or unloading of vehicles on any road;
  - 5.97.3 authorise the use as a parking place of any road;
  - 5.97.4 make provision as to the direction or priority of vehicular traffic; and
  - 5.97.5 permit or prohibit vehicular access to any road.
- 5.98 In most of the previous National Highways DCOs, the period of 12 months rather than 24 months was used. Given the complexity and scale of this Project, 24 months is necessary and justified (and this is also precedented, see article 45 of the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016). In addition, paragraph (2) differs from previous DCOs because it enables the regulation and restriction of vehicular access to any road to allow more targeted and proportionate traffic measures, short of prohibition, thereby minimising disruption.
- 5.99 Implementation of any of the measures is subject to the prior approval of the traffic authority in whose area the roads are situated. Provision is also made for the chief officer of police and the relevant traffic authority to be notified of any proposed measures in advance.

#### **Part 4 – Supplemental Powers**

##### *Article 18 – Powers in relation to relevant navigations or watercourses*

- 5.100 This article will permit National Highways to carry out specified activities relating to navigations 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 (e.g., the works associated with the discharge of water into the river Thames from the southern portal), and is precedented (see article 16 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016). This article is subject to the Protective Provisions contained in Schedule



14 (including those in favour of the Port of London Authority (the PLA) as well as the Port of Tilbury). The Applicant has significantly narrowed the scope of this provision, as compared to those precedents, and the definition of the river Thames is confined to the river Thames within the Order limits or otherwise affected by the authorised development. This provision is now agreed between National Highways and the PLA.

*Article 19 – Discharge of water*

- 5.101 This article establishes statutory authority for National Highways to discharge water into a sewer, watercourse or drain in connection with the carrying out or maintenance of the authorised development.
- 5.102 This statutory authority is subject to National Highways obtaining the consent of the owner of the sewer, watercourse or drain, but that consent must not be withheld unreasonably.
- 5.103 Paragraph (6) requires the undertaker to take such steps as are reasonably practicable to ensure that any water that is discharged is free from gravel, soil or other solid substance, oil or matter in suspension.
- 5.104 Paragraph (8) states that a person who fails to notify the undertaker of their decision in respect of an application for consent/approval within 28 days of the application being made is deemed to have given consent/approval. 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 an NSIP, the authorised development should not be at risk of being held up due to a failure to respond to an application for consent/approval. This deemed consent will only be operational where the application submitted includes a statement (pursuant to subparagraph (9)) notifying the relevant authority that the deemed consent provision applies.
- 5.105 This article has been included in previous National Highways DCOs (see for example article 18 of the M20 Junction 10a Development Consent Order 2017, article 17 of the A19/A184 Testo's Junction Alteration Development Consent Order 2018 and article 20 of the M42 Junction 6 Development Consent Order 2020).

*Article 20 – Protective work to land and buildings*

- 5.106 The purpose of this article is to allow National Highways to undertake protective works to land and buildings affected by the authorised development. The wording has broad precedent (see article 16 of the A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 and article 18 of the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016) but differs from precedents on the basis that it also allows for protective works to be carried out to land. The wider provision is justified in case any tunnelling works give rise to circumstances where the integrity of land (without buildings) needs to be protected. This article is necessary to make

appropriate provision to carry out protective works in the unlikely event that such a need arises.

- 5.107 National Highways would note that an expansion of such works beyond buildings has been endorsed in other underground projects (see, for example, article 18 of the London Underground (Bank Station Capacity Upgrade) Order 2015 which permits safeguarding works to roads in addition to buildings and article 21 of the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 which permits remedial works to land in addition to buildings).
- 5.108 Paragraph (9) is also a bespoke provision which has been inserted at the request of Thurrock Council, to require prior notice to be given to the local planning authority and Historic England where works are proposed to listed buildings, and to have regard to any responses received from those bodies.
- 5.109 Paragraph (12) applies section 13 of the Compulsory Purchase Act 1965, thereby providing an enforcement mechanism (by way of a warrant) where entry onto, or possession of, land under the article is refused. The definition of protective works (in paragraph (13)) in this article is preceded from other tunnel and river crossing projects, see article 14(11) of the River Tyne (Tunnels) Order 2005, article 18(11) of the London Underground (Northern Line Extension) Order 2014 and article 16(12) of the Lake Lothing (Lowestoft) Third Crossing Order 2020.

*Article 21 – Authority to survey and investigate the land*

- 5.110 This article gives National Highways the power to enter certain land for the purpose of surveying and investigating. The article provides that National Highways must give at least 14 days' notice before exercising the powers of entry, and that compensation is payable for any loss or damage. The ability to survey land affected by the Project and outside the Order limits is required so that National Highways can be confident that the surveys can be conducted to assess the effects of the Project, or on the Project. It imposes a lesser burden than seeking compulsory acquisition of such land.
- 5.111 Powers to make excavations and boreholes to investigate groundwater and discharge water onto land are also included, to ensure that National Highways is able to undertake all necessary activities in connection with surveying the land.
- 5.112 Paragraphs (1) to (5) are based on the Model Provisions and have precedent in a number of made DCOs to date.
- 5.113 The drafting in paragraph (1) departs from the Model Provisions by authorising surveys on land which may be affected by the authorised development. This extension beyond the Order limits has precedent (see article 23 of the M42 Junction 6 Development Consent Order 2020, article 19 of the A19 Downhill Lane Development Consent Order 2020, and article 22 of the A30 Chiverton to Carland Cross Development Consent Order 2020).

- 5.114 Paragraph (2) departs from the precedents mentioned directly above because it requires the notice to set out the nature of the activity, survey or investigation proposed (as per the A428 Black Cat to Caxton Gibbet Development Consent Order 2022).
- 5.115 Paragraphs (6) and (7) are not in the model provisions but have precedent in the M42 Junction 6 Development Consent Order 2020 (see article 23). Paragraph (6) applies a deemed consent period to ensure the delivery of the authorised development is not unduly delayed. This deemed consent will only be operational where the application submitted includes a statement (pursuant to subparagraph (8)) notifying the relevant authority that the deemed consent provision applies.
- 5.116 Paragraph (7) 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.

*Article 22 – Removal of human remains*

- 5.117 This article is based on article 17 of the Model Provision and is required to ensure that the appropriate treatment of such remains does not delay the implementation of authorised development. The provision is justified as there is evidence of human remains in close proximity to the Project. In any event, given the significant scale of the Project, and the likelihood that remains could be found within the Order limits, there is a strong justification for including the power on a precautionary basis.
- 5.118 This article departs from the Model Provision in that paragraph (14) excludes the requirement to give notice before the removal of remains which the undertaker is satisfied were interred more than 100 years ago and that no relative or personal representative of the deceased is likely to object to their removal. This approach has precedent in the Crossrail Act 2008 and the M42 Junction 6 Development Consent Order 2020 (article 48). Paragraph (15) requires that the undertaker must apply for and comply with a direction from the Secretary of State under paragraph (12) regarding the subsequent treatment of remains following their removal. Paragraph (16) confirms that this article does not displace the need to comply with Requirement 9 contained in Schedule 2, which contains provisions relating to the historic environment.

*Article 23 – Felling or lopping of trees and removal of hedgerows*

- 5.119 This article allows any tree or shrub that is near the Project to be felled or lopped, or have its roots cut back, if it is considered to obstruct the construction, operation or maintenance of the Project or endanger anyone using it. Compensation is payable for any loss or damage caused. This article also allows for the removal of hedgerows including hedgerows to which the Hedgerows Regulations 1997 apply.
- 5.120 This article places works carried out to hedgerows under the Order in the same position as they would be if they had been authorised by way of planning

permission, or were being carried out by the National Highways in its capacity as highway authority. In those circumstances, regulations 6(1)(e) and (h) of the Hedgerows Regulations, respectively, would authorise the removal of hedgerows.

- 5.121 This article is precedent (see, for example, article 36 of the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016, article 17 of the draft A303 (Amesbury to Berwick Down) Development Consent Order) except that paragraph (4) has been amended so that the power in relation to hedgerows applies to hedgerows overhanging the Order limits (to mirror paragraph (1) given such hedgerows may also need to have work carried out to them).

*Article 24 – Trees subject to tree preservation orders*

- 5.122 This allows National Highways to fell or lop any trees subject to Tree Preservation Orders (TPOs) described in Schedule 7. This is based on a model provision which has been used in numerous DCOs (see for example article 35 of the A19/A184 Testo's Junction Alteration Development Consent Order 2018). In addition to the trees subject to TPOs set out in Schedule 7, the article permits works to trees which are made subject to TPOs after the Order comes into force, by virtue of paragraph (3). It is not considered appropriate that trees made subject to TPOs following the Order coming into force should prevent the expeditious delivery of the project. This element is precedent (see, for example, article 46 of draft A428 Black Cat to Caxton Gibbet Development Consent Order 2022).

## **Part 5 – Powers of Acquisition and Possession of Land**

*Article 25 – Compulsory acquisition of land*

- 5.123 This article authorises the acquisition of land by compulsory purchase. It grants the power to acquire such land as is required for the Project. This is subject to articles 27 (time limit for exercise of authority to acquire land compulsorily), 28 (compulsory acquisition of rights and imposition of restrictive covenants) and 35 (temporary use of land for carrying out the authorised development),
- 5.124 The provision is necessary to secure the delivery of the Project as set out in more detail in the Statement of Reasons (Application Document 4.1) accompanying the application. There is precedent for this form of article (see for example article 20 of the A19/A184 Testo's Junction Alteration Development Consent Order 2018, which reflects the Network Rail (North Doncaster Chord) Order 2012, the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013 and the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014).

*Article 26 – Compulsory acquisition of land – incorporation of the mineral code*

5.125 This article incorporates Parts 2 and 3 of Schedule 2 of the Acquisition of Land Act 1981. This means that where National Highways acquires land under the powers of the Order, it will not acquire any mineral deposits present in the land (other than those necessarily extracted or used in constructing the authorised development) unless they are expressly included in the conveyance. Such an article is included in the Model Provisions (article 19) and the majority of made transport DCOs to date and is necessary to exempt mines and mineral interests from compulsory acquisition under the Order.

*Article 27 – Time limit for exercise of authority to acquire land compulsorily*

5.126 This article gives National Highways 8 years 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. These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should this Order be made.

5.127 The 8 year time limit reflects the scale of the development and is preceded for other significant, complex and large linear schemes (cf. article 45 of the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 which includes a 10-year period, and article 21 of the National Grid (Hinkley Point C Connection Project) Order 2016 which permits an 8 year period). National Highways initially proposed a 10 year period but following discussions with stakeholders, reduced the period to 8 years.

5.128 This article differs from other DCOs as it sets out that the 8 year period starts to run from the the expiry of the legal challenge period under section 118 of the Planning Act 2008, or the earlier of the final determination of any legal challenge under that provision or 1 year from date the Order comes into force. This is necessary following recent experience of recent legal challenges to made DCOs, which may delay the exercise of compulsory acquisition powers and in so doing reduce the length of time within which those powers may be exercised, if the period relates (as it does usually) to the date on which the Order is made. As a public body, National Highways must also seek to ensure value for public money. It is therefore considered appropriate that the time period for the exercise compulsory acquisition powers should begin once the legal challenge period has expired or a legal challenge has been determined. In the absence of this provision, National Highways may be placed in a position where it would not be able to further reduce the extent of acquisition of land. This is because National Highways practice to exercise the powers of temporary possession, and once works are complete, it would then acquire the “as built” designs allowing for further reductions in the extent of compulsory acquisition. If the period for compulsory acquisition started to run at a time when National Highways was not carrying out the works because of an ongoing challenge, it would contract the period in which it could follow that approach. The Applicant notes that the concept of a compulsory acquisition period running from the end of a legal challenge period is preceded (see the Manston Airport Development Consent Order 2022).

*Article 28 – Compulsory acquisition of rights and imposition of restrictive covenants*

- 5.129 This article allows for rights/restrictive covenants over land to be acquired as well as (or instead of) the land itself, and also for new rights to be created over land.
- 5.130 It provides for such rights and restrictive covenants as may need to be acquired by National Highways over land which it is authorised to acquire under article 25 (compulsory acquisition of land). The public benefit of this is that it would allow National Highways, if appropriate, to reduce the area of outright acquisition and rely on the creation and acquisition of rights instead. A provision of this kind is usual in Transport and Works Act orders and Hybrid Bills, and has been followed in a number of DCOs, for example the Network Rail (North Doncaster Chord) Order 2012, the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013 and the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014.
- 5.131 Paragraph (1) allows National Highways to acquire existing rights and create new rights over any of the Order land. Although National Highways 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 the Book of Reference, Land Plans and Schedule 8 of the Order, this provision ensures that National Highways retains the flexibility to acquire or create rights/restrictive covenants over land where that land might otherwise have to be acquired outright. Without the inclusion of this article, National Highways would have no alternative but to acquire the land outright if an alternative agreement could not be reached by private agreement. National Highways would stress that Advice Note Fifteen is intended to capture broad restrictive covenants powers where no outright of acquisition of land is taking place. National Highways does not, therefore, consider that paragraph 24 of that Advice Note should impede the general power in paragraph (1) in respect of rights.
- 5.132 Paragraph (1) is also justified where the power to acquire rights may arise before the acquisition of the land. For example, if National Highways has taken temporary possession of land under article 35, there may be a need to acquire a right prior to the acquisition of the land, e.g. for a statutory undertaker.
- 5.133 Paragraph (2) provides that, for the land described in Schedule 8, National Highways' 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 of the authorised development as specified in Schedule 8. The power to impose restrictive covenants will allow for the possibility of reducing the area of outright acquisition and thus enable a more proportionate exercise of compulsory powers. It is therefore in the public interest and has precedent in Transport and Works Act orders and the Silvertown Tunnel Order 2018.

- 5.134 Paragraphs (3) and (4) provide for the exercise of the powers in paragraph (1) by statutory undertakers with National Highways' prior written consent. These provisions provide a mechanism allowing those persons to benefit from the rights acquired for their benefit. The intention behind the drafting is that the liability to pay compensation to the owners and occupiers of the land burdened by the new rights or restrictive covenants would remain with National Highways, notwithstanding that the benefit of the rights acquired would be enjoyed by parties other than National Highways. Related drafting is contained in article 8. These provisions are based on the draft A303 (Amesbury to Berwick Down) Development Consent Order. This article is required because of the significant utilities works as part of the Project. The provision would allow the transfer of the powers to acquire rights and impose restrictive covenants to such persons (without transferring the requirement to pay compensation), without the consent of the Secretary of State. The removal of the requirement for the Secretary of State's consent is justified because interested parties will have an opportunity to consider and comment on the nature of the rights to be acquired during the pre-examination and examination process, and the mechanism provided would have no material impact of the exercise of the Order powers on third parties, nor would it affect those parties entitlement to compensation in the normal way. In addition, given the scale of the Project, without this provision there would need to be a very significant number of requests to the Secretary of State consent to the transfer of the benefit of the Order, for the purposes of providing rights in connection with each of the utility diversions required in connection with the Project.
- 5.135 Paragraph (5) provides that powers under paragraph (1) to acquire the rights and to impose the restrictive covenants for the benefit of statutory undertakers or for the benefit of any other person do not preclude the acquisition of such other rights and the imposition of such other restrictive covenants in respect of the same land. (This particular provision is based on article 26(3) of the Lake Lothing (Lowestoft) Third Crossing Order 2020.)
- 5.136 Paragraph (6) provides that, where National Highways needs only to acquire rights over land, it shall not be obliged to acquire any greater interest in that land.
- 5.137 Paragraph (7) introduces Schedule 9, which modifies the compulsory purchase and compensation provisions under general legislation. The modifications do not affect the entitlement to compensation, but generally ensure that the compensation code applies equally to the additional categories of acquisition covered by the Order – the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories and is commonplace in Transport and Works Act orders and DCOs, such as the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016. For the purpose of section 126(2) of the 2008 Act, the relevant compensation provisions are modified only to the extent necessary to ensure that they apply properly to the acquisition of rights, and not to affect the amount of compensation to which landowners would be entitled. The schedule is heavily precedented and reflects the drafting in the A19/A184 Testo's Junction Alteration Development Consent

Order 2018 (Schedule 6), as well as the more recent M42 Junction 6 Development Consent Order 2020 (Schedule 9) with the exception of the final paragraph which amends the 2017 Regulations (see further article 32 below).

*Article 29 – Private rights over land*

- 5.138 In order for it to be possible to implement the Project, provision is needed for the extinguishment of private rights over the Order land that would be incompatible with that implementation. This article supplies this provision.
- 5.139 Paragraph (1) provides for the extinguishment of private rights over Order land subject to compulsory acquisition under the Order, from the moment of acquisition or occupation of that land.
- 5.140 Paragraph (2) provides for the extinguishment of existing private rights over land that is subject to the compulsory acquisition of new rights or imposition of restrictive covenants (but where the underlying land is not subject to powers of compulsory acquisition), if the exercise of those existing rights is inconsistent with the implementation of the Project, from the date of acquisition of the right, imposition of the restrictive covenant or occupation of the underlying land, or the date of any activity authorised by the Order interferes with or breaches those rights (the drafting in this regard is identical to article 23(2) of the draft A303 (Amesbury to Berwick Down) Development Consent Order). This ensures that a private right is not an impediment to the delivery of the Project. Paragraph (3) provides that rights over Order land that is already owned by National Highways are also extinguished, at the point that any activity authorised by the Order interferes with or breaches those rights.
- 5.141 Paragraph (4) provides for the temporary suspension of private rights over Order land that is not acquired but is occupied temporarily by National Highways in order to construct the Project. The suspension is for the duration of the temporary occupation.
- 5.142 Paragraphs (5) to (8) make provision for compensation and for circumstances where rights are preserved. Paragraph (5) provides that any right holders who suffer loss caused by the extinguishment or suspension of rights will be entitled to compensation.
- 5.143 Paragraph (9) sets out a list of matters deemed to be private rights to provide certainty as to the scope of the article. The list of deemed private rights is broad in order to ensure that any right which could potentially interfere with the implementation of the Project can be extinguished.
- 5.144 This approach is proportionate and draws on the precedents of the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013 (article 23), the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 (article 21) and the M42 Junction 6 Development Consent Order 2020 (article 28). Further information on National Highways's requirement for this provision is set out in the Statement of Reasons (Application Document 4.1) accompanying the application.



*Article 30 – Modification of Part 1 of the 1965 Act*

5.145 This article modifies the provisions of Part 1 of the Compulsory Purchase Act 1965 (the 1965 Act) as applied to the Order by section 125 of the 2008 Act. In accordance with section 126(2) of the 2008 Act, these provisions are modified only to the extent necessary to ensure that they apply properly to the compulsory acquisition powers authorised by the Order. These modifications have broad precedent in Schedule 14 to the High Speed Rail (London – West Midlands) Act 2017 and article 29 of the M42 Junction 6 Development Consent Order 2020.

*Article 31 – Application of the 1981 Act*

5.146 This article applies (with minor modifications to make the provisions appropriate to the context of acquisition under powers in a DCO) the provisions of the Compulsory Purchase (Vesting Declarations) Act 1981 (the 1981 Act) to compulsory acquisition under the Order, so that National Highways has the option of acquiring Order land that is subject to the powers of compulsory acquisition by vesting declaration.

5.147 Vesting declarations are one of two ways of acquiring land that is subject to compulsory purchase. The other method involves serving a notice to treat on the land owner to commence the process of establishing the acquisition price, after which title in the land is transferred. The date on which title will transfer is uncertain under the notice to treat method.

5.148 A vesting declaration, in contrast, sets the date on which title in the land is transferred to the acquiring authority. Compensation is negotiated or determined and paid later. Vesting declarations therefore allow title in the land to pass to the acquiring authority more quickly than using the notice to treat method, and also allow several parcels to be acquired at once. Their use is subject to serving notices and observing time limits as required by the 1981 Act.

5.149 The modifications ensure consistency with the 8-year period sought under the Order for acquisition of rights. They further ensure that appropriate references are made to the 2008 Act. The modifications are based in large part on previous highways NSIPs and, following amendments to the 1981 Act by the Housing and Planning Act 2016, the High Speed Rail (London - West Midlands) Act 2017. More specifically:

5.149.1 Paragraph (4) modifies section 1(2) so that section 1 applies to National Highways.

5.149.2 Paragraph (6) modifies section 5 to remove the reference to situations where the compulsory purchase order is subject to special parliamentary procedure.

5.149.3 Paragraph (7) omits section 5A, on the basis that the Order prescribes the time limit for compulsory acquisition in article 27.

