

A428 Black Cat to Caxton Gibbet improvements

TR010044

Volume 3

3.2 Explanatory Memorandum

Planning Act 2008

Regulation 5(2)(c)

Infrastructure Planning (Applications: Prescribed Forms and
Procedure) Regulations 2009

February 2022

Infrastructure Planning

Planning Act 2008

**Infrastructure Planning
(Applications: Prescribed Forms and Procedure)
Regulations 2009**

**A428 Black Cat to Caxton Gibbet
improvements**

Development Consent Order 202[]

3.2 Explanatory Memorandum (clean)

Regulation Number:	Regulation 5(2)(c)
Planning Inspectorate Scheme Reference	TR010044
Application Document Reference	TR010044/APP/3.2
Author:	A428 Black Cat to Caxton Gibbet improvements scheme, Project Team, National Highways

Version	Date	Status of Version
Rev 1	26 February 2021	DCO Application
Rev 2	31 August 2021	Deadline 1
Rev 3	4 November 2021	Deadline 4
Rev 4	14 December 2021	Deadline 6
Rev 5	25 January 2022	Deadline 9
Rev 6	15 February 2022	Deadline 10

Table of contents

Chapter	Pages
1 Summary	1
2 Purpose of the Order	2
3 Ancillary matters	8
4 The Order	9
5 Requirements	40

1 Summary

- 1.1.1 This memorandum explains the purpose and effect of each article of, and the requirements of, the draft A428 Black Cat to Caxton Gibbet Development Consent Order (the Order) **[TR010044/APP/3.1v6]**, as required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009. This document should be read alongside the Order and the other documents submitted in respect of the application for the Order.

2 Purpose of the Order

- 2.1.1 National Highways, the Applicant, is applying to the Secretary of State for a development consent order to construct the A428 Black Cat to Caxton Gibbet improvements scheme (the Scheme).
- 2.1.2 National Highways is the strategic highway company responsible for operating, maintaining and improving the Strategic Road Network ('SRN') in England. National Highways was established under the name "Highways England Company Limited" when it became a Government owned company in April 2015, succeeding to the functions of the Highways Agency. On 8 September 2021, Highways England Company Limited changed its name to National Highways Limited which is why some of the application documents refer to Highways England and not National Highways.
- 2.1.3 In summary the purpose of the Scheme is to address the problems of congestion, poor journey time reliability and poor resilience against incidents between the Black Cat and Caxton Gibbet roundabouts. The Scheme seeks to address these problems through construction of a new 10 mile (16km) dual 2-lane carriageway from the Black Cat roundabout to Caxton Gibbet roundabout, to be known as the A421 (hereafter referred to as the 'new dual carriageway') and in addition approximately 1.8 miles (3km) of tie-in works.
- 2.1.4 A detailed description of the Scheme is included in Chapter 2, The Scheme of the Environmental Statement **[APP-071]**.
- 2.1.5 The objectives of the Scheme are:
- a. Connectivity: Cut congestion and increase capacity and journey time reliability between Milton Keynes and Cambridge.
 - b. Safety: Improve safety at junctions, side roads and private accesses by reducing traffic flows on the existing A428. Improve safety on the A1 by removing existing substandard side road junctions and private accesses onto the carriageway.
 - c. Economic growth: Enable growth by improving connections between people and jobs and supporting new development projects.
 - d. Environmental improvements: Maintain existing levels of biodiversity and have a beneficial impact on air quality and noise levels in the surrounding area.
 - e. Accessibility: Ensure the safety of cyclists, walkers, horse riders and those who use public transport by improving the routes and connections between communities.
 - f. Resilience: Improve the reliability of the road network so that it can cope better when accidents occur, without local roads being used as diversion routes.
 - g. Customer satisfaction: Listen to what is important to our customers to deliver a better road for everyone and improve customer satisfaction.

Nationally Significant Infrastructure Project

- 2.1.6 The Planning Act 2008 (PA 2008) makes a distinction between three different types of highway nationally significant infrastructure projects (NSIP) as set out in section 22(1)(a)-(c): construction, alteration and improvement. Under section 22(1) an NSIP must fall within one of the three categories specified, which are expressly stated to be alternatives. This Scheme is the “construction” of a highway within the meaning of section 22(1)(a).
- 2.1.7 The Scheme satisfies section 22(2) in that the highway will (when constructed) be wholly 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 and speed limits will be in excess of 50mph.
- 2.1.8 The Scheme also includes the diversion of a high-pressure gas pipeline (Work No. 51) (Pipeline) which will be treated as an NSIP if it meets the thresholds as set out in section 20 of the PA 2008. The relevant thresholds are:
- The construction of a gas pipeline by a gas transporter.
 - Wholly in England.
 - That is likely to have a significant effect on the environment.
 - That will have a design operating pressure of more than 7 bar gauge.
 - 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.
- 2.1.9 The Pipeline will be wholly in England, has a design operating pressure of more than 7 bar gauge and supplies more than 50,000 customers.
- 2.1.10 The Pipeline is expected to be constructed by Cadent Gas Limited (the current operator of the gas pipeline to be diverted) who is a "gas transporter" (as it holds a licence under the Gas Act 1986).
- 2.1.11 In order to apply the test contained in section 20(3)(b) of the PA 2008 and determine whether the diversion of the Pipeline would be likely to have a significant effect on the environment, National Highways prepared an initial screening assessment of the environmental effects of Work No. 51. The results of this screening assessment can be found within Appendix 4.4 of the Environmental Statement Appendices **[APP-158]**. National Highways subsequently carried out a further screening assessment of the environmental effects of Work No. 51. The results of this subsequent screening assessment can be found at Examination document **[Appendix 4.4v2 within TR010044/APP/6.3]**.
- 2.1.12 The new highway forming part of the Scheme will be constructed in the same location as the diversion of the Pipeline, although the precise alignment of the Pipeline diversion has not yet been settled within this location. In order to facilitate the construction of the new highway in this area, high heritage value archaeological remains will need to be excavated.

-
- 2.1.13 The programme of works for the Scheme requires the excavation of certain areas of archaeological remains and certain utility diversions to occur in advance of the main works. The excavation of the archaeological remains in the location of the Pipeline diversion, and the Pipeline diversion works themselves, are programmed as 'advance works'.
- 2.1.14 To authorise excavation of these archaeological remains in advance and outside of the DCO process, planning permission was granted by Central Bedfordshire Council (Reference: CB/20/04185/FULL). Whereas the screening assessment within Appendix 4.4 of the Environmental Statement Appendices **[APP-158]** was undertaken on the baseline with the archaeological remains in situ, the updated screening assessment is based on the excavation of archaeological remains which has taken place as at 15 February 2022. Both assessments assume that the alignment of the Pipeline diversion has the potential to impact on any archaeological remains present given the alignment is not fixed and can take place within the limits of deviation (shown on the Works Plans **[APP-010]**). However, because the vast majority of the archaeological material had been excavated as at the date of the updated screening assessment **[Appendix 4.4v2 within TR010044/APP/6.3]**, this determined no likely significant effects would occur from the construction of the Pipeline diversion.
- 2.1.15 As set out in the screening assessment, the impact on the high heritage value archaeological remains was the only factor in the diversion of the Pipeline that was likely to give rise to significant effects on the environment. Therefore, to the extent that it is accepted that the diversion of the Pipeline will not itself give rise to significant effects on the environment "when constructed", s20(3)(b) would not be engaged and the Pipeline diversion would not be an NSIP.
- 2.1.16 In the event that the Pipeline diversion does not qualify as an NSIP, Cadent and/or National Highways may obtain the necessary consents to carry out the Pipeline diversion works outside of the DCO process (through express planning permission or the use of permitted development rights). Therefore, article 59 of the Order **[TR010044/APP/3.1v6]** provides that the requirements contained in Schedule 2 of the Order will not apply to the Pipeline diversion if the Pipeline diversion is undertaken pursuant to a planning permission or permitted development rights unless the parties serve notice of their intention to carry out the Pipeline diversion pursuant to article 59 of the Order. If Cadent Gas Limited were to rely on its permitted development rights it would undertake an environmental determination process under the Gas Transporter Pipe-line Works (Environmental Impact Assessment) Regulations 1999 (as amended) before undertaking such works.
- 2.1.17 While planning permission for the archaeological excavation (Reference: CB/20/04185/FULL) has been granted and the work to excavate the archaeological remains is almost complete, the Pipeline diversion itself has not been undertaken. Therefore, the advanced works are included in the DCO application, and to the extent that the diversion of the Pipeline is considered to give rise to likely significant effects "when constructed", it will be an NSIP under section 20 of the PA 2008. In any event, until a screening opinion has been issued by the Secretary of State (SoS) which confirms that likely significant

environmental effects will not arise as a result of the diversion or the DCO application for the Scheme has been determined there is no certainty that the diversion will fall below the thresholds of section 20 of the PA 2008 such that it is not an NSIP. For these reasons, the application for development consent treats the diversion of the Pipeline as an NSIP in its own right and National Highways has prepared a Pipeline Statement which meets the requirements of Regulation 6(4) of the 2009 Regulations for the Pipeline [APP-248]. This has also informed which additional National Policy Statements have been considered (see Appendix B of the Case for the Scheme [APP-240] which sets out an assessment of the Scheme against the relevant energy National Policy Statements being the Overarching National Policy Statement for Energy (EN-1) and the National Policy Statement for Gas Supply Infrastructure and Gas and Oil Pipelines (EN-4)).

- 2.1.18 Work No. 41 is the only other diversion to a high pressure gas pipeline required by the Scheme but it does not meet the threshold for an NSIP because it does not serve more than 50,000 customers (either directly or indirectly) of a gas supplier. The pipeline affected by Work No. 41 serves Little Barford Power Station which in turn supplies electricity to its customers. Therefore, this pipeline serves gas to only one customer and does not meet the threshold for an NSIP under section 20 of the PA 2008.
- 2.1.19 In relation to the other utility diversions forming part of the Scheme, National Highways has considered whether they would meet the threshold as an NSIP pursuant to the PA 2008 and can confirm as follows:
- a. The Scheme includes the diversion of existing overhead electricity lines, however these lines will be diverted underground (Work Nos. 8, 32 and 110), and therefore do not constitute the "installation of an electric line above ground" as required by section 16 of the PA 2008. The Scheme does not include the diversion of an existing overhead electricity line.
 - b. The Scheme includes the diversion of existing water pipelines (Work Nos. 19, 28, 31, 44, 60, 61, 62, 66, 100, 103 and 107) and the diversion of an existing oil pipeline (Work No. 38). However, these diversions do not meet the threshold of a "cross country pipeline" in that the diversion in each case is less than 16.093 km (as defined by section 66 of the Pipe-lines Act 1962) and as such these Works do not meet the threshold set out in section 21 of the PA 2008.
- 2.1.20 As the Scheme itself is an NSIP, development consent must be obtained from the Secretary of State to authorise it, and an application for a development consent order must be made to the Secretary of State, care of the Planning Inspectorate (the Inspectorate), under section 37 of the PA 2008.
- 2.1.21 Schedule 1 (authorised development) to the Order contains a list of numbered works comprised in the Scheme.

Secretary of State Approval process

- 2.1.22 In the event that the Scheme is determined on the basis of containing both transport and energy NSIPs, the Secretary of State for Transport has nevertheless confirmed its status as the sole decision maker. The Secretary of State for Business, Energy and Industrial Strategy (BEIS) will be consulted on the recommendations made by the Examining Authority in relation to the energy NSIP and their comments will be taken into account when the Secretary of State for Transport takes the final decision.

Associated development

- 2.1.23 The Order specifically authorises development which is associated with the NSIP. The Secretary of State may, under the provisions of section 115 of the PA 2008, grant consent for development that is associated with the NSIP (associated development).
- 2.1.24 Guidance on associated development has been issued by the Secretary of State for Communities and Local Government¹. 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).
- 2.1.25 In some cases there may be some overlap between associated development and works which form part of the NSIP. Given this potential for overlap between the two categories, there is a danger that separating this out in the Order could potentially lead to an error, incorrectly defining it one way or another. For instance, there may be some on-highway, and some off-highway, diversion of the same piece of statutory undertaker equipment.
- 2.1.26 Noting that there is no requirement for a development consent order to distinguish between these two categories, National Highways has therefore chosen not to differentiate the NSIP and associated development works in Schedule 1 to the Order. All elements of the proposed development either constitute part of the NSIP or are associated development within the meaning of section 115(2) of the PA 2008, and so can properly be authorised by the Order.

¹ "Guidance on associated development applications for major infrastructure projects" (Department for Communities and Local Government) (April 2013)

-
- 2.1.27 In order to ensure that the authorised development is constructed efficiently and without impediment, the Order contains the powers to carry out the other associated works listed in paragraphs (a) – (u) of Part 1 of Schedule 1. The use of such measures was explicitly approved in the A19/A1058 Coast Road (Junction Improvement) Order 2016 (A19/A1058 Order) and extensive provisions were used in both the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 (A14 Order) and the Silvertown Tunnel Order 2018.
- 2.1.28 Finally, the Order also includes a list of ancillary works in Part 2 of Schedule 1 of the Order which are needed to allow the authorised development to be carried out but are not 'development' as defined by section 32 of the PA 2008 and therefore would not meet the definition of 'associated development' in section 115 of the PA 2008.

3 Ancillary matters

- 3.1.1 The Order also contains several ancillary matters, i.e. provisions not consisting of development.
- 3.1.2 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 PA 2008 the Order must be made by way of Statutory Instrument. The Order is therefore in that form.
- 3.1.3 Other ancillary matters include the temporary and permanent stopping up of lengths of existing highway and private means of access in the vicinity of the Scheme, the classification of highways, the imposition of traffic regulation measures (including the application of speed limits), the creation of new private means of access, and the application and disapplication of legislation.

4 The Order

- 4.1.1 The purpose and effect of the provisions of the Order are now explained in sequence. Whilst the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (S.I. 2009/2265) has been repealed, the Order is based on the model provisions (general and railway), as well as other development consent orders that have been made to date.

Part 1 — Preliminary

Article 1 - Citation and commencement

- 4.1.2 Article 1 sets out the name of the Order and the date on which it comes into force.
- 4.1.3 This article did not appear in the model provisions. However, it is a standard article that is included in all development consent orders.