- 5.149.4 Paragraph (8) modifies the statutory reference in section 5B(1), on the basis that the 2008 Act contains equivalent provisions that apply in respect of DCOs. The cross-reference to section 5A is also modified, to reflect that the time limit applicable to the Order.
- 5.149.5 Paragraph (9) modifies the statutory references in section 6(1)(b), on the basis that the 2008 Act contains equivalent provisions that apply in respect of DCOs.
- 5.149.6 Paragraph (10) modifies section 7(1)(a) in respect of constructive notice to treat under the Acquisition of Land Act 1981.
- 5.149.7 Paragraph (14) 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 to article 33, which has the same effect in relation to the acquisition of subsoil or airspace only.
- 5.149.8 Paragraph (15) 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 30, on the basis that both section 125 and article 30 modify the provisions of the 1965 Act.
- 5.150 The above provisions are 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 from the Model Provisions and National Highways has instead sought to follow the precedent established by recent DCOs (see for example article 26 of the A19 Testo's Junction Alteration Development Consent Order 2018, article 28 of the M20 Junction 10a Development Consent Order 2017 and article 24 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016). Paragraph (14) departs from these made Orders by inserting the reference to the same modification in article 30(5) for consistency.
- 5.151 Paragraphs (3), (5), (11), (12) and (13) are intended to allow the compulsory acquisition of rights and land in favour of a third party such as a statutory undertaker. These provisions are not contained in the Model Provisions but are intended to provide confirmation that the 1981 Act can be used to acquire rights and land on behalf of third parties, without the need to acquire the land in favour of National Highways and then transfer such land or rights to a third party, thereby causing a delay to any transfers of land or rights to those who are intended to benefit from such acquisition. National Highways is mindful that these provisions were removed from the M25 Junction 28 Development Consent Order 2022 and has sought to justify them further (see the commentary on article 32 directly below). These provisions have been the subject of significant engagement with Statutory Undertakers, and are agreed with them as well as Thurrock Council.

### *Article 32 – Modification of the 2017 Regulations*

- 5.152 This article modifies the Compulsory Purchase of Land (Vesting Declaration) (England) Regulations 2017 to ensure that the interests and rights in land which are intended to benefit a third party, such as a statutory undertaker whose apparatus may be re-located in order to construct the authorised development, will vest in that third party instead of National Highways, who would otherwise be the acquiring authority in respect of those interests and rights.
- 5.153 The amendments to these regulations, as well as the changes described in paragraph 5.144 above, are in line with emerging National Highways practice, and the provisions confirm the position that notwithstanding references in the 1981 Act and 2017 Regulations to vesting land “in themselves” (i.e., in the Acquiring Authority), land and rights can be acquired by National Highways in favour of any third party identified directly. This is a drafting change which confirms the ability for National Highways to acquire such rights and land (where such powers of acquisition are not transferred to another person to acquire rights/land directly), and is not a substantive change to the rights or land sought for permanent acquisition.
- 5.154 This article, as well as the changes to the 1981 Act, are justified for the Project because National Highways is proposing to vest land and rights in third parties, for example rights in relation to utilities assets to statutory undertakers, or replacement land which will vest back into the existing owners of special category land. In the absence of these provisions, the transfer of the land to those third parties would be delayed requiring first the acquisition of the land and rights by National Highways, registration at the Land Registry and then the subsequent transfer to the relevant third party and further registration at the Land Registry. Such a delay could give rise to unintended and undesirable consequences, for example, preventing statutory undertakers accessing their assets, and enabling local authorities to operate and maintain special category land. It also imposes an administrative burden and entails further costs which are to the detriment of value for public money. National Highways would stress that the Secretary of State has previously endorsed the principles of vesting land directly in third parties (see, for example, article 30(2) of the Cornwall Council (A30 Temple to Higher Carblake Improvement) Order 2015 and article 30(2) of the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013). National Highways would also stress that it has shared these provisions with statutory undertakers and local authorities (and referenced them in its public consultation) with no objection. These provisions have been the subject of significant engagement with Statutory Undertakers, and are agreed with them as well as Thurrock Council. It is imperative to the operation of a number of Protective Provisions (see, for example, the protective provisions for local highway authorities which requires direct vesting).

### *Article 33 – Acquisition of subsoil or airspace only*

- 5.155 This article allows National Highways to compulsorily acquire land, rights or both, in the subsoil of or of the airspace over land that is subject to compulsory

acquisition, as required for the Project and its protection from subsequent development and other conflicting events or actions, instead of acquiring all of the land up to and including the surface and airspace.

- 5.156 The purpose of this article is to give National Highways the flexibility to minimise so far as is possible the extent of surface interests to be acquired, with consequently less impact on landowners and lower compensation payments. It is considered to be in the public interest to provide this flexibility at the point at which National Highways begins to acquire the necessary land.
- 5.157 Paragraph (2) introduces Schedule 10 (Land in which only subsoil or new rights in and above the subsoil and surface may be acquired) and provides that only the “subsoil” (and easements or other new rights and the imposition of restrictive covenants in the remaining subsoil and over the surface of the land) contained in plots listed in that Schedule can be acquired. In most cases, the acquisition of subsoil (and any easements/restrictive covenants) is required in connection with the tunnels beneath the River Thames (and their safeguarding). The article makes clear the depth by which particular plots comprised in the river Thames are to be acquired is Ordinance Datum Newlyn.
- 5.158 Paragraphs (6) and (7) together make clear, for the purposes of paragraph (2), the meaning of “subsoil”. Paragraph (8) qualifies the ability to acquire easements and restrictive covenants in, on, over or under the River Thames which are outside of the tunnels under paragraph (2)(b) of this article on the basis that Article 48 (Protection of the tunnel area) provides the necessary protections. This does not prejudice the acquisition of the subsoil for the tunnels. Paragraph (8) has been agreed with the PLA.
- 5.159 This is also a standard provision used in many highways DCOs (see for example article 27 of the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016, article 27 of the A19/A184 Testo’s Junction Alteration Development Consent Order 2018 and article 31 of the A30 Chiverton to Carland Cross Development Consent Order 2020).

*Article 34 – Rights under or over streets*

- 5.160 The purpose of this article is to allow National Highways 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 full acquisition, is prohibited in the circumstances set out in paragraph (3). Compensation is payable for any loss or damage caused to an owner or occupier of land affected by the power of appropriation where no acquisition has taken place.
- 5.161 This article was included in the Model Provisions and the majority of DCOs made to date. It is considered that the article remains necessary for the authorised development, notwithstanding the effect of the Housing and Planning Act 2016, and it was retained in recent highways DCOs (see, for example, article 32 of the M42 Junction 6 Development Consent Order 2020).

*Article 35 – Temporary use of land for carrying out the authorised development*

- 5.162 The purpose of this article is, *inter alia*, to allow the land set out in Schedule 11 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Project but land acquisition is not required permanently. The authorisation of temporary possession prevents National Highways having to permanently acquire land which is required to construct the authorised development but which is not needed permanently and therefore assists in minimising the interference with landowners' rights. The time limits set out in article 27 (Time limit for exercise of powers to possess land temporarily or to acquire land compulsorily) apply to this article.
- 5.163 The inclusion of this article is important to ensure that the authorised development can be carried out efficiently and expeditiously following the making of the Order. National Highways is entitled either to occupy and use land pending its permanent acquisition, or to temporarily occupy and use land in Schedule 11, with provision made for the restoration of the land (subject to exceptions listed in paragraph (5)) and the payment of compensation to the affected landowners and occupiers for any loss or damage arising. These powers are considered to be reasonable given the status of the authorised development as an NSIP. The article has precedent in many DCOs (see for example article 29 of the A19/A184 Testo's Junction Alteration Development Consent Order 2018).
- 5.164 More particularly, paragraph (1)(a)(i) allows the land set out in Schedule 11 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Project but for which full title is not required outright permanently. The land which falls within this subparagraph includes land which will be occupied temporarily and then subject to permanent rights (e.g. diversion of utilities apparatus) and/or land in respect of which permanent structures will be erected during temporary possession. In line with this, paragraph (1)(d) confirms that the authorised development as listed in Schedule 1 can be undertaken on land that has been temporarily occupied.
- 5.165 Paragraph (1)(a)(ii) allows for the temporary occupation of any of the Order land that is subject to the powers of permanent acquisition, but in respect of which no process for acquisition has yet been commenced. The rationale for this is that it reduces the amount of land that is required to be subject to outright acquisition. Thus, article 25 with article paragraph (1)(a)(ii) make it possible for National Highways to occupy land temporarily initially and only proceed to acquire permanently that part which is necessary for the Project as constructed. The benefits of this are lesser impacts on landowners and lower costs to National Highways, which is in the public interest. In line with this, paragraph (1)(d) confirms that the authorised development as listed in Schedule 1 can be undertaken on land that has been temporarily occupied.
- 5.166 Paragraph (1)(a)(ii) differs from a number of made Orders in that it permits the temporary possession of Order land even where a general vesting declaration under the Compulsory Purchase (Vesting Declaration) Act 1981 in connection with the acquisition of rights and/or the imposition of restrictive covenants has

been made. Generally, the position under made Orders to date has been to permit the temporary possession of Order land where a right has been acquired under the Compulsory Purchase Act 1965 (see, for example, article 29(1)(a)(ii) of the draft A303 (Amesbury to Berwick Down) Development Consent Order). The justification is that the acquisition of a right (e.g., for the purposes of providing mitigation or protecting statutory undertakers' apparatus) does not necessarily obviate the need to take temporary possession for some other purpose unrelated to the right acquired. There are a number of instances where land is required for dual purposes in connection with the Project. Extending the drafting in the manner proposed is justified because, whether a right is acquired by way of a notice of entry under the Compulsory Purchase Act 1965 or a general vesting declaration under the Compulsory Purchase (Vesting Declaration) Act 1981 (or whether it is a restrictive covenant which is being imposed rather than the acquisition of a right), there may be a need to take temporary possession of land for a purpose which is not connected to the acquisition of the right. In other words, the mechanism by which a right is required does not relate to the justification for the provision. In circumstances where the Secretary of State does not agree with the drafting changes, National Highways request the insertion of "(other than in connection with the acquisition of rights only)" in accordance with the precedented approach (e.g., article 32(1)(a)(ii) of the A1 Birtley to Coal House Development Consent Order 2021).

- 5.167 Paragraph (2) and (3) make provision for the service of notices. Paragraph (2) requires National Highways to provide a notice 28 days (or a lesser period requested by National Highways and then approved by the landowner) before taking temporary possession of land. A number of complex DCO projects have provided 14 days, but National Highways has taken the decision for the Project to double that period. This 28 day period is proportionate and ensures that the Project can be delivered expeditiously, reducing impacts on local communities whilst balancing the need to provide appropriate notice to persons with interest in land. The provision also allows for this period to be reduced with the agreement of the landowners. This is considered reasonable because where a shorter period is agreed, there can be no question of the landowner being prejudiced. Paragraph (2) also requires that the notice set out the works, facilities or other purposes for which temporary possession has been taken.
- 5.168 Paragraph (3) is included to ensure that National Highways is not prohibited from taking temporary possession of land in circumstances where there is a danger to its staff, the public or the surrounding environment. This provision has been included in made temporary possession articles (see, for example, article 34 of the M42 Junction 6 Development Consent Order 2020) but subparagraph (a) has been narrowed in scope so that it refers to those carrying out the authorised development. National Highways considers public safety, and the safety of its staff, is paramount and so the notice provision should be temporarily suspended. In such circumstances, paragraph (3) still requires National Highways to give such period of notice as is reasonably practical in the circumstances.
- 5.169 As noted above, paragraph (5) sets out National Highways must before giving up temporary possession remove all temporary works and restore the land

subject to temporary possession to the reasonable satisfaction of the owners except that it is not required to carry out any of the activities listed in paragraphs (5)(a) to (g). Paragraph (5) is precedented (see, for example, article 33(7) of the M42 Junction 6 Development Consent Order 2020) but paragraph (f) has been inserted to avoid the need to remove or un-do soil reprofiling work and paragraph (g) makes explicit that an agreement with the landowner can be reached regarding the removal of temporary works from land provided planning permission is in place. The Applicant considers it important to maintain paragraph (g) in order to ensure that works which have permission are not un-done where they have appropriate planning permissions in place. The Applicant notes that the safeguard on planning permission goes above precedents which allow for landowner agreement (e.g., the A428 Black Cat and Thames Tideway DCOs do not require planning permission to be in place).

- 5.170 Under paragraph (8), any dispute as to the satisfactory removal of temporary works and restoration of land under paragraph (5) does not prevent National Highways from giving up possession of the land. This provision is considered to be reasonable as it clarifies that National Highways is able to give up possession of land, and bring to an end any obligations associated with that possession, without affecting any duty on National Highways to undertake restorative work on land in the event that a dispute under paragraph (7) is resolved in a landowner's favour.
- 5.171 Paragraph (10) makes clear National Highways is not to be precluded from acquiring any permanent rights or restrictive covenants for those plots in Schedule 8 or part of the subsoil of or airspace over (or rights/restrictive covenants in the subsoil of or airspace over) land in Schedule 10. This provision is based on article 33(8) of the A30 Chiverton to Carland Cross Development Consent Order 2020 and is necessary to ensure that powers sought under articles 28 and 33 are not affected by the prohibition on acquiring land which is subject to temporary possession. This provision has been removed in some DCOs, but is required in the Order because there are plots which are duplicated in Schedules 8, 10 and 11. The reason plots have been duplicated is in order to provide clarity about the purposes for which temporary possession is taken over those plots under paragraph (1)(a)(i) and also to ensure that landowners are aware that notwithstanding their land is subject to temporary possession (under paragraph (1)(a)(i)), this land may also be required in connection with the acquisition of rights (including restrictive covenants) or subsoil. The provision also explicitly confirms that the ability to extinguish rights under article 37(3) is not affected by the general prohibition in article 35(10) which disapplies the compulsory acquisition of land in respect of land subject to temporary possession (see further explanation of why this is necessary below in respect of Article 37).
- 5.172 Paragraph (11) confirms that National Highways is not permitted to take temporary possession of the plots specified in this paragraph where only subsoil acquisition is sought in connection with the construction of the tunnels. A similar, but not identical, provision is contained in article 31(1)(a) of the London Underground (Northern Line Extension) Order 2014

*Article 36 – Temporary use of land for maintaining the authorised development*

- 5.173 This article provides that National Highways may take temporary possession of land within the Order limits required for the purpose of maintaining the authorised development and to construct such temporary works as may be reasonably necessary for that purpose for a period of five years (or, in relation to landscaping, such period as may be approved in a management plan under Requirement 5 in Schedule 2) from the date on which that part of the authorised development is first opened for use. Provision is made for service of notices and compensation. This power does not apply with respect to houses, gardens or any other buildings for the time being occupied. Under paragraph (6), all temporary works must be removed before National Highways gives up possession under this article and the land must be restored to the reasonable satisfaction of the owners.
- 5.174 Provision is made for giving notice and compensation (paragraphs (3), (4), (7), (8) and (9)).
- 5.175 This article is required to enable National Highways to carry out maintenance during the maintenance period and is appropriate as it would impose a lesser burden than permanently acquiring interests and rights in land to achieve the same purpose.
- 5.176 Paragraph (11) replicates the effect of article 35(11) in respect of the power under this article.
- 5.177 The A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 (see article 28), the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 (see article 29) and the A30 Chiverton to Carland Cross Development Consent Order 2020 (see article 33) reflect the wording used in this article. In relation to the maintenance period being tied to a period approved in a plan, this is based on article 33(11) of the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022.

*Article 37 – Statutory undertakers*

- 5.178 This article provides National Highways with clear statutory authority to acquire interests in and rights over land owned by statutory undertakers (ie utilities operators such as electricity and gas companies).
- 5.179 It also allows National Highways to extinguish rights owned by statutory undertakers over the Order land, and to 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 and described in the Book of Reference. In practice, it is impracticable to show and describe all such apparatus and so a general power for the extinguishment of rights and removal or relocation of apparatus belonging to statutory undertakers over or within any Order land is required.
- 5.180 As the land over which this power may be exercised is shown on the Land Plans, and the beneficiaries of such rights are described in the Book of



Reference, the requirements of Regulations 5(2)(i)(iii) and 7(1)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 are satisfied.

- 5.181 Paragraph (2) restricts National Highways' power to extinguish rights or move apparatus by excluding apparatus in streets. It applies alternative provisions more appropriate to balancing the interests of the various affected parties where the apparatus in question is in a street.
- 5.182 This article is subject to Schedule 14 which contains provisions for the protection of certain statutory undertakers to ensure their continued ability to carry out their functions despite the interference with their rights/apparatus required to facilitate the Project.
- 5.183 This article has broad precedent (see article 32 of the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016, article 30 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016, and article 31 of the draft A303 (Amesbury to Berwick Down) Development Consent Order).
- 5.184 Paragraph (3) provides that, where temporary possession of land is taken, National Highways may extinguish rights and restrictive covenants relating to apparatus removed or decommissioned, provided it has, in agreement with the statutory undertaker, given notice to the landowners. This is intended to allow National Highways, if appropriate and with the agreement of the statutory undertaker, to remove redundant apparatus, and to ensure the relevant land is only burdened with interests that are required. This is not a Model Provision but follows the approach taken on other connection projects including article 27 of the National Grid (Richborough Connection Project) Development Consent Order 2017 and article 39 of the draft A47 North Tuddenham to Easton Development Consent Order).
- 5.185 Paragraphs (5) to (7) require the Applicant to remove the certain multi-utility and overhead line works following the completion of distinct, specified works. By way of explanation, the authorised development comprises "ABC" diversions, i.e. where existing apparatus is diverted from A to B and then, later, to C. In such cases, these provisions confirm that the "B" apparatus, and the rights acquired in connection with that apparatus, would be removed and the rights on the "C" works being complete. In addition, where rights are acquired in connection with utility connections for construction compounds, and those compounds are completed, the apparatus and the associated rights would be removed. This provides certainty for landowners of the Applicant's intention that such apparatus and rights would be removed (unless otherwise agreed with both the landowner and the relevant statutory undertaker).

*Article 38 – Apparatus and rights of statutory undertakers in stopped up streets*

- 5.186 This article governs what happens to statutory undertakers' apparatus (e.g. pipes, cables) under streets that are stopped up by the Order. Without the

article, the statutory undertaker would not have access to the apparatus, since there will no longer be a right of way along the street.

- 5.187 Under paragraph (2), the statutory undertaker may remove, relocate or replace any affected apparatus of its own volition, or must do so if it is reasonably requested by the undertaker.
- 5.188 Under paragraph (3), the statutory undertaker would receive compensation from National Highways for any relocation works and associated costs. Paragraphs (4) and (5) discount from this compensation the cost associated with a higher specification in the replacement apparatus. Paragraph (6) discounts from this compensation the increase in value to the statutory undertaker for having new rather than old (i.e., older than 7½ years) apparatus.
- 5.189 Paragraph (7) provides that where statutory undertakers are affected by a stopping up in relation to those parts of the Project that constitute “major bridge works”, “major transport works” or “major highways works”, as defined in the 1991 Act, the cost sharing provisions under that Act will apply instead of the compensation provision in this article.
- 5.190 This article is a standard provision for highways DCOs (see, for example, article 30 of the A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 and article 36 of the A30 Chiverton to Carland Cross Development Consent Order 2020).

*Article 39 – Recovery of costs of new connections*

- 5.191 This article provides that if any statutory undertaker's apparatus is removed and this cuts a service to anyone, such that they have to seek a connection to other apparatus, then the cost of establishing a new service can be claimed from National Highways. It has precedent in a number of DCOs, including article 33 of the A19/A184 Testo's Junction Alteration Development Consent Order 2018 and article 38 of the M42 Junction 6 Development Consent Order 2020.

*Article 40 – Special category land*

- 5.192 This article deals with open space, common land, etc. The article makes provision for the special category land (defined under paragraph (8)) to be acquired and to vest in the undertaker (or a specified party, where appropriate) once the Secretary of State has certified (following consultation with the relevant planning authority) that a scheme for the provision of the replacement land, and a timetable for the implementation of that scheme, has been received from National Highways.
- 5.193 Under section 131 of the 2008 Act, a DCO is subject to Special Parliamentary Procedure to the extent it authorises compulsory acquisition of land to which section 131 applies (i.e. a common, open space or fuel or field garden allotment). The exception is if the Secretary of State is satisfied that certain tests under section 131 are met, including if the Secretary of State is satisfied

that replacement land has been or will be given in exchange for the Order land, and the replacement land has been or will be vested in the prospective seller and subject to the same rights, trusts and incidents as attach to the Order land (section 131(4) of the 2008 Act).

- 5.194 Accordingly, paragraph (1) provides for special category land not to vest in National Highways until it has acquired replacement land (or the replacement land is otherwise in the name of the persons who owned the special category land on the date the Order powers are exercised) and the Secretary of State has certified that a scheme for the provision of replacement land and timetable for the implementation of the Project has been received. Paragraph (2) confirms that, on paragraph (1) being satisfied, the special category land or rights in or over special category land is to vest in National Highways or any specified party. Paragraph (3) confirms that National Highways will implement the scheme approved under paragraph (1) and the replacement land will be subject to all previous rights, trusts and incidents, in accordance with sections 131(4) and 132(4) of the 2008 Act.
- 5.195 As the Project involves the provision of replacement land for common land, paragraph (4) makes provision for the amendment of the register of common land and is substantially based on article 37(3) of the Port of Tilbury (Expansion) Order 2019.
- 5.196 Paragraph (5) has been inserted as some common land included in the Order limits may be deregistered as common land before the exercise of the relevant Order powers. Accordingly, no provision for replacement land (as defined in the 2008 Act) would be required under sections 131 and 132 of the 2008 Act in those circumstances.
- 5.197 Paragraph (6) confirms that a scheme can be submitted in relation to individual sites, and also confirms that the scheme must not conflict with the outline LEMP (which provides outline information regarding the layout and proposed characteristics of the proposed replacement land).
- 5.198 Under section 132 of the 2008 Act, the acquisition of rights over land to which section 132 applies (i.e., common, open space or fuel or field garden allotment) is subject to Special Parliamentary Procedure, unless an exception under that section applies. Paragraph (7) deals with those plots where the exception under section 132(3) applies (i.e., the land when burdened with a new right created under this Order, will be no less advantageous than they were before the making of this Order) and where an exemption under section 131(5) applies.
- 5.199 Paragraph (8) provides for the definitions used in this article.

*Article 41 – Disregard of certain improvements, etc.*

- 5.200 This article provides for the Tribunal to disregard certain interests in and enhancements to the value of land for the purposes of assessing compensation with respect to its compulsory acquisition where the creation of the interest or

the making of the enhancement was designed with a view to obtaining compensation or increased compensation.

- 5.201 It complies with section 126 of the 2008 Act as it does not have the effect of modifying or excluding the application of an existing provision relating to compulsory purchase compensation. The article has precedent in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 (article 37), the River Humber Gas Pipeline Replacement Order 2016 (article 29) and the Lake Lothing (Lowestoft) Third Crossing Order 2020 (article 38), and orders under the Transport and Works Act 1992 such as the London Underground (Northern Line Extension) Order 2014 (article 32) and the Midland Metro (Wolverhampton City Centre Extension) Order 2016 (article 35).
- 5.202 The wording of this article mirrors section 4 (assessment of compensation) of the Acquisition of Land Act 1981 (in this paragraph "the 1981 Act"). It is necessary to specifically apply the effect of section 4 of the 1981 Act in the Order. This is because the 1981 Act only applies to a compulsory purchase to which any other statutory instrument has applied its provisions and neither the 2008 Act, nor standard Order provisions, apply these. Sections 120(3) and 120(5)(a) and Schedule 5 (by virtue of section 120(3)) of the 2008 Act allow the application in a DCO of statutory provisions which relate to the payment of compensation.

*Article 42 – Set off for enhancement in value of retained land*

- 5.203 This article provides that, in assessing the compensation payable to any person in respect of the acquisition of any land, the Tribunal shall set off against the value of the land any increase in value of any contiguous or adjacent land belonging to that person arising out of construction of the authorised development.
- 5.204 This article complies with section 126(2) of the 2008 Act as it does not have the effect of modifying the application of an existing provision relating to compulsory purchase compensation. The article has precedent in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 (article 38) and the Lake Lothing (Lowestoft) Third Crossing Order 2020 (article 39), and orders under the Transport and Works Act 1992 such as the London Underground (Northern Line Extension) Order 2014 (article 33) and the Midland Metro (Wolverhampton City Centre Extension) Order 2016 (article 36).
- 5.205 The principle in this article is established in section 6B to 6E of the Land Compensation Act 1961 (effect of certain actual or prospective development of adjacent land in same ownership), which needs to be applied. Sections 120(3) and 120(5)(a) and Schedule 5 (by virtue of section 120(3)) of the 2008 Act allow the application in a DCO of statutory provisions which relate to the payment of compensation.

*Article 43 – Crown rights*

- 5.206 This article prevents the undertaker from acquiring any Crown land (as defined in the 2008 Act), or from otherwise interfering with such land, without the written consent of the relevant Crown authority. The Crown's consent may be given unconditionally or subject to terms and conditions.
- 5.207 The proposed Order land includes parcels of land which constitute Crown land. This article has been included to ensure that any acquisition of other landholdings, creation or extinguishment of rights cannot create any interference with the rights of the Crown.
- 5.208 This article reflects the provisions of section 135 of the 2008 Act. The drafting is based on recent highway DCO precedent, see for example article 57 of the Lake Lothing (Lowestoft) Third Crossing Order 2020.

## **Part 6 – Operations**

### *Article 44 – Power to operate, use and close the tunnel area*

- 5.209 This article authorises National Highways to operate, use and close the tunnels. This is based on articles 42 and 43 of the Silvertown Tunnel Order 2018, and articles 38 and 39 of the draft A303 (Amesbury to Berwick Down) Development Consent Order. Paragraph (2) makes provision for National Highways to close the tunnels subject to the notice provisions under paragraph (3), except in an emergency which is defined in paragraph (5). Paragraph (4) makes clear the powers to operate and close the tunnels only have effect from the date the tunnel area is open.

### *Article 45 – Road user charging*

- 5.210 This article provides the power for the Secretary of State to impose road user charging for use of the tunnel area under the Order in accordance with the terms of Schedule 12.
- 5.211 The basis of this power is section 120(3) or section 120(5) of the 2008 Act. Section 120(3) provides that '*an order granting development consent may make provision relating to, or to matters ancillary to, the development for which consent is granted*'. Paragraph 18 of Schedule 5 to the 2008 Act confirms that the matters for which provision may be made include '*charging tolls, fares (including penalty fares) and other charges*'. Section 144(2A) of the 2008 Act further indicates that the "other charges" which may be imposed under this provision can include '*charges in respect of the use or keeping of motor vehicles on roads*'. In addition, Section 120(5)(c) of the 2008 Act also provides the legal basis for the inclusion of this article as it states that an order granting development consent may '*include any provision that appears to the Secretary of State to be necessary or expedient for giving full effect to any other provision of the order*'.
- 5.212 Schedule 12 contains the terms on which charges are to be imposed under the Order. In general terms this Schedule is set out in a similar way to a road user charging scheme order under the Transport Act 2000, and incorporates related

procedures and processes so that the charges for the tunnel area will operate in the same way as road user charges under the Transport Act 2000. More specifically, Schedule 12 is modelled on the existing Dartford Crossing charging order (ie, the A282 Trunk Road (Dartford-Thurrock Crossing Charging Scheme) Order 2013 (the 2013 Order)). As the intention is for the road user charges to be the same as the charges in place in respect of the Dartford Crossing, it is considered this is an appropriate precedent (rather than the more bespoke provisions of the Silvertown Tunnel Order 2018).

- 5.213 Schedule 12 has been drafted so that any charge imposed under this article:
- 5.213.1 reflects the amount the user of a vehicle would pay for using the Dartford Crossing, disregarding any exemption granted to local residents in respect of the Dartford Crossing; and
  - 5.213.2 will be reduced for local residents in the vicinity of the tunnel area (i.e., those resident in Gravesham and Thurrock), subject to the proviso that the discount reflects the local residents' discount granted in relation to the Dartford Crossing.
- 5.214 The use of the Dartford Crossing charging regime as the basis for the road user charges is reflected by paragraph 3 of Schedule 12, which states that the charges payable will be (i) the amount a vehicle would be charged under the existing Dartford Crossing charging order (ie, the 2013 Order); or (ii) where that charging order is revoked, the amount payable under any replacement charging order under the Transport Act 2000. As explained in the Road User Charging Statement (Application Document 7.6), the intention is to ensure that road user charging and penalty charges at the Dartford Crossing apply to the Project. Provision is also made to ensure that references to exemptions under the 2013 Order (e.g., for maintenance vehicles used in respect of the Dartford Crossing) are read as references to the Project.
- 5.215 The power to provide for payment agreements set out in paragraphs 5 and 6 of Schedule 12, for local residents and others respectively, is based on articles 6 and 7 of the 2013 Order. These paragraphs establish how any exemptions/discounts would be implemented.
- 5.216 Schedule 12 also applies the Road User Charging Schemes (Penalty Charges, Adjudication and Enforcement) (England) Regulations 2013 (in effect the enforcement regulations for road user charging schemes) to the charges imposed under this article. This allows for enforcement actions (including the removal of vehicles, and the imposition of penalty charges for non-payment or storage of vehicles). The definition of these Regulations in Schedule 12, as well as paragraph 1(2) of that Schedule, ensure that any amendments to them are incorporated for the purposes of the Order.
- 5.217 Schedule 12 reflects the enforcement powers available under the 2013 Order. Paragraphs 8 to 11 of Schedule 12 are identical to articles 10 to 13 of the 2013 Order. Paragraphs 12 and 13, which make provision for the immobilisation of vehicles and the removal, storage and disposal of vehicles, are based on the

more recent charging orders made under the Transport Act 2000 (see, for example, articles 13 and 14 of the Leeds Clean Air Zone Order 2018), though the power relating to immobilisation is also to be found in articles 14 and 15 of the 2013 Order.

*Article 46 – Suspension of road user charging*

5.218 This article is based on the equivalent power under section 172A of the Transport Act 2000 with modifications requiring an additional notice where there is an increase in any suspension period under paragraph (5). As the charges imposed under article 45 would not be a charging scheme under that enactment, an equivalent power is required. This is required in order to ensure that, in an emergency or for temporary purposes, the Secretary of State is able to suspend road user charges imposed under article 45.

*Article 47 – No apparatus in the tunnel area without consent*

5.219 This article prohibits the placing of statutory utilities' apparatus in the tunnels, and the use of those tunnels in connection with such apparatus, without the consent of National Highways. This provision is considered necessary on the basis that, while the Project will form part of the wider strategic road network, it is inappropriate (for obvious reasons) for the usual provisions to apply to a tunnel in respect of the powers of statutory undertakers to lay apparatus in roads. Comparable provisions are included in authorising legislation for tunnels (see, for example, article 37 of the River Tyne (Tunnels) Order 2005 and article 47 of the Silvertown Tunnel Order 2018).

*Article 48 – Protection of the tunnel area, etc.*

5.220 This article places certain restrictions on activities that can be undertaken in the River Thames above the tunnels for the purpose of protecting the tunnel structure. Paragraph (1) sets out the restrictions which apply to the PLA and other persons for the protection of the tunnel area. Paragraph (2) creates an exemption for specific activities which form part of the PLA's regular maintenance of the river Thames. Both the restrictions and exemptions are defined in paragraph (10). These provisions (as well as paragraph (3) to (8) discussed below), and the definitions in paragraph (10)) have been agreed with the PLA.

5.221 Paragraph (3) ensures that a consent provided to the PLA does not need to be re-provided to the holder of a licence.

5.222 Paragraphs (4) and (5) make provision where the restrictions in this article are contravened.

5.223 Paragraph (6) confirms that any consent may be given subject to terms and conditions, and requires a consent not be unreasonably withheld. Paragraph (7) contains a deemed consent provision which would apply to National Highways for any consents sought from the PLA under paragraph (1). Paragraph (8) makes provision for the designation and notification to the PLA of a person who will receive applications for consent under this article.

5.224 It should be noted that “river mooring permission” appears in square brackets as that permission is proposed under a Harbour Revision Order applied for by the PLA which has not yet been made. If that Harbour Revision Order is made with provisions regulating river mooring permissions, the square brackets will be removed. If it is not, the references will be removed altogether. A determination of that Harbour Revision Order is expected soon. The PLA have agreed that where the Harbour Revision Order is made, the references to river mooring permissions can remain.

5.225 Paragraph (9) disappplies the licence dated 28 May 1992 with the reference 9/92 granted under the Dangerous Substances in Harbour Areas Regulations 1987. That licence permits the berthing and anchoring of vessels carrying dangerous substances in close proximity to the tunnel area. It is therefore necessary for the purposes of public safety to suspend the licence insofar as it relates to the Higham bight anchorage, in order to ensure the safe operation of the tunnel area. The disapplication of an existing license is permitted by section 120 of the 2008 Act, and is not a consent in respect of which consent is required under section 150. This provision has been agreed with the Health and Safety Executive, the body responsible for the granting and regulation of explosive licences. Following amendments to ensure the disapplication bites when the relevant tunnelling and norther portal construction portal works are commenced, National Highways understands the provision is agreed with the PLA.

#### *Article 49 – Removal of vehicles*

5.226 This article makes provision enabling vehicles causing an obstruction to be removed from the tunnel area. Provision is made for steps to be taken to find the owner of a vehicle which has been removed so that notice may be sent to the owner. The owner may reclaim the vehicle on payment of all charges imposed under this article. Provision is made for the disposal of the vehicle in circumstances where the owner cannot be traced or where the owner declines to recover the vehicle.

5.227 This article is based on sections 99 to 102 of the Road Traffic Regulation Act 1984 and the Removal and Disposal of Vehicles (Traffic Officers) (England) Regulations 2008. The principle of applying an equivalent power in a DCO has precedent in the Silvertown Tunnel Order 2018 (article 44). The provision is necessary to facilitate the safe operation of the tunnel area. This provision provides a distinct power for the removal of vehicles from the power to remove vehicles in connection with the road user charge (see further above).

#### *Article 50 – Removal of obstructions*

5.228 This article enables obstructions falling from motor vehicles in the tunnels and the approaches to be removed. Except in the case of perishable items (which can be disposed of immediately), an owner of the goods (providing that person can be traced) will have five weeks to claim and take possession of the load. The owner will need to account for any expenses incurred in removing and storing the load. The power is required by National Highways to safely manage



the operation of the tunnels and has precedent in the recent Silvertown Tunnel Order 2018 (article 45), which it broadly follows.

*Article 51 – Byelaws relating to the tunnel area*

- 5.229 Paragraph (1) authorises National Highways to make and enforce byelaws to regulate the use and operation of the tunnels.
- 5.230 Paragraph (2) provides for the byelaws contained in Schedule 13 to have effect and be treated as confirmed by the Secretary of State. As the Order must be made by the Secretary of State, it is not necessary to re-confirm the byelaws contained in Schedule 13.
- 5.231 The procedure to be adopted in the Local Government Act 1972 for the making of byelaws is applied by paragraph (3). That provision is supplemented by paragraph (4) which applies the fast-track procedure in the Byelaws (Alternative Procedure) (England) Regulations 2016 (the Byelaws Regulations) to byelaws under this article. These provisions are justified on the basis that if any change to the byelaws in Schedule 13 are required (for example, because of future changes in technology or the need to change restrictions or persons authorised under the byelaws), or further byelaws are required, an amendment to the Order is considered disproportionate, and the Secretary of State has confirmed in a number of decisions that byelaws made under a DCO or TWAO can be amended by the regime specifically established under the Local Government Act 1972 and the Byelaws Regulations for that purpose.
- 5.232 Paragraph (6) provides that a breach of the byelaws constitutes an offence (as permitted by section 120(8) of the 2008 Act).
- 5.233 The byelaws included in Schedule 13 broadly follow those included in the Silvertown Tunnel Order 2018, Lake Lothing (Lowestoft) Third Crossing Order 2020 and the draft A303 (Amesbury to Berwick Down) Development Consent Order. National Highways requires byelaws, and the power to amend them, in order to safely regulate the conduct of persons within the tunnel area. Further explanation of the byelaws and detail of precedents are provided in Annex 3 of this document.

*Article 52 – Fixed penalty notices relating to byelaws*

- 5.234 This article gives an authorised person the power to serve a fixed penalty notice on a person who has committed an offence under byelaws made under it. A person who has breached a byelaw can avoid prosecution by paying the penalty. The amount of the fixed penalty is expressed as a percentage of the maximum fine which may be imposed, ie the maximum amount that applies from time to time under level 3 on the standard scale (currently £1,000). A person who pays the penalty in seven days will only pay one-fifth of the maximum amount of the fine; otherwise, the penalty will be one-half of the maximum amount of the fine. Failure to pay within 14 days exposes the offender

to the risk of prosecution. Provision is made for a deposit to be taken from those offenders who cannot provide a UK residential address.

- 5.235 The ability for DCOs to include such an article has precedent in the recently made Silvertown Tunnel Order 2018 (article 49) and the Lake Lothing (Lowestoft) Third Crossing 2020 (see article 47) and is required to enable the efficient enforcement of the byelaws regulating the use of the tunnels.

## **Part 7 – Miscellaneous and General**

### *Article 53 – Disapplication of legislative provisions, etc.*

- 5.236 This article provides (pursuant to section 120(5)(a) of the 2008 Act) for the disapplication in relation to the authorised development of certain requirements which would otherwise apply under general legislation. Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order.

- 5.237 More specifically, this article provides for the disapplication of various consents which would otherwise be required from the Environment Agency, internal drainage boards or a Lead Local Flood Authority, or under the Port of London Act 1968, Environmental Permitting (England and Wales) Regulations 2016, Highways Act 1980, the Water Resources Act 1991 or the Land Drainage Act 1991. The following provisions are disappplied under this article:

5.237.1 provisions requiring approvals from the Port of London Authority under the Port of London Act 1968 – the Order sets out in the Protective Provisions with the PLA a process for appropriate approvals and therefore the consents under sections 66 to 75 are not required. These are not provisions which require a consent under section 150 of the 2008 Act, though it has been agreed with the PLA and is precedented (see, e.g. article 3 of the Silvertown Tunnel Order 2018);

5.237.2 provisions requiring particular approvals under the Highways Act 1980 - these are not provisions which require consent under section 150 of the 2008 Act. Other highways DCOs do not contain these disapplications, but they are required for the Project given the greater level of works over the local road network (which in turn give rise to approvals required under these provisions). The matters the provisions seek to control are proposed to be managed under Requirements 4 and 5 in Schedule 2. In order to reduce the duplication, or inconsistency, in relevant controls, it is proposed to disapply these provisions. Similar provisions are disappplied for other significant projects (e.g., Schedule 24 to the High Speed Rail (West Midlands - Crewe) Act 2021 and Schedule 19 to the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014/2384 (Tideway Order));

5.237.3 Section 28E and 28H of the Wildlife and Countryside Act 1981 (these provisions relates to works carried out in a site of special scientific

interest) – this disapplication confirms that approvals under those provisions are not required; this is not a provision which requires consent under section 150 in England; and the disapplication of section 28E is preceded (e.g. article 3 of the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022);

5.237.4 byelaws made or deemed to have been made under the Water Resources Act 1991 – a consent under section 150 of the 2008 is required and discussions are ongoing with the Environment Agency as the appropriate agency (as defined in the Water Resources Act 1991);

5.237.5 provisions prohibiting the placing of obstructions in waterways which are not main rivers under the Land Drainage Act 1991 - a consent under section 150 of the 2008 is required for section 23 of the Land Drainage Act 1991 (but not sections 30 and 32) and discussions are ongoing with the drainage authorities;

5.237.6 byelaws made under the Land Drainage Act 1991 regulating the use and obstruction of watercourses – this disapplication prevents any inconsistency arising between the works authorised under the Order and byelaws. This is not a provision which requires consent under section 150 and is preceded (see, e.g., article 3 of the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022); and

5.237.7 requirements for an environmental permit for the carrying on of flood risk – a consent under section 150 of the 2008 is required and discussions are ongoing with the Environment Agency.

5.238 Paragraph (2) disapplies section 80A of the Port of London Act 1968 on the basis that protective provisions for the benefit of the PLA make provision for matters concerning lighting associated with the delivery of the Project. Section 80A is proposed to be introduced under the Port of London Harbour Revision Order which has not yet been made.

5.239 Paragraph (3) provides for a disapplication in respect of the temporary possession provisions of the Neighbourhood Planning Act 2017. This is required as the relevant sections of the Neighbourhood Planning Act 2017 have not been brought into force, subsidiary regulations to that Act have not yet been made, and there is therefore no certainty as to the requirements of the new temporary possession regime. As such, this enables the temporary possession regime created by this Order to be applied. This approach has been accepted by the Secretary of State in DCOs following the enactment of the Neighbourhood Planning Act 2017, such as the A19/A184 Testo's Junction Alteration Development Consent Order 2018 (article 2(7)) and more recently the M42 Junction 6 Development Consent Order 2020 (article 49(1)).