Article 2 - Interpretation

- 4.1.4 The purpose of article 2(1) is to define terms used in the remainder of the Order. It is a standard article and was included in the model provisions as article 1.
- 4.1.5 The following definitions in particular have been included due to the nature of the scheme:
- a. "the 1984 Act"
 - b. "bridleway"
 - c. "carriageway"
 - d. "cycle track": this term is used interchangeably with "cycle way" in the application documents and both are intended to have the meaning set out in the Order
 - e. "footpath" and "footway"
 - f. "road"
 - g. "special road"
 - h. "street"
 - i. "street authority"
 - j. "traffic authority".
 - k. "trunk road".

- 4.1.6 Other definitions to note include:

- a. "Commence" which makes clear that a number of works that would constitute a 'material operation' under the Town and Country Planning Act 1990 (1990 Act) do not mean that the authorised development has been 'commenced'. This enables National Highways to undertake certain preparatory works prior to the submission of relevant details for approval under the requirements, which the National Highways considers proportionate and within the scope of the environmental impact assessment. The works that are excluded from the

definition of commence are either de minimis or have minimal potential for adverse impacts. They may, in some cases, need to be carried out in order to comply with pre-commencement requirements (for example, to inform assessments and proposals required to be submitted for approval).

National Highways should be permitted to carry out low impact preparatory works following the grant of the DCO, whilst it is working to discharge the pre-commencement requirements, thereby helping to minimise the construction timetable. The definition of commence and the works excluded from 'commencement' generally follows that in the M42 Junction 6 Development Consent Order 2020 (M42 Junction 6 Order). However, in order to allow flexibility reference to "ecological surveys and pre-construction ecological mitigation" has been amended to "environmental surveys and pre-construction environmental mitigation".

The Order also excludes archaeological mitigation works and archaeological investigations from the definition of commence. However, there is a requirement in Schedule 2 of the Order which secures that all of the authorised development (including pre-commencement works) must comply with the Archaeological Mitigation Strategy **[TR010044/EXAM/9.23v3]** which has been submitted in full with the application. The definition of commence also excludes the creation of temporary hard standing and construction compound set up works, to allow the preparatory works for setting up the construction compounds to be undertaken before the requirements are discharged.

Finally, in order to ensure the appropriate controls are in place the Order contains a definition of pre-commencement work and requirement 20 which ensures that when carrying out any pre-commencement works the controls contained in the pre-commencement plan **[TR010044/EXAM/9.48v4]** and the bio-diversity pre-commencement plan **[REP8-004]** will apply.

As the Order contains a definition for 'pre-commencement work' the definition of 'commence' has been updated to refer to pre-commencement works as being excluded in order to avoid unnecessary repetition of the excluded activities.

- b. "Maintain" which includes inspect, repair, adjust, alter, improve, landscape, preserve, remove, reconstruct, refurbish or replace (see paragraph 4.1.25 below).
- c. "Order land" which includes the words 'or used permanently or temporarily' as this is the usual term for land involved in the Scheme - some of it may only be used temporarily rather than acquired.
- d. "Order limits" references the 'limits of deviation' as defining the extent of the area within which the authorised development may be carried out.

e. "land adjacent to the Order limits" means land outside but adjacent to the Order Limits which is reasonably necessary to construct or maintain the Scheme. Whilst it is not common to include this definition in DCOs, it does have precedent in the A303 Sparkford to Ilchester Dualling Development Consent Order 2021. This definition limits activities outside the Order Limits to those which are "reasonably necessary to construct or maintain" the Scheme. This protects landowners adjacent to the Order Limits being unduly affected.

4.1.7 Article 2(2) expands the definition of rights over land (which was included in the model provisions as article 1(2)) and clarifies the purpose of the power within the Order to impose restrictive covenants.

4.1.8 Article 2(3) expands the definition of rights over land to enable new rights to be created and acquired for the benefit of persons other than National Highways, or for the benefit of land adversely affected by the Order. This wording reflects wording set out in the M42 Junction 6 Order.

4.1.9 Article 2(4) defines measurements as approximate. The purpose of this is to ensure that if, upon construction of the works, it transpires that the distances are marginally different to those listed in the 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 all works will take place within the limits of deviation. It is common practice to include such provision in legislation authorising linear infrastructure - see, for example, the M20 Junction 10a Development Consent Order 2017 (M20 Junction 10a Order) at article 2(3) and the A19/A1058 Order at article 2(3).

4.1.10 Article 2(5) provides that areas given in the Book of Reference are approximate, since these are not covered by article 2(4). This is intended to clarify the position of the areas in the Book of Reference, and the purpose and effect is the same as set out in the previous paragraph.

4.1.11 Articles 2(6)-(7) tie references to lettered/numbered points and numbered works in the Order to the relevant plans.

4.1.12 Article 2(9) clarifies that references to any statutory body include that body's successors from time to time.

Article 3 - Disapplication of legislative provisions

4.1.13 This article provides (in reliance on section 120(5)(a) of the PA 2008) for the disapplication in relation to the construction of 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.

- 4.1.14 Paragraph (1) of article 3 disapplies provisions of the Neighbourhood Planning Act 2017 (the NPA 2017). This disapplication makes it clear that the temporary possession provisions in that enactment would not take effect at the expense of the temporary possession provisions contained in the Order. National Highways notes that the provisions relating to temporary possession in the NPA 2017 have not yet come into force and that regulations required to provide more detail on the operation of the regime have not yet been made. Due to the uncertainty in relation to the detail around that regime, National Highways has consulted on the long-standing process available under the PA 2008. National Highways additionally considers that if Parliament wished to apply the NPA 2017 temporary possession regime to DCO projects, it could have done so by effecting amendments to Part VII of the PA 2008. It has not done so, and in the absence of the clarity this would provide, National Highways proposes to proceed under the existing PA 2008 procedure.
- 4.1.15 Paragraph (2) of article 3 provides for the disapplication of various consents which would otherwise be required from the Environment Agency, internal drainage boards, lead local flood defence authorities or Natural England under the Environmental Permitting (England and Wales) Regulations 2016/1154, the Water Resources Act 1991 or the Land Drainage Act 1991. The disapplications are:
- a. For an environmental permit for the carrying on of flood risk.
 - b. For approval under byelaws made or deemed to have been made under the Water Resources Act 1991.
 - c. The prohibition for placing of obstructions in waterways which are not main rivers under the Land Drainage Act 1991.
 - d. The Secretary of State consent to vary an award which affects the drainage of land.
 - e. For approval under byelaws made under the Land Drainage Act 1991 regulating the use and obstruction of watercourses.
- 4.1.16 These are consents for activities which are a necessary part of the Scheme.
- 4.1.17 As these provisions (other than byelaws made under section 66 of the Land Drainage Act 1991 and section 32 of the Land Drainage Act 1991) are prescribed under section 150 of the PA 2008, the consent of the Environment Agency and the relevant drainage authorities to the inclusion of these provisions in the Order will be needed and these consents are being sought. There are draft protective provisions for the benefit of the Environment Agency and the relevant drainage authorities and these will be discussed with those bodies.
- 4.1.18 Paragraph (2) of this article also provides for the disapplication of section 15 (temporary closure of recreational waterways) of the Anglian Water Authority Act 1977 and Part 11 (Community Infrastructure Levy) of the PA 2008. Section 15 of the Anglian Water Authority Act 1977 has been replaced by article 58 (Works in the River Great Ouse), please see paragraphs 4.1.204 – 4.1.206 for further information.

- 4.1.19 By disapplying Part 11 of the PA 2008, this 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.
- 4.1.20 National Highways has produced a Consents and Agreements Position Statement [TR010044/APP/3.3v4] as part of this application. This sets out in greater detail National Highways' proposed approach to obtaining the other consents required for the Scheme.

Part 2 - Principal Powers

Article 4 - Development consent etc. granted by the Order

- 4.1.21 Article 4 provides the principal power to construct and operate the authorised development within the Order Limits. Schedule 1 describes the authorised development.
- 4.1.22 Development consent is subject to the provisions of the Order, including the requirements listed in Schedule 2. This is based on article 2 of the model provisions.
- 4.1.23 Article 4(2) was not included in the model provisions, but has been included in previous orders such as the M20 Junction 10a Order (article 5(2)) and the A14 Order (article 5(2)). It provides that any enactment applying to land within or adjacent to the Order Limits has effect subject to the provisions of the Order. As the Order amends and disapplies various enactments that apply to and affect the authorised development, or would otherwise do so, this ensures that the legislative position is consistent.

Article 5 - Maintenance of authorised development

- 4.1.24 This article sets out the scope within which National Highways may maintain the development. The definition of "maintain" is contained in article 2(1) and matches that which has been approved by the Secretary of State in the making of previous highway development consent orders, for example the M42 Junction 6 Order (article 4). It is therefore considered to be appropriate and acceptable to adopt the same definition for this Scheme. The various elements of the definition ("inspect, repair, adjust, alter, improve, landscape, preserve, remove, reconstruct, refurbish or replace") would bear their common sense meanings and would allow National Highways to undertake all types of works reasonably associated with maintenance, as the definition in the Highways Act 1980 is limited to "repair". The definition of "maintain" also ensures that any works carried out do not give rise to any materially new or materially different environmental effects to those identified in the Environmental Statement [APP-070-APP-086].
- 4.1.25 Powers of maintenance are subject to other provisions in the Order, in particular article 13 (Construction, and maintenance of new, altered or diverted streets or other structures), which makes provision in relation to maintenance by highway authorities.

Article 6 - Application of the 1990 Act

- 4.1.26 This article applies to specified works which, though temporary in nature, would be in place for a considerable period of time (e.g. temporary worksites). The article applies section 57(2) of the 1990 Act to those works to clarify that planning permission is not required for the resumption, at the end of that period, of the purpose for which that land was normally used before the development consent was granted.
- 4.1.27 Article 6 was not included in the model provisions, but has been included in the M42 Junction 6 Order (article 9).

Article 7 - Planning permission

- 4.1.28 Article 7(1) permits certain development authorised by a planning permission granted under the 1990 Act that is within the Order Limits to be carried out pursuant to the terms of the planning permission without breaching the Order. This provision is not a model provision, but ensures that National Highways does not breach section 161 of the PA 2008 in carrying out certain development pursuant to a grant of planning permission. This article is based on article 11 of the M42 Junction 6 Order.
- 4.1.29 Article (2) has been added to the Order to ensure that where there is an existing planning permission within the Order Limits the carrying out of the Order will not constitute a breach of that planning permission. This power is necessary for the Scheme because there is an extant planning permission for quarry works within the Order which contains a condition requiring restoration. Where the Order Limits fall within the land subject to that planning permission the undertaker will not be in breach of that planning permission.

Article 8 - Existing powers and duties of the undertaker

- 4.1.30 This article provides that nothing in the Order is to prejudice the operation of, and the power and duties National Highways under, the 1980 Act, the 1991 Act and the Town and Country Planning (General Permitted Development) (England) Order 2015 (2015 Order). This is not a model provision but its inclusion is essential to ensure that National Highways' functions under the 1980 Act, 1991 Act and 2015 Order are unaffected by the Order.
- 4.1.31 This article reflects the wording of recent National Highways orders such as the M20 Junction 10a Order (article 37).

Article 9 - Limits of deviation

- 4.1.32 Since the authorised development involves linear works, article 9 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 [**APP-009-APP010**], and vertical deviation subject to a maximum deviation of 1.0m upwards or 1.0m downwards.

- 4.1.33 The wording was not included in the model provisions, but has become common wording in development consent orders, for example in the M20 Junction 10a Order (article 8), the A14 Order (article 7) and the M42 Junction 6 Order (article 6). In addition to the limits of deviation shown on the Works Plans, article 9 also confirms that the routes shown on the Streets, Rights of Way and Access Plans may deviate laterally to the extent of the limits of deviation shown on those plans.
- 4.1.34 The ability to deviate within the prescribed limits of deviation is important to ensure that, if the precise 'as built' alignments or elevations are slightly different to those indicatively shown on the application plans, no question arises as to whether the works are permitted by the Order. The detailed design of the Scheme will only be completed following the grant of the Order (see requirement 12) and the limits of deviation therefore ensure that National Highways and its contractor have sufficient flexibility to design and construct the authorised development post consent.
- 4.1.35 The limits of deviation shown on the application plans have been taken into account in the preparation of the Environmental Statement [APP-070-APP-086], and the potential impacts of a deviation within the permitted limits have therefore been assessed. National Highways is only permitted to exceed the limits specified in this article if they can demonstrate to the Secretary of State's satisfaction that no materially new or different environmental effects from those reported in the Environmental Statement would arise.

Article 10 - Benefit of Order

- 4.1.36 Article 10 overrides section 156(1) of the PA 2008 (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. It would be impracticable for a variety of landowners to implement parts of the Order in an uncoordinated manner, which might be the case if section 156(1) were to apply.

Article 11 - Consent to transfer benefit of Order

- 4.1.37 This article allows the benefit of the Order to be transferred or granted to others by National Highways. Such provisions are widely accepted practice in development consent orders and the principle of this provision is broadly modelled on that contained in other Orders such as the A30 Chiverton to Carland Cross Development Consent Order 2020 (A30 Chiverton Order); the A63 (Castle Street Improvement, Hull) Development Consent Order 2020; the A585 Windy Harbour to Skippool Highway Development Consent Order 2020 (A585 Windy Harbour Order); the M42 Junction 6 Order; and the A19/A184 Testo's Junction Alteration Development Consent Order 2018 (A19/A184 Order). However, the equivalent provision in this article is drafted more widely because of the size and scale of the Scheme and the number of statutory undertakers and private means of access to land which are affected by it. Furthermore, it is unnecessary for each utility diversion and each private means of access to be identified individually within this article in so far as it relates to the transfer of the compulsory acquisition rights – all the rights which are proposed to be acquired by and for the benefit of such third parties are identified in Schedule 5 to the Order.