5.240 Paragraph (4) confirms that following the expiry of the maintenance period, the requirements to obtain a works license under the Port of London Authority Act 1968 does not apply to anything done within any structure forming part of the authorised development (e.g. the tunnels) or in connection with the operation

or maintenance of the authorised development or any other function of National Highways. This article is based on article 3(4) of the Silvertown Tunnel Order 2018. Paragraph (5) has been inserted at the request of the PLA to confirm that utility works unrelated to the highway forming part of the A122 are not within the scope of the disapplication of the 1968 Act in subparagraph (1) and (4).

- 5.241 Paragraph (6) provides for the disapplication of the Allotments Act 1922. The Allotments Act 1922 pre-date, and are inconsistent with, the statutory regime for the compulsory acquisition of land and interests over land. These inconsistent provisions are considered to have been impliedly repealed through the modern statutory regime of compulsory acquisition (e.g. the Compulsory Purchase Act 1965), but the disapplication is necessary to ensure that this is the case. This provision is precedented and has been incorporated into DCOs on this precautionary basis (see article 3(3) of the Great Yarmouth Third River Crossing Development Consent Order 2020).
- 5.242 Paragraph (7) in effect disapplies the Community Infrastructure Levy Regulations 2010, by making clear that any building comprised in the authorised development is to be deemed to be of a type that does not trigger liability for payment of the Community Infrastructure Levy (for a recent precedent for the drafting, see article 3(2) of the Lake Lothing (Lowestoft) Third Crossing Order 2020).
- 5.243 National Highways has produced a Consents and Agreements Position Statement (Application Document 3.3) as part of this application. This sets out in greater detail the proposed approach to obtaining the other consents required for the Project.
- 5.244 Paragraph (8) preserves National Highways', statutory undertaker's and the Secretary of State's existing powers and duties under the Highways Act 1980, the 1991 Act, the Transport Act 2000, and its permitted development rights. This paragraph is based on article 37 of the M20 Junction 10a Development Consent Order 2017 and article 51 of the Lake Lothing (Lowestoft) Third Crossing Order 2020.

#### *Article 54 – Designation of fen land*

- 5.245 This article applies section 193 of the Law of Property Act 1925 to parts of the Orsett Fen which are proposed to be used for the purposes of open mosaic habitat and water vole mitigation. This will increase the volume of land which is subject to public access rights in the area, and has been requested by Natural England. Public access rights in the area proposed for open mosaic habitats will be applied from the completion of the works. Public access rights in the area proposed for water vole mitigation will be applied from 12 months following completion of the works, or 18 months from the completion of those works, whichever is later. There is a longer period in the case of water vole mitigation to allow for a period of maturity. These provisions have been agreed with Natural England.

*Article 55 – Application of local legislation*

- 5.246 This article provides (pursuant to section 120(5)(a) of the 2008 Act) for the disapplication of certain requirements which would otherwise apply under specific pieces of local legislation. Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order.
- 5.247 National Highways considers that, in the context of the Project being of national significance, the Order should be the predominant authorising instrument for the works. The purpose of the regime created by the 2008 Act is to ensure that DCOs provide a unified consent for NSIPs, and the undertaker considers that disapplying and amending certain legislative provisions, as set out in the Order, is proportionate in this context. It is considered proportionate as the provision makes clear that the legislation will only be disapplied insofar as the local legislation is inconsistent with a provision of, or a power conferred by, the Order. The disapplication of local legislation in this manner is precedented (see, for example, article 3 of the Silvertown Tunnel Order 2018).
- 5.248 The table below sets out the rationale for the disapplication for the provisions contained in paragraph (1).

<b>Enactment</b>	<b>Rationale for disapplication</b>
An Act for making and maintaining a navigable Canal, from the River Thames, near to the Town of Gravesend, in the County of Kent, to the River Medway, at a Place called Nicholson's Ship Yard, in the Parish of Frindsbury, in the said County; and also a certain Collateral Cut, from White Wall in the said Parish, to the said River Medway	The Act confers certain powers to make and maintain a canal, from the River Thames near Gravesend, to the River Medway, at a place called Nicholson's Ship Yard ("the Thames and Medway Canal").The Thames and Medway Canal is disused, however the Act remains in force and has not been repealed. That canal sits within the Order limits. The disapplication of this Act therefore ensures consistency with the terms of the Order, to the extent that any future exercise of powers conferred by the Act were inconsistent with a provision of, or power conferred by, the Order.
An Act for enabling the Company of Proprietors of the Thames and Medway Canal, to vary the Line of the said Canal, and to raise a further	The Act confers further powers in respect of the Thames and Medway Canal. Whilst the Thames and Medway Canal is disused, the Act

<p>Sum of Money for completing the said Canal and the Works thereunto belonging; and for altering and enlarging the Powers of an Act, made in the Thirty-ninth and Fortieth Year of the Reign of His present Majesty, for making the said Canal and a Collateral Cut thereto</p>	<p>remains in force and has not been repealed. That canal sits within the Order limits. The disapplication of this Act therefore ensures consistency with the terms of the Order, to the extent that any future exercise of powers conferred by the Act were inconsistent with a provision of, or power conferred by, the Order.</p>
<p>An Act for enabling the Company of Proprietors of the Thames and Medway Canal to vary the Line of the said Canal; and for altering and enlarging the Powers of Two Acts passed in the Fortieth and Forty-fourth Years of His present Majesty, for making the said Canal and a Collateral Cut thereto</p>	<p>The Act confers further powers in respect of the Thames and Medway Canal. Whilst the Thames and Medway Canal is disused, the Act remains in force and has not been repealed. That canal sits within the Order limits. The disapplication of this Act therefore ensures consistency with the terms of the Order, to the extent that any future exercise of powers conferred by the Act were inconsistent with a provision of, or power conferred by, the Order.</p>
<p>Orsett (Essex) Inclosure and Reduction to a Stint and Improvement of Commons and Waste Grounds Act 1825</p>	<p>Any limits contained in or having effect under this Act on the exercise of the Order powers in respect of the Orsett Fen are disapplied. This is to ensure that the statutory provisions (e.g. byelaw making powers, requirements in relation to fencing) attaching to this land do not impede the delivery of the authorised development.</p>
<p>Commons Regulation (West Tilbury) Provisional Order Confirmation Act 1893</p>	<p>Any limits contained in or having effect under this Act on the exercise of the Order powers in respect of the West Tilbury common land are disapplied. This is to ensure that the statutory powers attaching such as those relating to maintenance or bylaw making powers do not impede the delivery of the authorised development.</p>

<p>Medway and Thames Canal Act 1902</p>	<p>The Act confers further powers in respect of the Thames and Medway Canal. Whilst the Thames and Medway Canal is disused, the Act remains in force and has not been repealed. The disapplication of this Act therefore ensures consistency with the terms of the Order, to the extent that any future exercise of powers conferred by the Act were inconsistent with a provision of, or power conferred by, the Order.</p>
<p>London Overground Wires Act 1933</p>	<p>This Act contains restrictions on the placing of wires over or upon streets without the consent of the local authority. The disapplication ensures that the execution of works pursuant to the Order is not subject to a further, secondary approval, reflective of the 'one-stop shop' approach to the consenting of nationally significant infrastructure projects.</p> <p>The disapplication of this Act is precedent, under article 3 of the Silvertown Tunnel Order 2018.</p>
<p>London, Midland and Scottish Railway Act 1936</p>	<p>The Act contains powers to stop up a section of public footpath leading from Low Street Lane to the road from Muckingford to East Tilbury. Low Street Lane is within/adjacent to the Order limits. The disapplication ensures that the delivery of the proposed development is not impeded by the exercise of the powers in this Act.</p>
<p>Thames Barrier and Flood Prevention Act 1972</p>	<p>The Act includes powers to undertake works, including sea defence areas, across a broad geographical area. The disapplication of these powers, insofar as their exercise would be inconsistent with a provision of, or power conferred by, the Order</p>

	<p>ensures that there is no prejudice to the delivery of the works pursuant to the Order.</p> <p>The disapplication of this Act is precedented, under article 3 of the Silvertown Tunnel Order 2018 and article 3 of the Port Tilbury (Expansion) Order 2019.</p>
County of Kent Act 1981	<p>The Act includes provisions prohibiting the carrying out of certain activities, including the parking of vehicles on grass verges. It is likely such activities may be require din connection with the Project. The disapplication of these powers, insofar as their exercise or application would be inconsistent with a provision of, or power conferred by, the Order ensures that there is no prejudice to the delivery of the works pursuant to the Order.</p>
Greater London Council (General Powers) Act 1986	<p>The Act contains restrictions on works affecting buildings or structures located under a street without prior approval. The Act applies to land in the area of the Project. The disapplication ensures that the execution of works pursuant to the Order is not subject to a further, secondary approval, reflective of the 'one-stop shop' approach to the consenting of nationally significant infrastructure projects.</p> <p>The disapplication of this Act is precedented, under article 3 of the Silvertown Tunnel Order 2018.</p>
Essex Act 1987	<p>The Act includes provisions prohibiting the carrying out of certain activities, including the parking of vehicles on grass verges. It is likely such activities may be required in connection with the Project. The</p>



	disapplication of these powers, insofar as their exercise or application would be inconsistent with a provision of, or power conferred by, the Order ensures that there is no prejudice to the delivery of the works pursuant to the Order.
Channel Tunnel Link Act 1996	The Act contains powers to carry out improvement works to the A2 and M2, with further ancillary provision made for the stopping up and temporary interference with highways. The disapplication of these powers, insofar as their exercise or application is still capable of enduring and would be inconsistent with a provision of, or power conferred by, the Order ensures that there is no prejudice to the delivery of the works pursuant to the Order.
Byelaws of the Rural District Council of Romford as to the nuisances in connection with the removal of offensive noxious matters 1899	The Byelaws impose restrictions upon and offences relating to the removal or carrying of certain substances or liquids within the District. Such substances and liquids may be required in connection with the Project. The disapplication of these provisions, insofar as their application would be inconsistent with the exercise of powers under the Order, ensures that there is no prejudice to the delivery of the works pursuant to the Order.
Byelaws of the Rural District Council of Romford for the prevention of nuisances 1902	The Byelaws create offences relating to the carrying out of certain activities within the District, including offences relating to the deposit of dust upon land and premises. The Project may require the deposit of particular materials, and controls relating to dust are contained in the Code of Construction Practice. The disapplication of these provisions, insofar as their application would be

	<p>inconsistent with the exercise of powers under the Order, ensures that there is no prejudice to the delivery of the works pursuant to the Order.</p>
<p>Byelaws of the Rural District Council of Romford with respect to the Drainage of Buildings 1908</p>	<p>The Byelaws regulate and create offences relating to the drainage of buildings erected within the District. There are drainage works (as shown in the Drainage Plans) associated with the Project. The disapplication of these provisions, insofar as their application would be inconsistent with the exercise of powers under the Order, ensures that there is no prejudice to the delivery of the drainage works pursuant to the Order.</p>
<p>Essex County Council byelaws for the Good Rule and Government 1938</p>	<p>The Byelaws regulate and create offences relating to certain activities, including the affixing of placards on structures abutting streets or other public places within the County. Signage is proposed as part of the Project. The disapplication of these provisions, insofar as their application would be inconsistent with the exercise of powers under the Order, ensures that there is no prejudice to the delivery of the works pursuant to the Order.</p>
<p>Urban District of Hornchurch byelaws for Nuisances 1938</p>	<p>The Byelaws create offences relating to the carrying out of certain activities within the District, including offences relating to the deposit of dust upon land and premises. The Project may require the deposit of particular materials, and controls relating to dust are contained in the Code of Construction Practice. The disapplication of these provisions, insofar as their application would be inconsistent with the exercise of powers under the Order, ensures that</p>

	there is no prejudice to the delivery of the works pursuant to the Order.
Urban District Council of Hornchurch byelaws as to removal through streets of offensive or noxious matter or liquid 1938	The Byelaws impose restrictions upon and offences relating to the removal or carrying of certain substances or liquids within the District. Such substances and liquids may be required in connection with the Project. The disapplication of these provisions, insofar as their application would be inconsistent with the exercise of powers under the Order, ensures that there is no prejudice to the delivery of the works pursuant to the Order.
Byelaws of the Urban District Council of Thurrock as to certain nuisances 1970	The Byelaws create offences relating to the carrying out of certain activities within the District, including offences relating to the deposit of dust upon land and premises. The Project may require the deposit of particular materials, and controls relating to dust are contained in the Code of Construction Practice. The disapplication of these provisions, insofar as their application would be inconsistent with the exercise of powers under the Order, ensures that there is no prejudice to the delivery of the works pursuant to the Order.
Byelaws of Gravesham Borough Council in respect of pleasure grounds known as Thong Lane Sports Ground 1970	The Byelaws contain provisions regulating certain activity and conduct at Thong Lane Sports Ground, also known as Cascades Leisure Centre. That site sits within the Order limits. The disapplication of these provisions, insofar as their application would be inconsistent with the exercise of powers under the Order, ensures that there is no prejudice to the delivery of the works pursuant to the Order.

Byelaws of the Borough of Medway in respect of pleasure grounds 1976	The Byelaws contain provisions regulating certain activity and conduct relating to pleasure grounds in the Borough of Medway. The disapplication of these provisions, insofar as their application would be inconsistent with the exercise of powers under the Order.
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5.249 Paragraph (4) modifies the application of section 42 of the Local Government Act 1976 (the 1976 Act). This modification avoids any future enactments undermining the powers and rights under the Order. National Highways does not consider that subsequent local legislation should impose controls and consent requirements which are not considered necessary at the point the Order is made by the Secretary of State. National Highways notes that the disapplication of section 42 of the 1976 Act has been included in other transport DCOs (e.g., Paragraph 4 of Schedule 14 to the West Midlands Rail Freight Interchange Order 2020 and Paragraph 4 of Schedule 15 to the Northampton Gateway Rail Freight Interchange Order 2019), and other significant DCO projects (e.g. Paragraph 5 of Schedule 25 to the Sizewell C (Nuclear Generating Station) Order 2022) except that ‘unless expressly stated otherwise’ has been inserted to account for any future legislation which Parliament specifically wishes to override the Order.

5.250 Paragraph (5) states that any inconsistency or conflict between works under the Order and the requirements of the Port of Tilbury (Expansion) Order 2019 should not give rise to enforcement action, and such an inconsistency or conflict is not to be treated as a breach by the Port of Tilbury London Limited of that Order. This is required because works authorised under the Order are not consistent with the requirements of management plans being implemented by the Port of Tilbury under the Port of Tilbury (Expansion) Order 2019. The Interrelationship document (Application Document Reference 7.17) sets out further information on the interface between the Project and Tilbury2 which was consented by the Port of Tilbury (Expansion) Order 2019).

*Article 56 – Planning Permission, etc.*

5.251 Paragraph (1) permits certain development authorised by a planning permission granted under the Town and Country Planning Act 1990 that is within the Order limits to be carried out pursuant to the terms of the planning permission without breaching the Order. This provision ensures that National Highways does not breach section 161 of the 2008 Act in carrying out certain development pursuant to a grant of planning permission. These provisions have precedent in the M20 Junction 10a Development Consent Order 2017 (article 7) and the A30 Chiverton to Carland Cross Development Consent Order 2020 (article 7)

- 5.252 Paragraph (2) provides that the land within the Order limits in which National Highways holds an interest shall be treated as “operational land of a statutory undertaker” for the purposes of the Town and Country Planning Act 1990 (the 1990 Act). The effect of that Order land being treated as operational land is that the person responsible for operating and maintaining the Project (National Highways or any transferee of its powers) will benefit from certain permitted development rights on that land in connection with the operation of the road. Article 37 of the A19/A184 Testo’s Junction Alteration Development Consent Order 2018 and article 42 of the A30 to Chiverton to Carland Cross Development Consent Order 2020 followed the same approach. Other DCOs often have this provision as a separate article. On this occasion, National Highways has included the provision in this article as it relates to “planning permissions” under the Town and Country Planning Act 1990. Paragraph (3) addresses the Supreme Court’s ruling in *Hillside Parks Ltd v Snowdonia National Park Authority* 2022 UKSC [30]. That judgment relates to planning permissions granted under the Town and Country Planning Act 1990. It holds that, unless there is an express provision otherwise, where development has taken place under one permission, whether another planning permission may lawfully be implemented depends upon whether it remains physically possible to carry out the development authorised by the second permission in light of what has already been done under the first permission.
- 5.253 Paragraph (3) ensures that enforcement action is not taken in respect of planning permissions granted under the 1990 Act which are inconsistent with the works and exercise of powers under the Order. It is intended to cater for the inconsistency in respect of, for example, the planning permission with the reference 20191217 (Gravesham Borough Council) which contains a condition requiring National Highways to restore land at Marling Close, which is included within the Order Limits and is required for use as a site compound during the construction phase, to its former condition by 9 July 2021. The provision ensures that conditions such as these do not cause enforcement action to be taken and enable the planning permission to continue to be valid notwithstanding a condition can no longer be complied with as a result of the authorised development. The provision is based on article 3(3) of the Lake Lothing (Lowestoft) Third Crossing Order 2020. However, it differs from that precedent in that the provision which reflects the terminology used by their Lordships in that case, and confirms that planning permissions which conflict with the Project can proceed without the risk of enforcement action being taken notwithstanding any incompatibility between the Project and the development authorised under a planning permission. It is considered this is necessary to confirm that developments are not prevented. Paragraph (4) has been inserted to deal with the converse situation and confirms that development under a planning permission is not to prevent activity authorised under the Order. Without paragraphs (3) or (4) there is a significant risk of the Project or other permissions being undeliverable or subject to enforcement action.
- 5.254 The Applicant wishes to emphasise that maintaining these provisions in the Order are vital to address matters which relate to the long-term interaction between planning permissions, and the Order, but also development comprised in the Project. As set out above, the Order includes provision for housing related

development (i.e., the replacement of the travellers' site in Thurrock). Whilst not currently anticipated, the Applicant notes that should Thurrock Council wish to make any changes in the future to the operation of that site, the Applicant considers it appropriate that such matters would be dealt with under the Town and Country Planning Act 1990. Paragraph (3) of this provision ensures that route is open to Thurrock Council. In the absence of this provision, there is potential for an amendment to the Order to be required. It would be wholly disproportionate and inappropriate to have to seek an amendment to the Order in those circumstances. The Applicant further notes that host authorities support these provisions (see, for example, Thurrock Council's [REP3-210] in which they note this article is agreed and that "In the Council's opinion this falls within the range of broad powers for the DCO – see Section 120 of the Planning Act 2008... The Council agrees there is not caselaw on exactly this situation, however, its addition makes the position clearer for the Council"; the London Borough of Havering has also confirmed that "LBH believe that provision of this nature is highly desirable. - in order to remove any doubt as to the effect of the Hillside judgement; and - to enable a planning permission, issued following the implementation, and in the knowledge, of the DCO, to be implemented without the risk of criminal liability under s.160 of the PA 2008" in [REP5-107]). In light of the need, and support for these provisions, the Applicant strongly requests these provisions are retained should development consent be granted. Paragraph (6) has been inserted to define "enforcement action" following a request by landowners to make clear that enforcing action under Part 7 of the 1990 is caught by subparagraph (3)(b).

- 5.255 Paragraph (5) treats works carried out under this Order as being immediately required for the purpose of carrying out development authorised by a planning permission for the purposes of a tree felling license. This provision is based on article 54(3)(c) of the Great Yarmouth Third River Crossing Development Consent Order 2020.

*Article 57 – Application of landlord and tenant law*

- 5.256 This article governs the leasing of land by National Highways to any other person. Essentially, it allows the terms of the lease to override any statutory provisions relating to landlord and tenant law.

*Article 58 – Defence to proceedings in respect of statutory nuisance*

- 5.257 Section 158 of the 2008 Act confers statutory authority for carrying out the Project for the purposes of a defence in statutory nuisance generally, subject to any contrary provision made by a particular DCO. This article is such a contrary provision, amending the terms of the defence. National Highways would note that article 38 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 references paragraphs (c), (d), (e), (fb), (g), (ga) and (h) of section 79(1) the Environmental Protection Act 1990 in the equivalent provision. Other DCOs contain references to a longer list of nuisances (e.g. article 39 of the Drax Power (Generating Stations) Order 2019) and others contain a shorter list (e.g., Cleve Hill Solar Park Development Consent Order 2020). In the case of the Order, National Highways has

narrowed the list of references to those nuisances which are considered to be potentially engaged (see paragraph 4.1.4 of the Statement of Statutory Nuisance (Application Document 6.6). Accordingly, paragraphs (d), (e), (fb), (g), (ga) are referenced in this article.