- 4.1.38 Paragraphs (2) and (3) together ensure that the person benefitting from any such transfer or grant would be subject to the same obligations as National Highways would be. An exception is made in relation to liability for the payment of compensation due in connection with the compulsory acquisition of land (including the compulsory acquisition of rights over land). Where new rights are to be acquired by and for the benefit of third parties, the liability for the payment of compensation to the owners of the land which will be burdened by those new rights, once acquired, will remain with National Highways. The transfer of the benefit of the Order would require the consent of the Secretary of State except in the circumstances specified in paragraph (4), which are necessary to ensure that statutory undertakers whose apparatus is to be relocated, and persons whose private means of access are to be stopped up and re-provided, may enjoy the benefit of the rights sought for their benefit under the Order and paragraph (5) which are necessary to allow the statutory undertakers to undertake the specific works listed in that paragraph.
- 4.1.39 Where the benefit of the Order is transferred under paragraphs (4) or (5), the liability for compensation claims under the powers of compulsory acquisition will rest with National Highways and the Funding Statement [APP-031] has been provided on this basis. Paragraph (3) specifically confirms that all entities listed in paragraph (5) are to be considered as 'statutory undertakers' for the purposes of article 11 so that liability for the payment of compensation is confirmed to remain with National Highways.
- 4.1.40 The process for the acquisition of such rights would therefore be as follows:
- a. The 'carve out' provision in paragraph (4) of article 11 would obviate the need for National Highways to seek the Secretary of State's consent to the transfer of the benefit of the Order, where such benefit was required to be transferred to statutory undertakers or to landowners to enable them to acquire (and enjoy the benefit of) rights over land, where it was necessary for them to do so in consequence of the diversion, relocation or replacement of their apparatus or their private means of access to land or premises, as the case may be (and as referenced in Schedules 5 and 4 to the Order respectively).
 - b. In place of the Secretary of State's consent to the transfer of the benefit of the Order, National Highways would have authority to, and would need, by paragraph (2) of article 28, to give its prior consent in writing to the transfer of the benefit of the Order in each case.
 - c. National Highways would enter into an agreement with the person(s) to whom the benefit of the provisions of the Order were to be transferred under article 11 or 28; and, in consequence of the transfer of the benefit of the Order, the acquiring authority in respect of the relevant right over land would be the statutory undertaker whose apparatus was being relocated, or the land owner whose private means of access was being stopped up and re-provided.

- d. Notwithstanding the above, National Highways would retain liability for the payment of compensation to the owner (and, if separate, the occupier) of the land burdened with the right so acquired.

Part 3 - Streets

Article 12 - Application of the 1991 Act

- 4.1.41 Article 12 provides for the application of the New Roads and Street Works Act 1991 (1991 Act). Although not included in the model provisions, there is precedent for these provisions in respect of the development consent orders granted for other major highways schemes, for example the M42 Junction 6 Order (article 13).
- 4.1.42 Paragraphs (1) and (2) provide that certain works carried out under the authority of the Order are to be "major highway works" for the purposes of the 1991 Act. The effect of this is to clarify that the cost-sharing provisions relevant to the diversion of utility apparatus (which would apply to such works under the 1991 Act if carried out by the highway authority) will apply in respect of the works authorised by the Order, irrespective of who carries them out.
- 4.1.43 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, and the specific provisions in the Order which regulate the carrying out of the Order works.
- 4.1.44 Paragraphs (4) to (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to streets which are to be temporarily restricted for use, altered or diverted under the Order. This is for two reasons: first, it prevents any confusion as to whether works in respect of a temporarily affected street 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 stopped up and those which are not.
- 4.1.45 Paragraphs (7)(a) and (b) provide that nothing in article 13 of the Order (which provides that any highway other than a special road or a trunk road that is constructed, altered or diverted under the Order must be maintained by the local highway authority) affects the operation of section 87 of the 1991 Act, which allows a local highway authority to declare that a street in its area is likely to become a maintainable highway and consequently that Part 3 of the 1991 Act applies to that street. National Highways will not be under the duties that apply to a street authority under the 1991 Act by virtue of being responsible for the maintenance of a street under article 13.

- 4.1.46 Paragraph (7)(c) clarifies that the provisions relating to responsibility for maintenance of streets in article 13 do not affect the application of Part 3 of the 1991 Act to maintenance works which are street works for the purposes of the 1991 Act. 'Street works' is defined in section 48(3) of the 1991 Act as including works for the maintenance of apparatus (but excluding works for road purposes) that are executed in pursuance of a statutory right or a street works licence.
- Article 13 - Construction and maintenance of new, altered or diverted streets and other structures*
- 4.1.47 The purpose and effect of article 13 is as follows:
- a. Under the Highways Act 1980 and the Appointment of a Strategic Highways Company Order 2015, National Highways is the highway authority for, and therefore is responsible for maintaining, trunk roads, including those to be provided as part of the Scheme. For any other highways and streets, this article determines the body that will be liable for maintenance. Liability for maintenance would transfer to the local highway authority following their issue of a certificate that the works had been completed to their reasonable satisfaction. Paragraphs (1) to (8) allow National Highways to make contrary agreements with the local highway authority concerned.
 - b. Paragraphs (1) and (2) are subject to paragraphs (4)-(8), which makes specific maintenance provision in relation to new bridges.
 - c. The effect of paragraphs (10) and (11) 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 ensures that the provision in section 58 of the Highways Act 1980 applies to National Highways not only in respect of trunk roads for which it is the highway authority but also other roads and is consistent with the approach taken in previous development consent orders.
- 4.1.48 Article 13 was not included in the model provisions, but has been included in all National Highways orders made to date, including the A14 Order (article 11).
- Article 14 - Classification of roads, etc.*
- 4.1.49 The designation of highways, the specification of the classes of traffic authorised to use a highway and speed limits are ancillary matters which may be included in a development consent order². These and other related matters are addressed by this article. These matters are integral to the implementation of the Scheme and it is therefore appropriate to include them in the Order as ancillary matters.
- 4.1.50 Paragraph (1) provides for the roads described in Part 1 of Schedule 3 to become trunk roads from the date that they are complete and open to traffic.
- 4.1.51 Paragraph (2) provides for the roads described in Part 2 of Schedule 3 to become classified roads from the date that they are complete and open to traffic.

² PA 2008 section 120(5) and Schedule 5, paragraphs 19 and 20.

-
- 4.1.52 Paragraph (3) provides for the roads described in Part 3 of Schedule 3 to become unclassified roads from the date that they are complete and open to traffic.
- 4.1.53 Paragraph (4) imposes speed limits on certain sections of the Scheme as described in Part 4 of Schedule 3.
- 4.1.54 Paragraph (5) provides for the restrictions specified in Part 5 of Schedule 3 (traffic regulation measures (clearways and prohibitions)) to apply to the lengths of road identified in that Part from such day as National Highways may determine.
- 4.1.55 Paragraph (6) provides that the orders specified in Part 6 of Schedule 3 are to be varied or revoked as specified in that Part on such day as National Highways may determine. National Highways has been unable to locate all of the orders that need to be varied or revoked despite requesting this information directly from the relevant local highway authorities. National Highways will continue to investigate these orders and will update the Order if any further orders can be identified.
- 4.1.56 Paragraph (7) confirms that the footpaths, cycle tracks, footways, bridlepaths and bridleways in Part 7 of Schedule 3 will be provided unless otherwise agreed with the relevant local highway authority.
- 4.1.57 Paragraph (8) provides for the trunk roads described in Part 8 of Schedule 3 to cease to be trunk roads on such day as National Highways may determine. In practice this will be a date that has been agreed with or notified to the local highway authority. However, paragraph (9) makes it clear that National Highways may only make such a determination with the consent of the Secretary of State following consultation with the local highway authority as to the date of de-trunking and whether the de-trunked highway is of a reasonably satisfactory standard. A similar approach was used in both the A14 Order and the A585 Windy Harbour Order.
- 4.1.58 The purpose of paragraph (10) is to confirm that the matters covered in paragraphs (1) to (9) could be varied or revoked in the future without the need to apply under the PA 2008 for an amendment to the Order, including where appropriate through the making of a Traffic Regulation Order.
- 4.1.59 Paragraphs (12) to (15) provide for a procedure to vary the classification of the roads provided for in paragraphs (1), (2) and (3) (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 Scheme proceeding under the Highways Act 1980.
- 4.1.60 Paragraph (16) defines "authorised vehicle" for the purposes of this article.

- 4.1.61 Paragraph (17) introduces a new obligation on National Highways to provide the location of the as constructed footpaths, cycle tracks, footways, bridlepaths and bridleways within three months of those ways being transferred to the relevant local highway authority for maintenance. The inclusion of paragraph (17) is required to address a specific concern of a local highway authority in relation to the effect that limits of deviation may have on the location of the public rights of way to be provided by the Scheme.
- Article 15 - Power to alter layout etc. of streets*
- 4.1.62 This article allows National Highways to alter the layout of existing streets within the Order Limits for the purpose of constructing and maintaining the authorised development. This is subject to the consent of the street authority who must be given the specified period of notice in advance of exercising the powers. This consent is deemed given if the street authority does not respond to National Highways' consent request within 28 days or, in the event that further information is requested by the street authority within 28 days, 14 days from the provision of such further information by National Highways.
- 4.1.63 Paragraph (2) requires National Highways to restore any street that has been temporarily altered to the reasonable satisfaction of the street authority.
- 4.1.64 Paragraph (5) provides that paragraphs (2), (3) and (4) do not apply where National Highways is the street authority for the street in which the works are being carried out.
- 4.1.65 It is considered appropriate to provide a power for National Highways as a Strategic Highways Company to enter and carry out works to side roads that would otherwise be within the purview of the local highway authorities. It is unnecessary to list the affected roads, since their location and extent is self-evident from the works, land and rights of way plans.
- 4.1.66 This article is necessary under section 120(5)(c) of the PA 2008 to give full effect to articles 4 (Development consent etc granted by the Order) and 5 (Maintenance of authorised development).
- 4.1.67 Article 15 is not included in the model provisions but is based on article 10 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 (M4 Order) amongst others.
- Article 16 - Street Works*
- 4.1.68 Article 16 allows National Highways to break up or open, tunnel or bore under, remove or use earth and materials in or under and place and maintain apparatus in or under the streets, demolish, remove, replace and relocate any street furniture, execute any works to improve sight lines, execute and maintain landscaping works, carry out re-lining and placement of road marking and remove and install temporary and permanent road signage in the Order Limits for the purposes of the authorised development. The authority given by this article is a statutory right for the purposes of sections 48(3) (streets, street works and undertakers) and 51(1) (prohibition of unauthorised street works) of the New Roads and Street Works Act 1991.

-
- 4.1.69 Article 16 is based on article 8 of the model provisions and has broad precedent, for example article 11 of the M4 Order and article 12 of the M42 Junction 6 Order.
- Article 17 – Temporary alteration, diversion, prohibition and restriction of the use of streets*
- 4.1.70 This article allows for the temporary alteration, diversion, prohibition or restriction of streets for the purposes of the Scheme, whilst ensuring that essential pedestrian access to and from premises along that street is maintained if necessary (paragraph (3)).
- 4.1.71 Paragraph (2) confers a power on National Highways where a street has been temporarily restricted for use under this article to use it as a temporary working site.
- 4.1.72 Under paragraph (4) the consent of the street authority is required where National Highways is not the street authority. The street authority may attach reasonable conditions to any consent, but must not unreasonably withhold or delay consent. Under paragraph (6), this consent is deemed given if the street authority does not respond to National Highways' consent request within 28 days or, in the event that further information is requested by the street authority within 28 days, 14 days from the provision of such further information by National Highways.
- 4.1.73 Paragraph (5) provides a right to compensation for any person suffering loss due to the suspension of a private right of way under this article.
- 4.1.74 While this article has been included in previous development consent orders for highway schemes, for example on the M20 Junction 10a Order (article 14) and the A14 Order (article 14), express reference to "temporary stopping up" has been removed. The drafting has been amended so that it is clear that the highway status of the land will remain during the temporary interference of use and any subsoil rights will not be impacted during the carrying out of the works.
- Article 18 - Permanent stopping up and restriction of use of streets and private means of access*
- 4.1.75 This article allows the streets and private means of access identified in Schedule 4 to be stopped up (i.e. the legal right of way along them to be extinguished). Since the definition of a 'street' in section 48 of the New Roads and Street Works Act 1991 includes highways and footways such ways can be stopped up under this article as well as vehicular accesses.
- 4.1.76 Paragraph (2) relates to the highways and private means of access to be stopped up as specified in Parts 2 and 3 of Schedule 4, for which a substitute is to be provided. It requires the substitute to be completed and open for use, or a temporary alternative route to be available, before the highway or private means of access in question is stopped up.

- 4.1.77 For the streets and private means of access to be stopped up as specified in Parts 1 and 4 of Schedule 4, no substitute street or private means of access is to be provided. Such a street or private means of access may not be stopped up unless the conditions referred to in paragraph (4) of article 18 are met.
- 4.1.78 Paragraph (6) provides a right to compensation for any person suffering loss due to the suspension or extinguishment of a private right of way under this article.
- 4.1.79 Since the definition of a 'street' in section 48 of the New Roads and Street Works Act 1991 includes highways and footways, the stopping up and diversion of footpaths and footways are dealt with by article 18 and Schedule 4 as well and there is no need for a separate provision.
- 4.1.80 This article was included in the model provisions as article 9.
- Article 19 - Access to works*
- 4.1.81 This article allows works accesses to be created within the Order Limits. This article departs from the model provisions (article 12) to provide National Highways with a general power to provide means of access, the intention being to provide similar powers to those available under the Highways Act 1980.
- Article 20 - Clearways, prohibitions and restrictions*
- 4.1.82 This article is necessary to ensure safe and proper operation of the authorised development, and to ensure that the Scheme delivers its intended benefits. It is therefore appropriate to include it in the Order as an ancillary matter under section 120(3) of the PA 2008.
- 4.1.83 Paragraph (1) prohibits waiting on any part of a road specified as a clearway and entry onto such lengths of road identified in Part 5 of Schedule 3 except upon the direction of or with a permission of a uniformed constable or traffic officer.
- 4.1.84 Paragraph (2) sets out a list of circumstances in which it would be lawful for a vehicle to contravene the restrictions and prohibitions set out in paragraph (1).
- 4.1.85 Paragraph (3) imposes a prohibition on waiting on any part of the highway to be constructed for the purposes of selling or dispensing goods from a vehicle. This provision is intended to prevent unauthorised trading on the highway, particularly in the laybys which are not designed to accommodate such a use.
- 4.1.86 Paragraph (4) confirms that the provisions of this article can be varied or revoked in the future without the need to apply under the PA 2008 for an amendment to the Order.
- 4.1.87 This article was not included in the model provisions but has been included in many National Highways orders made to date including the A14 Order and the M42 Junction 6 Order.

Part 4 - Supplemental powers

Article 21 - Discharge of water

- 4.1.88 This article sets out the circumstances in which National Highways is entitled to discharge water into a sewer, watercourse or drain, and its purpose is to establish statutory authority for doing so.