5.258 The defence is available if the nuisance relates to:

5.258.1 the construction or maintenance of the Project, and is in accordance with any controls imposed by the local authority under the Control of Pollution Act 1974, or cannot reasonably be avoided; or

5.258.2 the use or operation of the Project and cannot reasonably be avoided.

5.259 Paragraph (2) confirms that compliance with the controls and measures described in the Code of Construction Practice or any environmental management plan approved under paragraph 4 of Schedule 2 will be sufficient, but not necessary, to show that an alleged nuisance could not reasonably be avoided. This provision is necessary to clarify the scope of the defence of statutory authority arising from the grant of the Order. The Code of Construction Practice and management plans will reflect the set of appropriate measures and controls endorsed by the Secretary of State (if consent is granted). In the case of the management plans, these would be subject to further approval by the Secretary of State. It is not reasonable or appropriate for there to be a claim of statutory nuisance circumstances where there is compliance with plans which have been approved, and are intended to manage matters related to statutory nuisances.

5.260 This is an article that has precedent in made highway DCOs, for example article 38 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 (and paragraph (2) is based on article 41(2) of the Southampton to London Development Consent Order 2020).

*Article 59 – Protection of interests*

5.261 This article simply gives effect to Schedule 14, which contains provisions protecting the interests of third parties. Parts 1 and 2 of this schedule are based on the standard protective provisions approved by the Secretary of State in the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016, the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 and the M42 Junction 6 Development Consent Order 2020. Other parts of Schedule 14 make specific provision for particular statutory bodies and undertakers. National Highways has sought the views of the statutory undertakers who have interests affected by the authorised development and continues to negotiate with the statutory undertakers to ensure any concerns are dealt with appropriately. National Highways will provide a full update of the status of the negotiations throughout the examination.

*Article 60 – Deemed marine licence*

5.262 This article constitutes deemed consent (as provided for under section 149A of the 2008 Act) under section 65 of the Marine and Coastal Access Act 2008, the successor provision to section 34 of the Coast Protection Act 1949. Schedule 15 sets out the terms on which the licence would be granted. The overall structure of this licence reflects that found in Schedule 15 of the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 and Schedule 12 of the Silvertown Tunnel Order 2018.

*Article 61 – Stakeholder actions and commitments register*

5.263 This is a bespoke article which legally secures commitments which have been given to stakeholders through extensive pre-application engagement but which do not naturally sit within the outline management documents or other control documents secured under Schedule 2. In addition, the intention is to reduce the need for legal agreements by providing a mechanism to give legally secured commitments. This has the effect of:

5.263.1 assisting stakeholders by obviating time/expense associated with legal agreements thereby speeding up resolution of issues during examination; and

5.263.2 affording visibility to Examining Authority and Secretary of State as to how issues have been resolved without waiting for such agreements to be completed, thereby reducing delays at the decision stage.

5.264 This is not a precedented article, though the proposal draws some parallels with the Register of Undertakings and Assurances (RUAC) utilised in connection with HS2. The article requires National Highways to implement the measures contained in the Stakeholder Actions and Commitments Register, a DCO application document.

5.265 Paragraph (1)(a) and (b) permit modifications to the measures where the consent of the person with the benefit of the measure is obtained, or with the approval of the Secretary of State. This is necessary in the event that the measures are deemed to no longer be capable of implementation, or the measure no longer serves a useful purposes, or a modification could serve the purpose of the measure equally well. These provisions are based on section 106A(6) of the Town and Country Planning Act 1990 which allows the modification of measures secured under section 106 of that Act.

*Article 62 – Certification of documents, etc.*

5.266 This article provides for various plans and other documents to be certified by the Secretary of State as true copies of those documents referred to in the Order. The documents in question (with their reference and revision numbers) are listed in Schedule 16. A form of this article (excluding paragraphs (4) to (7)) is included in the Model Provisions and in the majority of DCOs made to date.

5.267 Paragraph (4) to (7) allow for errors in certified plans to be corrected where two justices in a magistrates court are satisfied that the error arose from mistake or inadvertence. .



5.268 These provisions do not circumvent or modify the application of Schedules 4 and 6 of the Planning Act 2008 as they relate to inadvertent errors, rather than corrections or (material or non-material) amendments to the Order, or works authorised under the Order. A correction order under the Planning Act 2008 is a correction to the made Order, not to plans themselves. The nature of the corrections which could be made under the proposed provisions is therefore materially different. For that reason, it is not considered that these provisions conflict with the process for corrections. For the avoidance of doubt, the proposed provisions in the dDCO do not permit textual amendments to the Order (if made). In relation to non-material and material amendments, these provisions also do not circumvent or modify the application of Schedules 4 and 6 of the Planning Act 2008 as they relate to inadvertent errors, not (material or non- material) amendments to the works authorised under the Order or anything authorised by the Order. They are therefore not “changes”.

5.269 These provisions are included in section 52 of the Crossrail Act 2008. They also find precedent in section 54 of the High Speed Rail (West Midlands - Crewe) Act 2021, section 53 of the Channel Tunnel Rail Link Act 1996, and section 43 of the Dartford-Thurrock Crossing Act 1988. It is considered that the Project, being of a similar scale and complexity to those projects, should incorporate these provisions on a precautionary basis to minimise a potential delay to the delivery of the Project in the unanticipated event that there is an error. It is not relevant that the projects which have included these provisions to date have been promoted by Acts of Parliament; rather it affirms the principle that it would be disproportionate to require subsequent instrument (be it an amendment Order or an Act of Parliament) to deal with manifest errors (as distinct from ‘changes’ to an application). It is the Applicant’s view that this provision is capable of being included in the dDCO under section 120(3) of the Planning Act 2008. The existing processes under the Planning Act 2008 are not intended to prevent the ability to ensure inadvertent errors or mistakes in certified plans delay a nationally significant infrastructure project. The Applicant has increased the period of notification to 28 days, inserted a new provision which requires representations to be provided to the justices in line with the London Borough of Havering’s requests relating to this provision and also required the local planning authority to be informed of any date of determination. The Applicant therefore considers appropriate safeguards are in place in relation to this provision which will ensure no delay in the construction of the Project..

*Article 63 – Service of notices*

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

5.271 It is common to have such an article in an order authorising development such as this. The article has precedent in a number of DCOs including the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 (see article 42).

5.272 The provision is useful because it provides clarity on the issue. It is noted that the service of notice provisions under sections 229 and 230 of the 2008 Act apply to notices served under that Act rather than notices served under a DCO made under that Act. For clarity, these provisions would not apply to any notices or certificates served under Schedule 12, as the Road User Charging Schemes (Penalty Charges, Adjudication and Enforcement) (England) Regulations 2013 would apply to those notices.

*Article 64 – Arbitration*

5.273 This article governs what happens when two parties disagree in the implementation of any provision of the Order except where this is expressly provided for (e.g., Schedule 12 relating to the road user charge). The matter is to be settled by arbitration, and if the parties cannot agree on who the arbitrator should be, this is decided by the President of the Institution of Civil Engineers. Precedent is provided by most DCOs, including article 42 of the A19/A184 Testo's Junction Alteration Development Consent Order 2018. Paragraph (2) of this article confirms that a decision of the Secretary of State will not be subject to arbitration.

*Article 65 – Appeals to the Secretary of State*

5.274 This article establishes an appeal process in relation to article 12, 17, 21, Requirement 13, permit schemes or under the documents secured under article 61 or Schedule 2 (i.e. provisions where a local authority has an approval role) and where a local authority issues a notice under section 60, or does not grant consent or grants conditional consent under section 61, of the Control of Pollution Act 1974.

5.275 In the case of the Order, the article was specifically requested by Thurrock Council. Two particular aspects warrant its inclusion. First, the articles mentioned above, and requirement 13 provide for matters to be discharged by the local planning authority. The aim of the article is to streamline the appeal process in the event of a refusal by a local authority, thereby minimising the potential for unnecessary delay to the Project.

5.276 Second, in respect of the Control of Pollution Act 1974, both sections 60 and 61 include provisions which allow the recipient of a notice, or National Highways in the case of a consent (as the case may be), to appeal to a magistrates' court within 21 days. Section 70 states that any appeal shall be by way of complaint for an order and that the Magistrates' Court Act 1980 applies to the proceedings. Further provisions as to appeals under these sections are included in Regulation 5 (in respect of appeals under section 60) and Regulation 6 (in respect of appeals under section 61) of the Control of Noise (Appeals) Regulations 1975.

5.277 Part 2 of the Magistrates' Court Act 1980 contains provisions for the hearing of civil complaints. It does not, however, prescribe specific timescales. Section 144 of the 2008 Act contains an enabling provision for the making of rules for regulating and prescribing the procedure and practice to be followed in

magistrates' courts in civil matters. An extensive number of statutory instruments have been made under this section, but the primary rules are considered to be those set out in the Magistrates' Court Rules 1981. Those rules impose a duty on the court to actively manage cases, and confer a range of powers to do so. However, they do not prescribe a specific procedure for the hearing of complaints.

5.278 National Highways notes that there is a significant backlog in the Magistrates Court. The Law Society notes that In the Magistrates' Court, the situation continues to deteriorate. 1,666 cases were added to the backlog in February 2023, bringing the total to 343,519. It is not considered that a nationally significant infrastructure project should be subject to such delays. Due to the need for certainty and the expeditious resolution both of any disagreements under sections 60 and 61 of the Control of Pollution Act 1974 and also Requirement 12, and to ensure that the construction of the authorised development is not subject to unnecessary delay, this article prescribes a clear procedure for the resolution of appeals by the Secretary of State. As set out further above, the Secretary of State has an agreed process for the discharge of Requirements and is therefore well placed to deal with such appeals. National Highways notes that an equivalent provision (in connection with the Control of Pollution Act 1974 only) was recently removed from the A38 Derby Junctions Development Consent Order 2021 on the basis that it was considered the process under the Control of Pollution Act 1974 was sufficient. National Highways considers that given the need for consistent and expeditious decision making across the Project, the need to deliver a complex Project in an expeditious manner with fixed timescales, that the appeals process set out in article 65 is appropriate in this case.

5.279 This modification of the Control of Pollution Act 1974 and the proposed process is precedented, particularly for complex infrastructure projects (see, for example, article 44 of the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016, article 52 of the M25 Junction 28 Development Consent Order 2022, and paragraph 4 of Schedule 17 to the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 which apply the same process to the Control of Pollution Act 1974). The proposal has been used in a number of orders where both approval of requirements and notices under the Control of Pollution Act 1974 are concerned (see, for example, Paragraph 16 of Schedule 2 to the Port of Tilbury (Expansion) Order 2019). National Highways notes that it proposes to use the Magistrates Courts system for corrections under article 62 on the basis that the same drivers for expeditious decision making during construction do not apply in that case. National Highways notes that the position of utilising an appeal to the Secretary of State for matters relating to the Control of Pollution Act 1974 but the Magistrates systems reflects Acts authorising major construction projects akin to the Project (see, for example, sections 20 and 52 of the Crossrail Act 2008 which does precisely this).

*Article 66 – Power to override easements and other rights*

- 5.280 This article provides a power to override easements and other rights and reflects the terms of section 120(3) and (4), and paragraphs 2 and 3 of Part 1 of Schedule 5 to the 2008 Act. This article has precedent in, for example, article 32 of the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014. It provides that land vested in the undertaker is discharged from all rights, trusts and incidents to which it was previously subject at the point of vesting, together with the benefit of restrictive covenants and instances where land subject to third-party rights is acquired by agreement rather than through compulsory acquisition. It also provides for the situation where access to the land for the purposes of the authorised development occurs before vesting.
- 5.281 Sections 203 to 205 of the Housing and Planning Act 2016 relate to the power (in section 203) to override easements and other rights, and to the provision of compensation for such interference (section 204). The implications of this power are wide-ranging – for instance, the power applies in respect of all types of interests and rights, in cases where there is planning consent (the definition of which includes development consent under the 2008 Act, as per section 205) for the works causing the interference, and the land has been appropriated or acquired, or could be acquired compulsorily, in connection with those consented works. Notwithstanding the above, the inclusion in the Order is necessary because this article authorises interference with easements and other rights not only where necessary in connection with the carrying out of building or maintenance work (as is the case where section 203 of the Housing and Planning Act 2016 applies) but also in connection with the exercise of any power authorised by the Order.
- 5.282 The power in this article is necessary and proportionate to enable the delivery of the authorised development while ensuring that provision is made for compensation to be paid to affected persons whose interests in or rights over land may be subject to interference arising therefrom. The drafting is preceded (see, for example, article 29 of the Lake Lothing (Lowestoft) Third Crossing Order 2020).

*Article 67 – No double recovery*

- 5.283 This article provides that compensation is not payable both under this Order and other compensation regimes for the same loss or damage. In addition, the article provides that there is not to be double recovery under two or more different provisions of this Order. The principle of equivalence, namely that a claimant in a compulsory purchase matter shall be compensated for no more than and no less than the claimant's loss, is long established and no part of the compensation code conflicts with this principle.
- 5.284 This article has precedent in article 56 of the M42 Junction 6 Development Consent Order 2020 as well as article 49 of the M25 Junction 28 Development Consent Order 2022.

*Article 68 – Interface with waste operation permits*

- 5.285 This article makes provision in relation to the interface with existing waste operation activities. There are a limited number of instances where the authorised development would overlap with sites which are subject to environmental permits for waste operations. Examples of where parts of the Order limits have land which is subject to an environmental permit are, for example, permits with the reference EPR/GP3733DZ, EPR/WP3094EP, EPR/DB3832RD, and EPR/XP3430LS). These are existing operations, but where the project proposes to use land. Article 68 allows National Highways to submit environmental schemes to, in turn, enable the Environment Agency to make regulator-initiated variations to existing permits. This enables the existing permit to be modified to give effect to the delivery of the Project.
- 5.285.1 In effect, where such a variation is made, the provisions ensure that where such an overlap arises, the existing permit holder is not subject to enforcement action as a result of activities authorised by the Order, and can continue their operations for their site so far as it relates to land outside of the Order limits or is otherwise not inconsistent with the activities authorised under the Order. This new article aids certainty in three key areas. Ensuring the EA has clarity on its enforcement powers under the environmental permitting regulations.
- 5.285.2 Ensuring there is clarity about the controls which apply to land inside the order limits.
- 5.285.3 Ensuring that operators outside the Order limits can continue in their operations without the risk of enforcement action.
- 5.286 Paragraph (1) permits the submission of an environmental scheme, following consultation with the Environment Agency and the existing permit holder. Paragraph (2) requires the Environment Agency to make a decision on the regulator-initiated variation. Paragraph (3) ensures that the regulator-initiated variation made will allow that the authorised activity to be carried out in accordance with the environmental scheme; and minimise the need for any future variations to the existing permit arising from an authorised activity.
- 5.287 Paragraph (4) modifies the existing Environmental Permitting Regulations to give effect to the steps outlined above. In particular, it permits the extent of a regulated facility to be reduced (e.g., where the Project proposes to permanently acquire or use land in connection with a purpose which is not a regulated facility), ensures that consultation provisions which are not relevant are disapplied. Provision is also made to ensure that National Highways are able to appeal to the Secretary of State for Transport in connection with a regulator-initiated variation. This is necessary as the Secretary of State for Transport has oversight over all of the works (see section 6.3 below).
- 5.288 Paragraph (6) permits National Highways to apply for the surrender of an environmental permit. This is necessary as under the Environmental Permitting Regulations, an operator can apply for a surrender but there may be circumstances where National Highways would own the relevant land in connection with the Project. The paragraph thereby allows the National Highways to apply to surrender the permit for that part of the land. The

Environment Agency would then make a determination in the ordinary way. Paragraph (7) confirms that the use of the land in connection with the Project, rather than its previous condition, would be considered.

5.289 These paragraphs are similar to those secured under article 6 of the Network Rail (Huddersfield to Westtown (Dewsbury) Improvements) Order 2022 and those proposed in Additional Provision 2 of the High Speed Rail (Crewe - Manchester) Bill. They are necessary in the case of the Project as there a number of landfills which overlap with the Order limits. These provisions have been the subject of significant engagement with the Environment Agency, and have been agreed by them.

5.290 Section 120(5)(a) of the 2008 Act confirms that a DCO can “modify” any “statutory provision”: A statutory provision includes "provision of an Act or of an instrument made under an Act." These provisions permit the variation of the existing Environmental Permitting Regulations.

These provisions do not involve revoking or varying the requirement to obtain an approval or a consent, and therefore this disapplication of a third party’s permit would not engage section 150 of the Planning Act 2008. Nonetheless, even if it is considered that section 150 applies, the Environment Agency has provided their consent for the inclusion of these provisions.

## **6 SCHEDULE 2 - REQUIREMENTS**

6.1 The requirements in Schedule 2 are the equivalents of planning conditions. They reflect the processes and procedures usually employed by National Highways when implementing a scheme such as this. Approvals are to be sought from the Secretary of State for Transport, following consultation with the local planning authority and/or another relevant third party. Again, this is consistent with the processes and procedures employed by National Highways when implementing a scheme such as this.

6.2 The requirements in Schedule 2 provide that the various schemes, details and plans to be approved must reflect the mitigation measures set out in the Register of Environmental Actions and Commitments (REAC) ((Application Document 6.3, Appendix 2.2)) which contains all of the mitigation commitments made in the Environmental Statement (Application Documents 6.1, 6.2 and 6.3). This is the mechanism to ensure that environmental mitigation is secured by the Order, and the approach here is consistent with other DCOs which have been made (see, for example, the A19 Downhill Lane Development Consent Order 2020). Further, the requirements provide that the approved schemes, details and plans must be implemented as approved, unless the Secretary of State approves further amendments to them.

6.3 The Secretary of State is the appropriate discharging authority for the Requirements for the following Project-specific reasons:

- a. the number of local authorities across the Project (Thurrock Council, Gravesham Borough Council, London Borough of Havering, Kent

County Council, Essex County Council) and the need for consistency in decision making warrants one discharging authority;

- b. the complexity of the Project (including its scale, the need to consider significant utilities works, works on the strategic road network) and the disparate elements of the Project being intrinsically linked together justifies one discharging authority with competence across the entire range of Project features; any attempt to disaggregate parts of the Project would be wholly impractical and artificial;
- c. the Requirements reflect arrangements agreed with the Department for Transport. In June 2016, the Department for Transport agreed to be the competent authority signing off compliance with the requirements for DCOs promoted by National Highways. There is now a specific team in the Department for Transport the purpose of which is to fulfil this function, hence the inclusion in the Order of the same provisions;
- d. in light of those arrangements, there are resources in place which are capable and competent to deal with discharging the requirements, and if any local authority was given this function, they would likely not have the resources to deal with this function, leading to a duplicated aspect of public administration and inefficient use of taxpayers' funds;
- e. the 2008 Act was designed to simplify and streamline the overall process of obtaining permission for infrastructure, and to expedite its delivery. If a local authority were to refuse permission, then it would be reasonable for there to be an appeal process. Necessitating this second, separate, level of approval in relating to all of the Requirements (and not a limited number of approvals as is the case for Article 65) would dilute this fundamental purpose of the 2008 Act and could lead to delays in the delivery of the Project leading to further disruption for local communities (and would be inconsistent with the trajectory of Government policy highlighted above in respect of article 2(10));
- f. local authorities will be consulted on the discharge of requirements 4, 5, 6, 8, 9, 10, 11, 12, 14 (as well as any variation to the limitation of deviation under article 6); as set out in paragraph 18 of Schedule 2 to the Order; representations from consultative bodies will be provided to the Secretary of State and so its views will be properly represented to, and considered by, the Secretary of State. The Design Principles further secure a robust set of engagement with local authorities at the detailed design stage;
- g. the Secretary of State has confirmed across a number of contexts and a wide variety of circumstances that it is the appropriate discharging authority for National Highways schemes. For completeness, the Secretary of State has confirmed this on the A556 Knutsford to Bowdon Scheme, A160 - A180 Port of Immingham Improvement, A14 Cambridge to Huntingdon Improvement Scheme, M4 Junctions 3 to 12 Smart Motorway, M20 Junction 10A, A19 / A184 Testos Junction Improvement,

A19 Downhill Lane, A63 Castle Street, M42 Junction 6, A303 Amesbury to Berwick Down, A38 Derby Junctions, and the A1 Birley to Coalhouse projects, A428 Black Caxton to Gibbet scheme, all three A47 schemes, the A57 Link road, and the A417 Missing Link project. We would further note that on the A303 Sparkford to Ilchester project, and reflective of the points directly above, the Secretary of State took the explicit decision to remove a local authority's proposed discharge function in relation to a *local road* (see the A303 Sparkford to Ilchester Dualling Development Consent (Correction) Order 2021). This approach continues to be the approach of all National Highways schemes in the examination and pre-examination phase.;

- h. National Highways has not experienced any significant issues in its engagement and coordination with local authorities in the implementation of the discharge of requirements for other National Highways DCO projects;
- i. the Order provides for a proportionate local authority approval function in other appropriate contexts (**Reason 9**), for example:
  - i. under article 9, National Highways accepts that it will use the local permit schemes subject to modifications (discussed further below);
  - ii. under article 10, a newly constructed or diverted road which is handed back to it, must be completed to its reasonable satisfaction;
  - iii. under article 12, where a street is proposed to be subject to temporary restriction or closure which is not listed in Schedule 3, consent from the local highway authority must be obtained;
  - iv. under article 17, consent of a local traffic authority must be obtained for any traffic regulation measures under that article;
  - v. specific measures secured under the terms of the Stakeholder and Actions Commitments Register; and
  - vi. under Schedule 2 to the Order, the layout and design of the relocated traveller's site is subject to the approval of Thurrock Council.
- j. National Highways notes a number of parties have not objected to the Secretary of State being the discharging authority under Schedule 2 (e.g., Natural England, the Environment Agency, TfL, the Port of Tilbury London Limited, and the Port of London Authority). In addition, a number of parties have put forward suggested Requirements where the Secretary of State is the proposed discharging authority (e.g., the joint submission [REP6-163] from the Port of Tilbury London Limited, DP World, Thames Enterprise Park propose the Secretary of State as the discharging authority).