- 4.1.89 The effect of paragraph (3) is that this can only be done with the consent of the owner. Consent can be given subject to reasonable terms and conditions, but cannot be unreasonably withheld. Under paragraph (7), this consent is deemed given if the owner does not respond to National Highways' request for consent within 28 days.
- 4.1.90 Paragraph (5) requires National Highways to take reasonably practicable steps to ensure that any water that is discharged is as free as may be practicable from gravel, soil or other solid substance, oil or matter in suspension.
- 4.1.91 This provision has been included in previous National Highways orders, for example the M20 Junction 10a Order (article 18) and the A14 Order (article 17).
- Article 22 - Protective work to buildings*
- 4.1.92 The purpose of this article is to allow National Highways to undertake protective works to buildings affected by the authorised development and to set out the procedure that will apply in these circumstances.
- 4.1.93 It was included in the model provisions as article 15 and has broad precedent, for example article 16 of the A19/A1058 Order, article 18 of the A14 Order and article 22 of the M42 Junction 6 Order.
- 4.1.94 Paragraph (10) 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.
- Article 23 - Authority to survey and investigate the land*
- 4.1.95 This article gives National Highways the power to enter certain land for the purpose of surveying and investigating. It provides that National Highways must give 14 days' notice before exercising the powers of entry. Compensation is payable for any loss or damage caused.
- 4.1.96 Paragraphs (1) to (5) were included in the model provisions as article 16 and in the majority of made DCOs to date. However, the drafting in paragraph (1) departs from the model provisions by authorising surveys, where reasonably necessary, on land outside but adjacent to the Order Limits. This extension beyond the Order Limits has precedent in the Silvertown Tunnel Order and the M42 Junction 6 Order. 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.
- 4.1.97 The ability to survey land adjacent to the Order Limits where reasonably necessary is required so that National Highways can be confident that the surveys can be conducted to assess the effects of the Scheme, or on the Scheme, from outside its limits. It imposes a lesser burden than seeking compulsory acquisition of such land.
- 4.1.98 Paragraphs (6) and (8) have precedent in the A14 Order and the M42 Junction 6 Order.

- 4.1.99 Paragraph (7) 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 and was also contained in the M42 Junction 6 Order.

Article 24 - Maintenance of drainage works

- 4.1.100 The purpose of article 24 is to make it clear that any realignment of drainage works or other works to them that are carried out as part of the Scheme do not affect the existing allocation of responsibility for maintenance of those drainage works, unless otherwise 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.
- 4.1.101 This article was not included in the model provisions. However, it appears in existing development consent orders (for example article 4 of the M20 Junction 10a Order and article 4 of the A14 Order) and is considered to be a sensible inclusion to clarify responsibility for maintenance of drainage works.

Part 5 - Powers of Acquisition

Article 25 - Compulsory acquisition of land

- 4.1.102 This article authorises the acquisition of land by compulsory purchase. It grants the power to acquire the land that is required for the Scheme. This is subject to article 28 (compulsory acquisition of rights), article 40 (temporary use of land for carrying out the authorised development) and article 57 (crown rights), which are explained below.
- 4.1.103 Article 25 is based on article 18 of the model provisions.

Article 26 - Compulsory acquisition of land - incorporation of the mineral code

- 4.1.104 This article incorporates Parts 2 and 3 of Schedule 2 to the Acquisition of Land Act 1981, exempting existing rights in minerals from the scope of compulsory acquisition unless they are expressly named and conveyed. It also makes provision for a situation where the owner of mines or minerals wishes to work such mines and minerals.

- 4.1.105 Article 26 was included in the model provisions as article 19.

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

- 4.1.106 This article gives National Highways five years to issue notices to treat or to execute a general vesting declaration to acquire the land that may be compulsorily acquired under the Order. These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should the Order be made.
- 4.1.107 The article also sets a 5 year time limit on the power of National Highways to take temporary possession of land under article 40, although it does not prevent National Highways from remaining in possession of land after that time if it took possession within the 5 year limit (this has consistently been approved by the Secretary of State, see for example article 22 of the A14 Order).

4.1.108 This article was included in the model provisions as article 20.

Article 28 - Compulsory acquisition of rights and imposition of restrictive covenants

- 4.1.109 This article allows for rights over land to be acquired as well as the land itself, and also for new rights to be created over land for the benefit of National Highways and for the benefit of third parties, such as statutory undertakers whose apparatus is required to be diverted or relocated, and the owner and occupiers of land whose private means of access are required to be stopped up and re-provided in consequence of the Scheme. It requires the written consent of National Highways for these powers to be relied upon by a third party. This article also includes the power to impose restrictive covenants.
- 4.1.110 It provides for such rights as may be required 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 possible, to reduce the area of outright acquisition and rely on rights instead.
- 4.1.111 Paragraph (2) provides that for the land described in Schedule 5, 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 set out in that Schedule.
- 4.1.112 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 other highway development consent orders, such as article 23 of the A14 Order.
- 4.1.113 Paragraphs (2), (3) and (5) provide for the exercise of the power by statutory undertakers and by the owners and occupiers of land (for the reasons noted above), with National Highways' prior written consent, to ensure that those persons are able to benefit from the rights acquired for their benefit. Related drafting in article 11 (consent to transfer benefit of Order) provides that the transfer to such persons of the power to acquire rights may be authorised in writing by the undertaker, without the need for the consent of the Secretary of State. This is necessary to facilitate the delivery of the Scheme and the supporting land acquisition strategy. The Scheme involves numerous utility diversions and also requires a significant number of private means of access to be stopped up and re-provided, with the replacement private means of access in some cases crossing land which is owned by third parties and which, in the interests of minimising the impacts of the Scheme on affected land owners, National Highways has not sought powers to acquire outright. In this scenario, the new rights (all of which are identified in Schedule 5 to the Order) need to be acquired by the relevant statutory undertakers or land owners, to enable them to enjoy the benefit of those rights. This is because if the rights are acquired by National Highways, then National Highways will have the benefit of them and they cannot legally be subsequently transferred to those who need them. Where rights are acquired under the Order for the benefit of such parties, liability for the

payment of compensation to the owners of the land which will be burdened by the new rights will remain with National Highways.

- 4.1.114 Paragraph (4) provides that, for the land described in Schedule 5, 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 5.
- 4.1.115 Paragraph (6) provides that where National Highways only needs to acquire rights over land, it is not obliged to acquire any greater interest in that land.
- 4.1.116 Paragraph (7) applies Schedule 6, which imposes modifications to the compulsory purchase and compensation provisions under general legislation. They do not affect the entitlement to compensation, but generally ensure that the compensation code applies to the additional categories of acquisition covered by the Order and the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories (done to allow lesser land interests to be acquired).
- 4.1.117 For the purpose of section 126(2) of the PA 2008, the relevant compensation provisions are modified only to the extent necessary to ensure that they apply properly to the acquisition of rights, and not to affect the amount of compensation to which landowners would be entitled.