## Definition of “commence”

- 6.4 Paragraph (1) defines various terms used in Schedule. Importantly it defines “commence” as any material operation (as defined in section 56(4) (time when development begun) of the 1990 Act) forming part of the authorised development other than preliminary works and “commencement” is to be construed accordingly. “Preliminary works” are in turn defined as:

*“operations consisting of archaeological investigations and pre-construction ecological mitigation (including vegetation clearance), environmental surveys and monitoring, investigations for the purpose of assessing and monitoring ground conditions and levels, erection of any temporary means of enclosure, receipt and erection of construction plant and equipment for advanced compound areas, diversion and laying of underground apparatus (except any excluded utilities works) for advanced compound areas, vegetation clearance and accesses for advanced compound areas, and the temporary display of site notices or information”*

- 6.5 The effect of these definitions is that a number of works that would constitute a “material operation” may be carried out without meaning that the authorised development has been “commenced”. This enables National Highways to undertake certain preliminary works prior to the submission of relevant details for approval under the requirements contained in Schedule 2, which National Highways considers proportionate. These activities 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).
- 6.6 National Highways 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 programme. These provisions are widely precedented (see for example the M20 Junction 10a Development Consent Order 2017 and the Silvertown Tunnel Order 2018). In particular, the list of activities excluded from the definition of commencement closely follows the definition contained in the M42 Junction 6 Development Consent Order 2020, with the exception that (i) excluded utilities works would constitute commencement (which is defined); and (ii) site clearance and accesses is only permitted for advanced construction compounds (identified in the Code of Construction Practice)
- 6.7 National Highways emphasises the importance of retaining this definition of “commence”. The definition was deleted by the Secretary of State when the A160/A180 (Port of Immingham Improvement) Development Consent Order 2015 was made. National Highways (the promoter of that scheme) drew the Secretary of State's attention to the consequences of this deletion and a Correction Order was made, amending some of the requirements, and it was recognised by the Secretary of State in the Correction Notice that the deletion of the definition of “commence” had ‘the unintended consequence of removing an acceptable degree of flexibility in the implementation of the project and that

this is a correctable error for the purposes of Schedule 4 to the Planning Act 2008.’

- 6.8 In recognition of the fact that appropriate controls are required in relation to the preliminary works, Requirement 4(1) and Requirement 10(1) in Schedule 2 to the Order (discussed further below) require that, in respect of the works which fall outside the definition of commencement, environmental controls and traffic management measures apply at the point that the Order is made. This ensures that in respect of those activities, appropriate environmental controls are in place notwithstanding they can be carried out prior to the discharge of the requirements. This approach also follows precedent (see, for example, requirement 4(1) in schedule 2 to the M42 Junction 6 Development Consent Order 2020).
- 6.9 Paragraph 1(2) of Part 1 of Schedule 2 confirms that references to “part” throughout Schedule 2 are references to a stage or element of the authorised development in respect of which National Highways has made an application under Schedule 2. In a similar vein, Paragraph 1(3) confirms that schemes and details may be approved in relation to a specified part of the authorised development (e.g., a Requirement could be discharged across a number of management plans, rather than one single management plan). This is the position established in a number of National Highways DCOs, but National Highways has taken the opportunity to confirm this explicitly in the provisions of the Order itself.

### **Requirements**

- 6.10 There a number of Requirements which are typical of major infrastructure projects. The purpose and effect of these is as follows:
- 6.10.1 Requirement 1 contains a number of definitions used in Part 1 of Schedule 2.
- 6.10.2 Requirement 2 provides that the authorised development must not begin later than five years from the date of the Order coming into force. Following the judgment in *Tidal Lagoon (Swansea Bay) Plc v Secretary of State for Business Energy And Industrial Strategy & Ors* [2021] EWHC 3170 (Admin), the term “begin” is used, rather than “commence”, as the carrying out of the preliminary works is considered adequate for the purposes of discharging this requirement. A definition of “begin” has been inserted in article 2. National Highways considers it sufficient for “material operations” comprised in preliminary works to be sufficient to discharge the requirement in relation to time limits. National Highways refers to section 2 of [REP5-089] which sets out how the approach adopted here is precedented, and is also not materially different from the approach in sections 154 and 155 of the Planning Act 2008.
- 6.10.3 The effect of Requirement 3(1) is that, where the authorised development is carried out, it must be carried out in accordance with

the Design Principles document (Application Document 7.5), the preliminary scheme design shown on the General Arrangement (Application Document 2.5), and Engineering Drawings and Sections (Application Document 2.9) unless otherwise agreed in writing by the Secretary of State, provided that any amendments to those documents showing departures from the preliminary scheme design would not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement.

Requirement 3(1) allows for a proportionate and acceptable level of flexibility in the final design of the Project, something that is considered necessary and appropriate in delivering complex major infrastructure projects such as this, where an appropriate degree of flexibility is in the public interest. Importantly, that flexibility is limited to the scope of the assessment.

National Highways emphasises that Requirement 3(1) links any such changes to the environmental effects reported in the Environmental Statement and so that which is permitted by Requirement 3 can be distinguished from the provisions concerning “tailpiece” provisions in paragraphs 17.3 to 17.6 of Advice Note Fifteen. National Highways further notes that the terminology around “compatible with” is precedented (see, Requirement 3(1) in the M42 Junction 6 Development Consent Order 2020, and Requirement 12(1) in the A38 Derby Junctions Development Consent Order 2021).

- 6.10.4 Requirement 4(1) requires that preliminary works are carried out in accordance with the preliminary works environmental management plan which includes the preliminary works REAC. This ensures that, for works carried out prior to the discharge of Requirement 4(2), appropriate controls are actually in place at the point such works are proposed to be carried out. The approach of permitting works to be carried out prior to the discharge of requirement, but subject to particular controls, was endorsed in the M42 Junction 6 Development Consent Order 2020.
- 6.10.5 Requirement 4(2) requires the preparation of an Environmental Management Plan (Second Iteration) in consultation with the relevant planning authority and Natural England for its approval by the Secretary of State. The Environmental Management Plan (Second Iteration) will be based substantially on the Code of Construction Practice (Application Document 6.3) prepared as part of the DCO application. The terminology around the naming of the management plans follows the Design Manual of Roads and Bridges (LA 120). The reference to “iteration” here is intended to reflect the particular stage of the development. In particular:
  - (a) The Code of Construction practice is the “first iteration” environmental management plan and forms part of the DCO

application, providing a framework for the controls which are intended to be carried through to the further iterations.

- (b) The Environmental Management Plan (Second Iteration) will fulfil the construction-related objectives and measures as outlined in the REAC and must be in accordance with ISO 14001. Further details of what must be contained in the Environmental Management Plan (Second Iteration) are set out in sub-paragraph (3).
- (c) Following the construction of the relevant parts of the authorised development, the Environmental Management Plan (Second Iteration) would be replaced by an Environmental Management Plan (Third Iteration) which will address the matters set out in the Code of Construction Practice that are relevant to the operation and maintenance of that part of the authorised development, except where such matters are managed under a LEMP approved under Requirement 5.

6.10.6 Further information on the overall control plan is provided in the Introduction to the Application (Application Document Reference 1.3).

6.10.7 Requirement 5 requires the preparation of a landscaping and ecology management plan covering all hard and soft landscaping works for approval by the Secretary of State. That plan must be approved prior to the opening of that part. It is not appropriate for the requirement to be discharged prior to commencement because the plan will relate to long-term and operational matters. In this context, we note that most National Highways DCOs do not contain any timescale for the approval of the equivalent landscaping scheme (see, for example, the A19/A184 Testo's Junction Alteration Development Consent Order 2018). There is a requirement that the proposed plan must reflect the relevant mitigation measures in the REAC and must be based on the Environmental Masterplan contained in the Environmental Statement (Application Document, 6.2). A plan may relate to part, rather than the entirety, of the authorised development.

6.10.8 Requirement 6 makes provision for dealing with any contaminated land and groundwater discovered during construction of the works, in consultation with the relevant planning authority and the Environment Agency and the relevant planning authority.

6.10.9 Requirement 7 states National Highways must carry out final pre-construction survey work to establish whether European or nationally protected species are present on any of the land affected or likely to be affected by any part of the relevant works, or in any of the trees and shrubs to be lopped or felled as part of the relevant works. This Requirement uses the formulation 'no part of the authorised development is to begin' (rather than 'commence') so that it also

applies to preliminary works (as defined in paragraph 1 of Schedule 2 to the Order).

- 6.10.10 Where, following pre-construction survey work or at any time when carrying out the authorised development, the conditions listed in subparagraph (2) are met, then the relevant parts of the relevant works must not begin until a scheme of protection and mitigation measures has been submitted to and approved in writing by the Secretary of State. Consultation with Natural England and other relevant planning authorities is required unless a qualified ecologist determines that the works in question do not require a protected species licence.
- 6.10.11 Requirement 8 provides that no part of the authorised development can commence until written details of a surface and foul water drainage system, reflecting the mitigation measures in the REAC and including means of pollution control, have been prepared in consultation with the relevant planning authority, local highway authority and flood authorities and approved in writing by the Secretary of State.
- 6.10.12 Requirement 9 requires National Highways to prepare a written scheme of investigation of areas of archaeological interest (to be approved by the Secretary of State, and which must be in accordance with the draft Archaeological Mitigation Strategy and Outline Written Scheme of Investigation (Appendix 6.9 of the environmental statement, application document TR010032/APP/6.3)). The requirement also requires National Highways to retain *in situ* any archaeological remains it discovers during the construction of the authorised development which have not previously been identified, and report these to the local planning authority. Temporary limitations are then placed on construction activity within 10 metres of the archaeological remains to allow assessment of whether further investigation is required. If so, the investigation and recording of the remains must be undertaken in accordance with a written scheme approved by the local planning authority.
- 6.10.13 Requirement 10 provides that no part of the authorised development can commence until a traffic management plan for the construction of that part (which is substantially in accordance with the outline construction traffic management plan (Application Document 7.14)) has been prepared and approved by the Secretary of State following consultation with the relevant planning authority.
- 6.10.14 Requirement 11 provides that no part of the authorised development is to commence until a construction travel plan for the construction of that part (which is substantially in accordance with the framework construction travel plan (Application Document 7.13)) has been prepared and approved by the Secretary of State following consultation with the relevant highway authority and where different, the relevant planning authority.

6.10.15 Requirement 12 provides that permanent and temporary fencing for highway works must be constructed and installed in accordance with Volume 1, Series 0300 of the Manual of Contract Documents for Highway Works unless other fencing is specified in the REAC, or where any departures are agreed by the Secretary of State.

6.10.16 Requirement 17 makes clear that where the authorised development must be carried out in accordance with approved details/schemes, those details/schemes are taken to include any subsequent amendments that are approved or agreed in writing by the Secretary of State (or, in the case of Requirement 13, the relevant local planning authority).

6.11 The following are bespoke requirements associated with the Project:

6.11.1 Requirement 13 provides that the details and layout of the replacement of the traveller's site in Thurrock must be approved by Thurrock Council. It further provides that any such details must be in accordance with the design principles and any other plans or schemes approved by the Secretary of State. An appeal mechanism to the Secretary of State is provided for in the case of a refusal or a grant subject to conditions. The Requirement also 'carries over' relevant conditions from the existing planning permission for the replacement site. It further confirms that such conditions are to be treated as though they are conditions imposed, and capable of enforcement, under the Town and Country Planning Act 1990. The Applicant considers such provisions fall within section 120(3) of the Planning Act 2008 and ensure that relevant conditions apply.

6.11.2 Requirement 14 requires National Highways to submit a monitoring scheme to the Secretary of State prior to the opening of the Project. This monitoring strategy must be in accordance with the wider network impacts management and monitoring plan (Application Document 7.12). This is similar to a Requirement included in the A428 Black Cat to Caxton Gibbet Development Consent Order 2022 (see Requirement 24).

6.11.3 Requirement 15 prevents the carrying out of Work No. TGFP1 unless the Thurrock Flexible Generation Plant has commenced. This is because that work is only necessary in circumstances where that project has commenced.

6.11.4 Requirement 16 requires the preparation and approval by the Secretary of State of a Carbon and Energy Plan (Second Iteration) which is based on the Carbon and Energy Plan (First Iteration). The plan will set out the measures to be applied during the construction and operation of the project in order to reduce carbon emissions resulting from the Project.

- 6.11.5 Requirement 17 secures passive provision for the proposed Tilbury Link Road. In order to ensure there is no prejudice to the Secretary of State's decision making as part of the Road Investment Strategy. The provision ensures the requirement attaches to a particular period. It would be unreasonable and impractical, for example, to have to reconstruct or modify works which have commenced. It is therefore appropriate to limit the requirement to considering the available information at the point of the detailed design stage.
- 6.11.6 In light of the potential for traffic impacts at the Orsett Cock roundabout, Requirement 18 is a bespoke requirement to consult, and have approved by the Secretary of State, a scheme containing specific measures which are reasonably necessary to minimise traffic flows and optimise the network at the Orsett Cock roundabout. In addition, it secures a requirement for the scheme to be based on monitoring. It further explicitly secures operational monitoring under Requirement 14. The provision is substantially based on Requirement 14 of the M25 Junction 28 Development Consent Order 2022. While the circumstances are not identical, the concern there was specifically in relation to increase in delays on A1023 Brook Street entering the M25 junction 28 roundabout and so the Applicant considers it to be relevant.
- 6.12 Part 2 of Schedule 2 provides a clear procedure for the discharge of requirements. It sets out clear time limits for decisions to be made and makes provision for circumstances where the Secretary of State requires further information to be provided in relation to an application for the discharge of a requirement. It further provides that any anticipatory steps which National Highways takes to comply with the requirements before the Order is made will be treated as effective in complying with the requirements once the Order is made, thereby avoiding the need to repeat such steps.
- 6.13 Part 2 (with the exception of paragraph 20 discussed below) as drafted reflects the discharge of requirements provisions approved in previous "made" DCOs, including the A19/A184 Testo's Junction Alteration Development Consent Order 2018, the A30 Chiverton to Carland Cross Development Consent Order 2020 and the A585 Windy Harbour to Skippool Highway Development Consent Order 2020.
- 6.14 Paragraph 20 is based on the A63 (Castle Street Improvement, Hull) Development Consent Order 2020, and ensures that National Highways must give due consideration to any representations made by consultees when they are consulted under Schedule 2. It further provides that, where a body is consulted under Schedule 2, National Highways must provide at least 28 days for that body to respond from the date of the information being provided. Paragraph (2) provides that National Highways can consent to extend that period to 42 days (from the date of the information first being provided) where a request from a consultee body is made no later than 21 days from the provision of the information. This is considered appropriate given the varying scale of complexity particular documents and matters may entail.

## ANNEX 1 TO EXPLANATORY MEMORANDUM

### COMPLIANCE WITH REGULATION 6(4) OF INFRASTRUCTURE PLANNING (APPLICATIONS: PRESCRIBED FORMS AND PROCEDURE) REGULATIONS 2009

1.1 Where an application for development consent is for the construction of a pipe-line, regulation 6(4) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 provides that the application must be accompanied by the following information:

- (a) *the name of the proposed pipeline;*
- (b) *the owner of the proposed pipeline;*
- (c) *the start and end point of the proposed pipeline;*
- (d) *the length of the proposed pipeline in kilometres;*
- (e) *the external diameter in millimetres of the proposed pipeline;*
- (f) *what will be conveyed by the proposed pipeline; and*
- (g) *whether the grant of any rights in land or consents to road or river crossing works are required and if so whether they can be obtained by agreement.*

1.2 The following tables set out the required information under regulation 6(4) in respect of each work which constitutes a gas pipe-line NSIP to which that regulation applies.

#### **Work No. G2**

<b>Regulation</b>	<b>Requirement</b>	<b>Response</b>
6(4)(a)	Name of the proposed pipeline	Feeder 5 Phase 1
6(4)(b)	Owner of the proposed pipeline	National Grid Gas Plc (Company registration number 02006000) whose registered address is 1-3 Strand, London, WC2N 5EH
6(4)(c)	Start point of the proposed pipeline	Subject to the limits of deviation in article 6 of the Order, the indicative start point is grid reference Easting: 566371 and Northing: 170332 adjacent to Claylane Woods in Gravesham, Kent
6(4)(c)	End point of the proposed pipeline	Subject to the limits of deviation in article 6 of the Order, the indicative end point is grid reference Easting: 566482 and Northing: 170377 within Claylane Woods in Gravesham, Kent
6(4)(d)	Length of the proposed pipeline in kilometres	0.125km
6(4)(e)	External diameter in mm of proposed pipeline	762mm
6(4)(f)	What will be conveyed by the proposed pipeline	Natural gas
6(4)(g)	Whether the grant of any rights in land or consents to road or	Rights in land and consents will be required, and they can be obtained by



	<p>river crossing works are required and if so whether can be obtained by agreement</p>	<p>agreement. In respect of rights, National Highways has offered to engage in negotiations with each of the affected landowners to acquire the rights in land by voluntary agreement. However, the compulsory acquisition of rights in land is sought in order to provide certainty that the Project can be delivered efficiently and expeditiously. Further details of the rights required (and justification for their compulsory acquisition) can be found in the Book of Reference (Application Document 4.2), and the Statement of Reasons (Application Document 4.1).</p> <p>In addition, in relation to any road works, the Order (Application Document 3.1) contains the power to undertake works in Schedule 1 (including the gas pipeline works), the power to temporarily close, divert, alter and restrict the use of streets, powers to permanently stop up streets, and other traffic regulation powers. No gas pipeline works are proposed over any river crossing. The level of information provided here is consistent with other pipeline NSIP applications (e.g. the Southampton to London pipeline project, the River Humber gas pipeline project), but further information on consents and agreements required for the Project is provided in the Consents and Agreements Position Statement (Application Document 3.3).</p>
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**Work No. G3**

<b><u>Regulation</u></b>	<b><u>Requirement</u></b>	<b><u>Response</u></b>
6(4)(a)	Name of the proposed pipeline	Feeder 18
6(4)(b)	Owner of the proposed pipeline	National Grid Gas Plc (Company registration number 02006000) whose registered address is 1-3 Strand, London, WC2N 5EH
6(4)(c)	Start point of the proposed pipeline	Subject to the limits of deviation in article 6 of the Order, the indicative start point is grid reference Easting: 566469 and Northing: 170239 within Claylane Woods in Gravesham, Kent
6(4)(c)	End point of the proposed pipeline	Subject to the limits of deviation in article 6 of the Order, the indicative end point is grid reference Easting: 567486 and Northing: 171021 north

		of Shorne Ifield Road in Gravesham, Kent
6(4)(d)	Length of the proposed pipeline in kilometres	1.612km
6(4)(e)	External diameter in mm of proposed pipeline	762mm
6(4)(f)	What will be conveyed by the proposed pipeline	Natural gas
6(4)(g)	Whether the grant of any rights in land or consents to road or river crossing works are required and if so whether can be obtained by agreement	<p>Rights in land and consents will be required, and they can be obtained by agreement. In respect of rights, National Highways has offered to engage in negotiations with each of the affected landowners to acquire the rights in land by voluntary agreement. However, the compulsory acquisition of rights in land is sought in order to provide certainty that the Project can be delivered efficiently and expeditiously. Further details of the rights required (and justification for their compulsory acquisition) can be found in the Book of Reference (Application Document 4.2), and the Statement of Reasons (Application Document 4.1).</p> <p>In addition, in relation to any road works, the Order (Application Document 3.1) contains the power to undertake works in Schedule 1 (including the gas pipeline works), the power to temporarily close, divert, alter and restrict the use of streets, powers to permanently stop up streets, and other traffic regulation powers. No gas pipeline works are proposed over any river crossing. The level of information provided here is consistent with other pipeline NSIP applications (e.g. the Southampton to London pipeline project, the River Humber gas pipeline project), but further information on consents and agreements required for the Project is provided in the Consents and Agreements Position Statement (Application Document 3.3).</p>

**Work No. G4**

<b><u>Regulation</u></b>	<b><u>Requirement</u></b>	<b><u>Response</u></b>
6(4)(a)	Name of the proposed pipeline	Feeder 5 Phase 2
6(4)(b)	Owner of the proposed pipeline	National Grid Gas Plc (Company registration number 02006000) whose registered address is 1-3 Strand, London, WC2N 5EH

6(4)(c)	Start point of the proposed pipeline	Subject to the limits of deviation in article 6 of the Order, the indicative start point is grid reference Easting: 566744 and Northing: 170835 to the south of Astra Drive in Gravesham, Kent
6(4)(c)	End point of the proposed pipeline	Subject to the limits of deviation in article 6 of the Order, the indicative end point is grid reference Easting: 568360 and Northing: 172228 to the south of A226 Gravesend Road and St Mary's Church in Gravesham, Kent
6(4)(d)	Length of the proposed pipeline in kilometres	2.725km
6(4)(e)	External diameter in mm of proposed pipeline	762mm
6(4)(f)	What will be conveyed by the proposed pipeline	Natural gas
6(4)(g)	Whether the grant of any rights in land or consents to road or river crossing works are required and if so whether can be obtained by agreement	<p>Rights in land and consents will be required, and they can be obtained by agreement. In respect of rights, National Highways has offered to engage in negotiations with each of the affected landowners to acquire the rights in land by voluntary agreement. However, the compulsory acquisition of rights in land is sought in order to provide certainty that the Project can be delivered efficiently and expeditiously. Further details of the rights required (and justification for their compulsory acquisition) can be found in the Book of Reference (Application Document 4.2), and the Statement of Reasons (Application Document 4.1).</p> <p>In addition, in relation to any road works, the Order (Application Document 3.1) contains the power to undertake works in Schedule 1 (including the gas pipeline works), the power to temporarily close, divert, alter and restrict the use of streets, powers to permanently stop up streets, and other traffic regulation powers. No gas pipeline works are proposed over any river crossing. The level of information provided here is consistent with other pipeline NSIP applications (e.g. the Southampton to London pipeline project, the River Humber gas pipeline project), but further information on consents and agreements required for the Project is provided in the Consents and Agreements Position Statement (Application Document 3.3).</p>

## Annex 2 - Assessment of proposed electricity line works for purposes of section 16 of the Planning Act 2008

### Background

- 1.1 The Project requires the diversion of certain National Grid Electricity Transmission (NGET) transmission and UK Power Networks (UKPN) distribution powerlines (the OH Works).
- 1.2 As the design progresses and further information is received, the OH Works have been assessed as to whether any would constitute a Nationally Significant Infrastructure Project (NSIP) in their own right.

### What constitutes an NSIP for electric lines?

- 1.3 Section 14 (Nationally significant infrastructure projects: general) of the Planning Act 2008 sets out what constitutes an NSIP (which must then be authorised by DCO). So far as relevant to the works, s.14 provides—

*“(1) In this Act “nationally significant infrastructure project” means a project which consists of any of the following ...*

*(b) the installation of an electric line above ground ...”*

- 1.4 Section 14(2) provides that subsection (1) is subject to sections 15 to 30A. Section 16 (Electric lines) sets out further criteria as to when the installation of an electric line above ground is, and when it is not, an NSIP.

- 1.5 Section 16(1) and (2) state—

*“(1) The installation of an electric line above ground is within section 14(1)(b) only if (when installed) the electric line will be—*

*(a) wholly in England,*

*(b) wholly in Wales,*

*(c) partly in England and partly in Wales, or*

*(d) partly in England and partly in Scotland, subject to subsection (2).*

*(2) In the case of an electric line falling within subsection (1)(d), the installation of the line above ground is within section 14(1)(b) only to the extent that (when installed) the line will be in England.”*

- 1.6 All of the works are wholly within England so the condition in s.16(1)(a) is met. Conditions (1)(b) to (d) and s.16(2) are not relevant to the Project.

- 1.7 Section 16(3) provides that installation of electric line above ground is **not** within s.14(1)(b) (i.e. is not an NSIP) where the following conditions are met—

*“(a) if the nominal voltage of the line is expected to be less than 132 kilovolts,*

*(aa) if the length of the line (when installed) will be less than two kilometres,*

*(ab) if—*

*i. the line will replace an existing line,*

- ii. *the nominal voltage of the line is expected to be greater than the nominal voltage of the existing line [other than in a European Site or SSSI],*
- iii. *the height above the surface of the ground of any support for the line will not exceed the height of the highest existing support or support which is being replaced by more than 10 per cent, and*
- iv. *where the line is to be installed in a different position from the existing line, the distance between any new support and the existing line will not exceed 60 metres and the existing line will be removed within twelve months from the date on which the installation of the line which replaces it is complete,*  
*(b)to the extent that (when installed) the line will be within premises in the occupation or control of the person responsible for its installation, or*  
*(c)if section 37(1) of the Electricity Act 1989 (consent required for overhead lines) does not apply to it by virtue of the Overhead Lines (Exemption) (England and Wales) Regulations 2009 (SI 2009/640), as amended by the Overhead Lines (Exempt Installations) (Consequential Provisions) Order 2010.”*

1.8 Subsections (a), (aa), (ab), (b) and (c) are alternatives: if the work in question falls into one of those categories, it is not an NSIP. However, the constituent parts of (ab) are cumulative; all must be fulfilled for the replacement line to not be an NSIP on that basis.

1.9 In relation to section 16(1)(c), the Overhead Lines Exemption Regulations (OLER) provide that consent under s.37 of the Electricity Act 1989 is not required for certain types of relatively smaller electric line work. Given that, it is logical for such works should not require a DCO – hence the provision made in section 16(3)(c). The relevant OLER exemptions for the types of works proposed in this case are in regulation 3(1)(c) and (e) which exempt—

*“(c) the installation or keeping installed, subject to the provisions of regulation 5, for a period not exceeding six months of an electric line (no part of which is within a European site or an SSSI) which connects two points on an existing line which are no further apart than the maximum distance [500 metres for lines less than 66kV and 850 metres for all other lines] so as to provide a diversion for the existing line;*

*(e) the installation or keeping installed, subject to the limitations in regulation 4 and the provisions of regulation 5, of an electric line (no part of which is within a European site or an SSSI) which replaces an existing line whether or not it is installed in the same position as the existing line in question*

...

The exemption in reg.3(1)(c) is subject to the provisions of regulation 5. The exemption in reg.3(1)(e) is subject to the limitations in regulation 4 and the provisions of regulation 5.

1.10 None of the electric line works are in a European Site or SSSI, and so this element is not considered further. The limitations in regulation 4 are—

- a. *“that the electric line does not have a nominal voltage greater than the nominal voltage of the existing line;*
- b. *that any conditions applicable to the existing line which are contained in—*
  - i. *a consent granted under section 37(1) of the Act or section 10(b) of the Schedule to the Electric Lighting (Clauses) Act 1899; or*
  - ii. *an order granting development consent under the Planning Act 2008,*  
*are complied with;*
- c. *that the height above the surface of the ground of any support for the electric line does not exceed the height of the highest existing support or support which is being replaced by more than 10 per cent;*
- d. *that where the electric line is installed in a different position from the existing line the distance between any small support and the existing line does not exceed 30 metres and the distance between any other support and the existing line does not exceed 60 metres; and*
- e. *that where the electric line is installed in a different position from the existing line, the existing line is removed within twelve months from the date on which the installation of the electric line which replaces it is completed.”*

Note that (a) to (e) are cumulative.

- 1.11 Regulation 5 provides that the exemptions in regulation 3(1)(c), (e) and (f) do not apply if—
- a. *the electric line is to be installed in a different position from the existing line; or*
  - b. *the height above the surface of the ground of any support for the electric line will exceed the height of the highest support which is to be replaced; or*
  - c. *subject to sub-paragraph (3), the installation will be in a National Park or an area of outstanding natural beauty,*  
*and it is determined for the purposes of this regulation that there is likely to be a significant adverse effect on the environment.”*

Note that (a) to (c) are alternatives.

### **Assessing the works against the NSIP “exemption criteria” in s.16(3)**

#### **Work Number OH1**

- 1.12 Work No. OH1 consists of the diversion of an existing powerline via the construction of temporary and new supports.
- 1.13 The nominal voltage of the line is expected to be 400kV. The exemption criterion in s.16(3)(a), (i.e. development is not an NSIP if less than 132 kilovolts) is therefore not met).

- 1.14 The length of the permanently modified line is approximately 0.495km. The exemption criterion in s.16(3)(aa), (i.e. development is not an NSIP if less than two kilometres) is therefore met.
- 1.15 All of the cumulative conditions of s.16(3)(ab) are not met by Work No. OH1:
- a. The line would replace an existing line (criterion met);
  - b. The nominal voltage is not expected to be greater than the nominal voltage of the existing line (criterion not met);
  - c. It requires a new support that will exceed the height of the highest existing or replaced support by more than 10 per cent (criterion not met);
  - d. The distance between the new support and the existing line exceeds 60m (criterion not met).

As all the exemption criteria are not met, the exemption under s.16(3)(ab) does not apply.

- 1.16 The diverted line, when installed, will not be within premises in the occupation or control of the person responsible for its installation. The exemption criterion in s.16(3)(b) is therefore not met).
- 1.17 Work No. OH1 does not meet the exemption criteria in s.16(3)(c), i.e. those electric line works to which s.37(1) of the Electricity Act 1989 (consent required for overhead lines) does not apply by virtue of OLER, reg. 3.
- a. The exemption in reg.3(1)(c) (temporary works) does not apply because the section length of the temporarily diverted line is greater than 850m – the maximum distance between two points for a diversion. This exemption would not, in any event, exempt the permanent aspects of the work.
  - b. The exemption in reg. 3(1)(e) does not apply. Although the line replaces an existing line, it does not meet the conditions in regulation 4 (to which (e) is subject) because the height of the new supports exceeds the highest existing support or support which is being replaced by more than 10% and those supports are greater than 60m away from the existing line.

Regulations 3(1)(c) and (e) are also each subject to the provisions of regulation 5 but these provisions are not relevant in light of the fact that the criterion under regulations 3(1)(c) and (e) are not met, for the reasons given above.

## **Work No. OH2**

- 1.18 Work No. OH2 comprises the removal of an existing powerline and associated poles.
- 1.19 It is not an NSIP by virtue of the type of works to be undertaken: there is no *“installation of an electric line above ground”* as described in s.16. and is not assessed further on these grounds.

### Work No. OH3

- 1.20 Work No. OH3 consists of the diversion of part of an existing powerline underground, including (above ground) the construction of a temporary support and a new support.
- 1.21 This assessment only considers those parts of Work No. OH3 which fall within the description of "*installation of an electric line above ground*" in s.16.
- 1.22 The nominal voltage is expected to be 132kV. The exemption criteria in s.16(3)(a), (i.e., development is not an NSIP if less than 132 kilovolts), is therefore not met).
- 1.23 There is no proposed modification to the alignment of the electric line above ground. The exemption criteria in s.16(3)(aa), (i.e. development is not an NSIP if less than two kilometres, is therefore met. In the eventuality that the line was to be moved within the limit of deviation, the condition is still met.
- 1.24 All of the cumulative conditions of s.16(3)(ab) are not met by Work No. OH3:
- a. The line would replace an existing line (criterion met);
  - b. The nominal voltage is not expected to be greater than the nominal voltage of the existing line (criterion not met);
  - c. As designed, it does not require a new support that will exceed the height of the highest existing or replaced support by more than 10 per cent. However, the new support *would* exceed 10 per cent if the vertical limit of deviation was utilised, and so the criterion is considered to be not met (criterion not met);
  - d. The distance between the new support and the existing line does not exceed 60m (criterion met).

As not all the exemption criteria are met, the exemption under s.16(3)(ab) does not apply.

- 1.25 The diverted line, when installed, will not be within premises in the occupation or control of the person responsible for its installation. The exemption criterion in s.16(3)(b) is therefore not met).
- 1.26 Work No. OH3 does meet the exemption criteria in s.16(3)(c), i.e. those electric line works to which s.37(1) of the Electricity Act 1989 (consent required for overhead lines) does not apply by virtue of OLER, reg. 3.
- a. The exemption in reg.3(1)(c) (temporary works) applies because the section length of the temporarily diverted line is less than 850m – the maximum distance between two points for a diversion and is expected to be erected for less than six months. This exemption would not, however, exempt the permanent aspects of the work.
  - b. The exemption in reg. 3(1)(e) applies because the replacement electric line would comply with the conditions in regulation 4 (as set out above at para. 1.10).



- 1.27 Regulations 3(1)(c) and (e) are also each subject to the provisions of regulation 5 but these provisions are not relevant in light of the fact that the line will not be in a different position and the height of the support for the line will not exceed the height of the highest support which is to be replaced, unless the limits of deviation are exercised.

#### **Work No. OH4**

- 1.28 Work No. OH4 consists of the diversion of an existing powerline via the construction of temporary and new supports.
- 1.29 The nominal voltage of the line is expected to be 400kV. The exemption criterion in s.16(3)(a), (i.e. development is not an NSIP if less than 132 kilovolts, is therefore not met).
- 1.30 The length of the permanently modified line is approximately 0.89km. The exemption criterion in s.16(3)(aa), (i.e. development is not an NSIP if less than two kilometres, is therefore met).
- 1.31 All of the cumulative conditions of s.16(3)(ab) are not met by Work No. OH4:
- a. The line would replace an existing line (criterion met);
  - b. The nominal voltage is not expected to be greater than the nominal voltage of the existing line (criterion not met);
  - c. It requires a new support that will exceed the height of the highest existing or replaced support by more than 10 per cent (criterion not met);
  - d. The distance between the new support and the existing line exceeds 60m (criterion not met).

As all the exemption criteria are not met, the exemption under s.16(3)(ab) does not apply.

- 1.32 The diverted line, when installed, will not be within premises in the occupation or control of the person responsible for its installation. The exemption criterion in s.16(3)(b) is therefore not met).
- 1.33 Work No. OH4 does not meet the exemption criteria in s.16(3)(c), i.e. those electric line works to which s.37(1) of the Electricity Act 1989 (consent required for overhead lines) does not apply by virtue of OLER, reg. 3.
- a. The exemption in reg.3(1)(c) (temporary works) does not apply because the section length of the temporarily diverted line is greater than 850m – the maximum distance between two points for a diversion. This exemption would not, in any event, exempt the permanent aspects of the work.
  - b. The exemption in reg. 3(1)(e) does not apply. Although the line replaces an existing line, it does not meet the conditions in regulation 4 (to which (e) is subject) because the height of the new supports exceeds the highest existing

support or support which is being replaced by more than 10% and those supports are greater than 60m away from the existing line.

- 1.34 Regulations 3(1)(c) and (e) are also each subject to the provisions of regulation 5 but these provisions are not relevant in light of the fact that because the criterion under regulations 3(1)(c) and (e) are not met, for the reasons given above.

**Work No. OH5**

- 1.35 Work No. OH5 consists of the diversion of an existing powerline via the construction of new supports.
- 1.36 The nominal voltage of the line is expected to be 132kV. The exemption criterion in s.16(3)(a), (i.e. development is not an NSIP if less than 132 kilovolts, is therefore not met).
- 1.37 The length of the permanently modified line is approximately 1.45km. The exemption criterion in s.16(3)(aa), (i.e. development is not an NSIP if less than two kilometres, is therefore met).
- 1.38 All of the cumulative conditions of s.16(3)(ab) are not met by Work No. OH5:
- a. The line would replace an existing line (criterion met);
  - b. The nominal voltage is not expected to be greater than the nominal voltage of the existing line (criterion not met);
  - c. It requires a new support that will exceed the height of the highest existing or replaced support by more than 10 per cent (criterion not met);
  - d. The distance between the new support and the existing line exceeds 60m (criterion not met).

As all the exemption criteria are not met, the exemption under s.16(3)(ab) does not apply.

- 1.39 The diverted line, when installed, will not be within premises in the occupation or control of the person responsible for its installation. The exemption criterion in s.16(3)(b) is therefore not met).
- 1.40 Work No. OH5 does not meet the exemption criteria in s.16(3)(c), i.e. those electric line works to which s.37(1) of the Electricity Act 1989 (consent required for overhead lines) does not apply by virtue of OLER, reg. 3.
- a. No temporary works are promoted, so the exemption in reg.3(1)(c) does not apply.
  - b. The exemption in reg. 3(1)(e) does not apply. Although the line replaces an existing line, it does not meet the conditions in regulation 4 (to which (e) is subject) because the height of the new supports exceeds the highest existing

support or support which is being replaced by more than 10% and those supports are greater than 60m away from the existing line.

Regulations 3(1)(c) and (e) are also each subject to the provisions of regulation 5 but these provisions are not relevant in light of the fact that the criterion under regulations 3(1)(c) and (e) are not met, for the reasons given above.

#### **Work No. OH6**

- 1.41 Work No. OH6 consists of the diversion of an existing powerline via the construction of temporary and new supports.
- 1.42 The nominal voltage of the line is expected to be 400kV. The exemption criterion in s.16(3)(a), (i.e. development is not an NSIP if less than 132 kilovolts, is therefore not met).
- 1.43 The length of the permanently modified line is approximately 1.185km. The exemption criterion in s.16(3)(aa), (i.e. development is not an NSIP if less than two kilometres, is therefore met).
- 1.44 All of the cumulative conditions of s.16(3)(ab) are not met by Work No. OH6:
  - a. The line would replace an existing line (criterion met);
  - b. The nominal voltage is not expected to be greater than the nominal voltage of the existing line (criterion not met);
  - c. It requires a new support that will exceed the height of the highest existing or replaced support by more than 10 per cent (criterion not met);
  - d. The distance between the new support and the existing line exceeds 60m (criterion not met).

As all the exemption criteria are not met, the exemption under s.16(3)(ab) does not apply.

- 1.45 The diverted line, when installed, will not be within premises in the occupation or control of the person responsible for its installation. The exemption criterion in s.16(3)(b) is therefore not met).
- 1.46 Work No. OH6 does not meet the exemption criteria in s.16(3)(c), i.e. those electric line works to which s.37(1) of the Electricity Act 1989 (consent required for overhead lines) does not apply by virtue of OLER, reg. 3.
  - a. The exemption in reg.3(1)(c) (temporary works) applies because the section length of the temporarily diverted line is less than 850m – the maximum distance between two points for a diversion and is expected to be erected for less than six months. This exemption would not, in any event, exempt the permanent aspects of the work.
  - b. The exemption in reg. 3(1)(e) does not apply. Although the line replaces an existing line, it does not meet the conditions in regulation 4 (to which (e) is

subject) because the height of the new supports exceeds the highest existing support or support which is being replaced by more than 10% and those supports are greater than 60m away from the existing line.

Regulations 3(1)(c) and (e) are also each subject to the provisions of regulation 5 but these provisions are not relevant in light of the fact that the criterion under regulations 3(1)(e) are not met, for the reasons given above.

#### **Work No. OH7**

- 1.47 Work No. OH7 consists of the diversion of an existing powerline via the construction of temporary and new supports.
- 1.48 The nominal voltage of the line is expected to be 275kV. The exemption criterion in s.16(3)(a), (i.e. development is not an NSIP if less than 132 kilovolts, is therefore not met).
- 1.49 The length of the permanently modified line is approximately 2.47km. The exemption criterion in s.16(3)(aa), (i.e. development is not an NSIP if less than two kilometres, is therefore not met).
- 1.50 All of the cumulative conditions of s.16(3)(ab) are not met by Work No. OH7:
- a. The line would replace an existing line (criterion met);
  - b. The nominal voltage is not expected to be greater than the nominal voltage of the existing line (criterion not met);
  - c. It requires a new support that will exceed the height of the highest existing or replaced support by more than 10 per cent (criterion not met);
  - d. The distance between the new support and the existing line exceeds 60m (criterion not met).

As all the exemption criteria are not met, and the exemption under s.16(3)(ab) does not therefore apply.

- 1.51 The diverted line, when installed, will not be within premises in the occupation or control of the person responsible for its installation. The exemption criterion in s.16(3)(b) is therefore not met).
- 1.52 Work No. OH7 does not meet the exemption criteria in s.16(3)(c), i.e. those electric line works to which s.37(1) of the Electricity Act 1989 (consent required for overhead lines) does not apply by virtue of OLER, reg. 3.
- a. The exemption in reg.3(1)(c) (temporary works) applies because the section length of the temporarily diverted line is less than 850m – the maximum distance between two points for a diversion and is expected to be erected for less than six months. This exemption would not exempt the permanent aspects of the work.

- b. The exemption in reg. 3(1)(e) does not apply. Although the line replaces an existing line, it does not meet the conditions in regulation 4 (to which (e) is subject) because the height of the new supports exceeds the highest existing support or support which is being replaced by more than 10% and those supports are greater than 60m away from the existing line.

Regulations 3(1)(c) and (e) are also each subject to the provisions of regulation 5 but these provisions are not relevant in light of the fact that the criterion under regulations 3(1)(e) are not met, for the reasons given above.

### **Work No. OH8**

- 1.53 Work No. OH8 consists of the diversion of an existing powerline via the construction of new supports.
- 1.54 The nominal voltage of the line is expected to be 132kV. The exemption criterion in s.16(3)(a), (i.e. development is not an NSIP if less than 132 kilovolts, is therefore not met).
- 1.55 The length of the permanently modified line is approximately 1.0km. The exemption criterion in s.16(3)(aa), (i.e. development is not an NSIP if less than two kilometres, is therefore met.
- 1.56 All of the cumulative conditions of s.16(3)(ab) are not met by Work No. OH8:
  - a. The line would replace an existing line (criterion met);
  - b. The nominal voltage is not expected to be greater than the nominal voltage of the existing line (criterion not met);
  - c. As designed, it does not require a new support that will exceed the height of the highest existing or replaced support by more than 10 per cent. However, the new support would exceed 10 per cent if the vertical limit of deviation was utilised, and so the criterion is considered to be not met (criterion not met);
  - d. The distance between the new support and the existing line does not exceed 60m (criterion met).

As all the exemption criteria are not met, the exemption under s.16(3)(ab) does not apply.

- 1.57 The diverted line, when installed, will not be within premises in the occupation or control of the person responsible for its installation. The exemption criterion in s.16(3)(b) is therefore not met).
- 1.58 Work No. OH8 does not meet the exemption criteria in s.16(3)(c), i.e. those electric line works to which s.37(1) of the Electricity Act 1989 (consent required for overhead lines) does not apply by virtue of OLER, reg. 3.
  - a. No temporary works are promoted, so the exemption in reg.3(1)(c) does not apply.

- b. The exemption in reg. 3(1)(e) does not apply. Although the line replaces an existing line, it does not meet the conditions in regulation 4 (to which (e) is subject) because the supports are greater than 60m away from the existing line.

Regulations 3(1)(c) and (e) are also each subject to the provisions of regulation 5 but these provisions are not relevant in light of the fact that the criterion under regulations 3(1)(c) and (e) are not met, for the reasons given above.

## Summary Table

As set out above, all the OH Works are in England so subsection (1) & (2) are met. Subsection (3) provides *exceptions* to what is an NSIP so that if the relevant subsection (subsections 3(a) to (c)) apply, the relevant OH Work is not an NSIP. Subsection (3)(ab) is only met if all subparagraphs ((i) to (iv)) are met and so the table below includes a subsection “(3)(ab) (cumulative)” column. Work No. OH2 does not contain works relevant to Section 16 installation of an electric line above ground and as such has been omitted from the table.

Work No	Is the relevant criterion / condition in section 16 met?											Are the OH Works Within Section 14(1)(b)?	Summary of rationale
	(1) & (2)	(3)(a)	(3)(aa)	(3)(ab) (Cumulative)	(3)(ab) Subsection Tests				(3)(b)	(3)(c)			
					(3)(ab)(i)	(3)(ab)(ii)	(3)(ab)(iii)	(3)(ab)(iv)		1(c)	1(e)		
OH1	✓	x	✓	x	✓	x	x	x	x	x	x	x	This work is not an NSIP because the criterion in s16(3)(aa) is met – OH1 is less than 2km.
OH3	✓	x	✓	x	✓	x	x	✓	x	x	✓	x	This work is not an NSIP because the criterion in s16(3)(aa) and (c) is met – OH3 is less than 2km and an exemption under OLER would apply.
OH4	✓	x	✓	x	✓	x	x	x	x	x	x	x	This work is not an NSIP because the criterion in s16(3)(aa) is met – OH4 is less than 2km.
OH5	✓	x	✓	x	✓	x	x	x	x	x	x	x	This work is not an NSIP because the criterion in s16(3)(aa) is met – OH5 is less than 2km.
OH6	✓	x	✓	x	✓	x	x	x	x	x	x	x	This work is not an NSIP because the criterion in s16(3)(aa) is met – OH6 is less than 2km.
OH7	✓	x	x	x	✓	x	x	x	x	x	x	✓	This work is an NSIP because no exemptions or criterion in section 16(3) apply
OH8	✓	x	✓	x	✓	x	x	✓	x	x	x	x	This work is not an NSIP because the criterion in s16(3)(aa) is met – OH8 is less than 2km.

## ANNEX 3 TO EXPLANATORY MEMORANDUM

### LOWER THAMES CROSSING BYELAWS

#### 1 Introduction

- 1.1 This Annex explains the purpose and effect of each paragraph of Schedule 13 to the Order.
- 1.2 Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 requires that explanatory memoranda explain *“the purpose and effect of provisions in the draft order”*. Whilst this does not by convention ordinarily extend to the detail of Schedules to development consent orders, this note has been provided to assist in understanding the provisions within Schedule 13.
- 1.3 As with other provisions of a draft DCO, the byelaws set out in Schedule 13 are, in many instances, preceded through their use in other DCOs for schemes of a similar nature. In this instance, the relevant precedents can be found mainly within the A303 (Amesbury to Berwick Down) Development Consent Order, the Lake Lothing (Lowestoft) Third Crossing Development Consent Order 2020 and the Silvertown Tunnel Order 2018. The current Dartford Thurrock Regulations 1989 which, although not a DCO, are relevant to the Project given the Project's alignment with the Dartford Crossing, have also been considered and some of the byelaws in Schedule 13 are based on those regulations. A table at the end of this memorandum sets out the draft Byelaws in Schedule 13 and cross references these to the above schemes as relevant.

#### 2 Schedule 13

Schedule 13 sets out the byelaws made under article 51 (byelaws relating to the tunnel area) that are to apply.

##### Paragraph 1 – Citation

- 2.1 Article 1 sets out the name of the Byelaws, establishing how they may be cited in subsequent legislation. It confirms that the byelaws set out in Schedule 13 are being made pursuant to article 51 of the Order.

##### Paragraph 2 – Interpretation

- 2.2 The purpose of paragraph 2 is to define terms used in the remainder of the Byelaws.
- 2.3 The following are the main definitions used in the remainder of the Byelaws and are typical of Byelaws made for highway schemes that include tunnels:
  - (a) "authorised person";



- (b) "motor vehicle";
- (c) "trailer";
- (d) "the tunnel area";
- (e) "tunnel equipment"; and
- (f) "tunnel infrastructure".

Paragraph 3 – General Safety

2.4 The purpose of paragraph 3 is to ensure the safe and proper operation of the authorised development. It imposes various restrictions on individuals using the tunnel area in order to maintain the continued safety of the tunnel equipment, the tunnel infrastructure, and the safety of the users of the tunnel area. In particular, it provides that:

- (a) no motor vehicle is to stop in the tunnel unless at the direction of an "authorised person";
- (b) no item is to be placed, thrown, dropped or trailed within the tunnel area if it is capable of injuring or endangering any person or property; and
- (c) no person is to operate, obstruct, interfere with or stop any tunnel equipment.

2.5 It additionally sets out a limited exception to the byelaw mentioned in paragraph 2.4(c) directly above: in the case of an emergency, a person may operate, obstruct, interfere with or stop any tunnel equipment but only by means of equipment which is intended to be used in an emergency. Such an exception is necessary and proportionate, and therefore appropriate for inclusion, in order for emergency situations to be dealt with and to enable National Highways to maintain appropriate safety standards whilst also ensuring the smooth operation of the authorised development.

Paragraph 4 – Traffic regulation

2.6 The purpose of this paragraph is to make it clear that there are restrictions relating to the use of the tunnel area. In particular, the paragraph sets out that the following types of vehicle are not permitted to use the tunnel area, unless they form part of a secured load of a motor vehicle:

- (a) a pedal cycle (of any kind);
- (b) tricycle;
- (c) barrow;
- (d) cart;
- (e) buggy;
- (f) pedicab;

- (g) rickshaw;
- (h) vehicles used as a personal transporter; and
- (i) human or animal drawn means of conveyance.

2.7 A number of other restrictions apply in order to maintain safety, for example to ensure that a motor vehicles does not come to a stop within the tunnel area:

2.7.1 any loads being carried by a motor vehicle must be contained and secured;

2.7.2 motor vehicles must have sufficient fuel or power to complete the journey within the tunnel area;

2.7.3 motor vehicles must be in a good condition in order to minimise the risk of breakdown, damage or injury to other persons or property;

2.7.4 any animals must be enclosed within a motor vehicle or trailer and not released whilst in the tunnel area;

2.7.5 motor vehicles are not to be abandoned except in an emergency as directed by an authorised person; and

2.7.6 motor vehicles are not to drive below ten miles per hour except where the traffic flow prevents this.

2.8 As with paragraph 3, this byelaw is intended to ensure the safe operation of the authorised development for the tunnel area users.

#### Paragraph 5 – Breakdowns and falling loads

2.9 Paragraph 5 deals with scenarios where something may go wrong within the tunnel area, namely breakdowns and falling loads, and what is to be done in such circumstances. It is right for byelaws to foresee reasonable complications and to provide a mechanism through which they can be dealt with and this paragraph seeks to address those concerns.

2.10 The paragraph sets out a clear mechanism through which safety in the tunnel area can most appropriately be maintained in such emergency circumstances. The driver of the vehicle is to inform an appropriate person of such an incident immediately and is to switch on the motor vehicle's hazard lights.

2.11 The paragraph also makes it clear what the driver is not to do, namely: not attempt to refuel and not attempt to reclaim the load.

2.12 As with the provisions of paragraphs 3 – 4 of Schedule 13, this paragraph has the safety of tunnel area users as its objective.

#### Paragraph 6 – Restrictions on conduct in the tunnel area

2.13 Paragraph 6 sets out a number of restrictions in relation to personal conduct within the tunnel area. This once more relates to the safety of the tunnel area and its

users and ensures that the tunnel area is kept free of damage and nuisance in order that the authorised development can continue to operate as it should.

- 2.14 A number of common sense restrictions are placed on individuals, including but not limited to:
- (a) no sleeping within the tunnel area;
  - (b) no climbing on, removal of or damage to any tunnel infrastructure or equipment;
  - (c) no loitering in the tunnel area;
  - (d) no operating of music or sound systems at such a loud volume that they cause nuisance to other users of the tunnel area; and
  - (e) a general restriction not to cause nuisance in the tunnel area.

### **Enforcement**

- 2.15 Paragraphs 7 to 10 deal with the enforcement of these byelaws in the event of non-compliance.

#### **Paragraph 7 – Compliance with instructions, etc.**

- 2.16 Paragraph 7 sets out a number of formalities. It provides that any person suspected of breaching a byelaw (or attempting to breach a byelaw) must provide their name and address to an authorised person when requested to do so. It also provides that any person within the tunnel area, whether suspected of breaching a byelaw or not, is to carry out the instructions of an authorised person and to follow the requirements of any notice displayed by National Highways.
- 2.17 Both of these provisions are necessary byelaws in order to ensure that National Highways can operate the authorised development in the manner in which it is intended i.e. as a safe highway, whilst also being able to take appropriate enforcement action by being able to identify the person causing the breach.
- 2.18 Paragraph 7 also sets out provisions to ensure that any authorised person acts appropriately. In particular, paragraph 7(2) provides that the authorised person must, at the time of requesting the name and address of the person suspected of breaching the byelaws, state what the nature of the suspected breach of the byelaw is. Paragraph 7(3) further provides that only the 'reasonable' instructions of an authorised person are to be carried out by a person in the tunnel, thus not giving the authorised person unlimited powers.
- 2.19 Paragraph 7(4) is an important provision as it ensures that a person does not commit a breach of the byelaws by complying with the instructions of an authorised person, when ordinarily carrying out such action e.g. by walking on foot in the tunnel would otherwise be a breach.

#### **Paragraph 8 – Identification of authorised persons**

2.20 Paragraph 8 provides that an authorised person who is exercising any power which the byelaws authorises them to must produce a form of identification setting out the name of their employer. This is necessary in order to ensure that those individuals who are claiming to be an authorised person are in fact an authorised person under the byelaws.

Paragraph 9 – Breaches by authorised persons

2.21 Paragraph 9 provides that an authorised person is not committing a breach of the byelaws if they are undertaking activities in the course of their employment which would otherwise be a breach of the byelaws. This allows the authorised person to carry out duties required as necessary without the fear of enforcement action, for example, to enter the tunnel on foot to deal with an incident, whereas an unauthorised person doing so in normal circumstances would be a breach of byelaw 4(1).

Paragraph 10 – Attempted breach

2.22 Paragraph 10 makes it clear that any individual who it can be shown has attempted to breach a byelaw, will be liable to the same penalty as if they had actually breached a byelaw. Such a provision is needed in order to discourage any breach or even attempted breach of the byelaws.

Table setting precedents for each provision in Schedule 13 of the Order

References in the table below to:

- the draft A303 (Amesbury to Berwick Down) Development Consent Order 2020 are to paragraphs in Schedule 8 to that order;
- the Silvertown Tunnel Order 2018 are to paragraphs in Schedule 9 to that order; and
- the Lake Lothing (Lowestoft) Third Crossing Order 2020, are to paragraphs in Schedule 10 to that order.

Paragraph in Schedule 13 to the Order	Precedent
3(1)	5(1) draft A303 (Amesbury to Berwick Down) Development Consent Order 2020 5(1) Silvertown Tunnel Order 2018
3(2)	5(2) draft A303 (Amesbury to Berwick Down) Development Consent Order 5(2) Silvertown Tunnel Order 2018 4(d) Lake Lothing (Lowestoft) Third Crossing Order 2020

3(3)	<p>3(3)(a) is taken from the Dartford Thurrock Regulations</p> <p>5(3) and 5(4) draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>5(3) and 5(4) Silvertown Tunnel Order 2018</p>
4(1)	<p>7(1) draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>7(1) Silvertown Tunnel Order 2018</p>
4(2)(a)	<p>7(2) draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>7(2) Silvertown Tunnel Order 2018</p>
4(2)(b)	<p>7(10) draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>7(10) Silvertown Tunnel Order 2018</p> <p>6(11) Lake Lothing (Lowestoft) Third Crossing Order 2020</p>
4(2)(c)	<p>7(5) and 7(9) draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>7(5) and 7(9) Silvertown Tunnel Order 2018</p>
4(3)	<p>7(3) and 7(4) draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>7(3) and 7(4) Silvertown Tunnel Order 2018</p> <p>6(6) and 6(7) Lake Lothing (Lowestoft) Third Crossing Order 2020</p>
4(4)	<p>7(6) draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>7(6) Silvertown Tunnel Order 2018</p> <p>6(8) Lake Lothing (Lowestoft) Third Crossing Order 2020</p>

4(5)	<p>7(14) draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>7(16) Silvertown Tunnel Order 2018</p>
5(1)	<p>Regulation 9 of the Dartford Thurrock Regulations</p> <p>7(11) draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>7(11) Silvertown Tunnel Order 2018</p> <p>6(12) Lake Lothing (Lowestoft) Third Crossing Order 2020</p>
5(2)	<p>Regulation 9 of the Dartford Thurrock Regulations</p> <p>7(12) draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>7(12) Silvertown Tunnel Order 2018</p> <p>6(13) Lake Lothing (Lowestoft) Third Crossing Order 2020</p>
5(3)	<p>Regulation 9 of the Dartford Thurrock Regulations</p> <p>7(13) draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>7(13) Silvertown Tunnel Order 2018</p> <p>6(14) Lake Lothing (Lowestoft) Third Crossing Order 2020</p>
6(1)	<p>6(3) draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>6(3) Silvertown Tunnel Order 2018</p> <p>5(3) Lake Lothing (Lowestoft) Third Crossing Order 2020</p>
6(2)(a)	<p>6(1) draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>6(1) Silvertown Tunnel Order 2018</p> <p>5(1) Lake Lothing (Lowestoft) Third Crossing Order 2020</p>

6(2)(b)	<p>4. draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>4. Silvertown Tunnel Order 2018</p> <p>4. Lake Lothing (Lowestoft) Third Crossing Order 2020</p>
6(2)(c)	<p>4. draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>4. Silvertown Tunnel Order 2018</p> <p>4. Lake Lothing (Lowestoft) Third Crossing Order 2020</p>
6(2)(d)	<p>4. draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>4. Silvertown Tunnel Order 2018</p> <p>4. Lake Lothing (Lowestoft) Third Crossing Order 2020</p>
6(2)(e)	<p>4. draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>4. Silvertown Tunnel Order 2018</p> <p>4. Lake Lothing (Lowestoft) Third Crossing Order 2020</p>
6(2)(f)	<p>4. draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>4. Silvertown Tunnel Order 2018</p> <p>4. Lake Lothing (Lowestoft) Third Crossing Order 2020</p>
6(2)(g)	<p>4. draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>4. Silvertown Tunnel Order 2018</p> <p>4. Lake Lothing (Lowestoft) Third Crossing Order 2020</p>
6(2)(h)	<p>4. draft A303 (Amesbury to Berwick Down) Development Consent Order</p> <p>4. Silvertown Tunnel Order 2018</p>

	4. Lake Lothing (Lowestoft) Third Crossing Order 2020
6(2)(i)	4. draft A303 (Amesbury to Berwick Down) Development Consent Order 4. Silvertown Tunnel Order 2018 4. Lake Lothing (Lowestoft) Third Crossing Order 2020
6(2)(j)	6(2) draft A303 (Amesbury to Berwick Down) Development Consent Order 6(2). Silvertown Tunnel Order 2018
6(2)(k)	10(2) draft A303 (Amesbury to Berwick Down) Development Consent Order 10(2) Silvertown Tunnel Order 2018
6(2)(l)	3. draft A303 (Amesbury to Berwick Down) Development Consent Order 3. Silvertown Tunnel Order 2018 3. Lake Lothing (Lowestoft) Third Crossing Order 2020
6(2)(m)	7(7) draft A303 (Amesbury to Berwick Down) Development Consent Order 7(7) Silvertown Tunnel Order 2018 6(9) Lake Lothing (Lowestoft) Third Crossing Order 2020
6(2)(n)	7(8) draft A303 (Amesbury to Berwick Down) Development Consent Order 7(8) Silvertown Tunnel Order 2018
6(2)(o)	4. draft A303 (Amesbury to Berwick Down) Development Consent Order 4. Silvertown Tunnel Order 2018
7(1)	9(1) draft A303 (Amesbury to Berwick Down) Development Consent Order



	9(1) Silvertown Tunnel Order 2018
7(2)	9(2) draft A303 (Amesbury to Berwick Down) Development Consent Order  9(2) Silvertown Tunnel Order 2018
7(3)	10(1) draft A303 (Amesbury to Berwick Down) Development Consent Order  10(1) Silvertown Tunnel Order 2018
7(4)	10(3) draft A303 (Amesbury to Berwick Down) Development Consent Order  10(3) Silvertown Tunnel Order 2018
7(5)	10(4) draft A303 (Amesbury to Berwick Down) Development Consent Order  10(4) Silvertown Tunnel Order 2018
8	11(1) and 11(2) draft A303 (Amesbury to Berwick Down) Development Consent Order  11(1) and 11(2) Silvertown Tunnel Order 2018
9	12. draft A303 (Amesbury to Berwick Down) Development Consent Order  12. Silvertown Tunnel Order 2018  7. Lake Lothing (Lowestoft) Third Crossing Order 2020
10(1)	13 draft A303 (Amesbury to Berwick Down) Development Consent Order  13 Silvertown Tunnel Order 2018
10(2)	5(4) Lake Lothing (Lowestoft) Third Crossing Order 2020

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