Article 29 - Public rights of way

- 4.1.118 Article 29(1) provides for the public rights of way specified in Parts 1 and 2 of Schedule 4 and shown on the Rights of Way and Access Plans to be extinguished. The rights of way are extinguished following either the expiry of a site notice which must be erected at either end of the way to be extinguished no less than 28 days prior to the extinguishment or in relation to the public rights of way identified in Part 2 of Schedule 4, the date on which the relevant alternative section of the public rights of way as identified in that part of the Schedule are open for use by the public.
- 4.1.119 Article 29 is based on article 10 of the model provisions and follows the M20 Junction 10a Order (article 25) and the A14 Order (article 24), although it brings together the requirement in Article 18 of the Order so that it is clear that the permanent stopping up is subject to the requirement to provide the substitute public right of way.

Article 30 - Private rights over land

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

-
- 4.1.121 Paragraph (3) provides that rights over Order land that is already owned by National Highways are extinguished any material operation comprised in the authorised development interferes with or breaches those rights.
- 4.1.122 Paragraph (4) provides that all private rights over land which National Highways takes temporary possession of under the Order will be suspended and unenforceable for as long as National Highways remains in lawful possession of the land.
- 4.1.123 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.
- 4.1.124 Paragraph (9) sets out a list of matters deemed to be private rights.
- 4.1.125 Paragraph (10) provides that the owners and occupiers of the land to be accessed over new private means of access which require taking access along the tracks to be formed on the Order Land are granted private rights to use these tracks. This provides certainty to the owners and occupiers of the affected landholdings as to how their access will be secured.
- 4.1.126 Other than paragraph (10) which has been drafted for this Scheme, article 30 is based on article 22 of the model provisions and previous National Highways orders such as the M20 Junction 10a Order (article 26), the A14 Order (article 25), and the M42 Junction 6 Order (article 28).

Article 31 - Power to override easements and other rights

- 4.1.127 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 PA 2008. This article has precedent in, for example, article 32 of the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 (Thames Tideway Order). It provides statutory authority for carrying out any authorised activity that interferes with any of the interests listed in paragraph (2) including restrictions on user of land arising by the virtue of a contract. Paragraph (3) provides for compensation to be payable where the interests listed in paragraph (2) are overridden.
- 4.1.128 Notwithstanding the coming into force of section 203 of the Housing and Planning Act 2016, the power to override easements and other rights is required in respect of the exercise of articles 23 (authority to survey and investigate land), 22 (protective work to buildings) and 45 (felling or lopping of trees and removal of hedgerows) in circumstances where National Highways has not acquired the land.

Article 32 - Disregard of certain interests and improvements

- 4.1.129 This article provides for the Lands 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.

- 4.1.130 It complies with section 126 of the PA 2008 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 Tideway Order and the River Humber Gas Pipeline Replacement Order 2016, and TWAOs such as the London Underground (Northern Line Extension) Order 2014 and the Midland Metro (Wolverhampton City Centre Extension) Order 2016.
- 4.1.131 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 the PA 2008 (nor standard Order provisions) does not apply these. Sections 120(3) and 120(5)(a) and Schedule 5 (by virtue of section 120(3)) of the Act allow the application in a DCO of statutory provisions which relate to the payment of compensation.
- Article 33 - Set-off for enhancement in value of retained land*
- 4.1.132 This article provides that in assessing the compensation payable to any person in respect of the acquisition of any land, the Lands 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.
- 4.1.133 This article complies with section 126(2) of the PA 2008 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 Tideway Order and TWAOs such as the London Underground (Northern Line Extension) Order 2014 and the Midland Metro (Wolverhampton City Centre Extension) Order 2016.
- 4.1.134 The principle in this article is established in section 7 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) of and Schedule 5 (by virtue of section 120(3)) to the PA 2008 allow the application in a DCO of statutory provisions which relate to the payment of compensation.
- Article 34 - No double recovery*
- 4.1.135 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.
- 4.1.136 The principle of equivalence, namely that a claimant in a compulsory purchase matter shall be compensated for no more than and no less than his loss, is long established and no part of the compensation code conflicts with this principle.
- 4.1.137 This article has precedent in the Thames Tideway Order, the National Grid (Richborough Connection Project) Development Consent Order 2017 and the North London Heat and Power Generating Station Order 2017.

Article 35 - Modification of Part 1 of the 1965 Act

- 4.1.138 The purpose of this article is to ensure consistency between the terms of the Order and the Compulsory Purchase Act 1965 (as amended by the Housing and Planning Act 2016) as applied by section 125 of the Act. It has precedent in the M20 Junction 10a Order (article 27).

Article 36 - Application of the 1981 Act

- 4.1.139 This article applies (with minor modifications to make the provisions appropriate to the context of acquisition under powers in a development consent order) the provisions of the Compulsory Purchase (Vesting Declarations) Act 1981 to compulsory acquisition under the Order so that National Highways has the option to acquire land via the vesting declarations procedure.
- 4.1.140 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 landowner 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.
- 4.1.141 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 acquirer more quickly than using the notice to treat method, and also allow several parcels to be acquired at once. Their use is subject to serving notices and observing time limits as required by the 1981 Act (as amended by the Housing and Planning Act 2016).
- 4.1.142 The modifications ensure consistency with the standard five year period sought under the Order for acquisition rights. It further ensures that the appropriate references are made to the Act. The article is based on article 23 of the model provisions, and previous National Highways orders such as the M20 Junction 10a Order (article 28) and the M4 Order (article 24).

Article 37 - Modification of the 2017 Regulations

- 4.1.143 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. This article is based on article 32 of the draft M25 Junction 28 Development Consent Order.

Article 38 - Acquisition of subsoil or air-space only

- 4.1.144 This article allows National Highways to acquire or create rights in, land below the surface or above the surface, rather than having to acquire all of the land.

4.1.145 The purpose of this article is to give National Highways the flexibility to minimise so far as is possible the extent of interests to be acquired, with consequently less impact on affected landowners and lower payments of compensation, both of which are in the public interest. Any subsoil or airspace acquired under this provision can only be used for the same purposes for which National Highways could have acquired all of the land. This provision allows acquisition of the minimum interest needed to deliver the scheme.

4.1.146 This article is based on article 24 of the model provisions, which related to subsoil only, and previous National Highways orders such as the M20 Junction 10a Order (article 29) and the M4 Order (article 25).

Article 39 - Rights under or over streets

4.1.147 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. 28 days prior notice will be given to the street authority before the exercise of this power.

4.1.148 The article was included in the model provisions as article 27 but has been amended to provide a notice commitment to the street authority.

Article 40 - Temporary use of land for carrying out the authorised development

4.1.149 The purpose of this article is to allow the land set out in Schedule 7 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Scheme but which is not required permanently. The authorisation of temporary possession prevents National Highways having to permanently acquire land which is required to construct the Scheme but which is not needed permanently and therefore assists in minimising the interference with landowners' rights.

4.1.150 This article also allows for the temporary occupation of any of the Land intended for permanent acquisition that has not yet been acquired.

4.1.151 The article is based on article 28 of the model provisions, with a number of changes:

- a. First, the ability to occupy land temporarily that is subject to powers of permanent acquisition but that has not yet been acquired (paragraph (1)(a)(ii)) has been added. This allows National Highways to occupy land without having to acquire it immediately. There is a consequential amendment to paragraph (3) to cater for the two types of land.

- b. Secondly, paragraph (1)(d) has been added so that permanent works specified in column (3) of Schedule 7, and any other permanent mitigation works in connection with the authorised development, may be left on land that has been temporarily occupied, rather than having to acquire such land for this purpose. The rationale for this is that it reduces the amount of land that is required to be subject to outright acquisition. The intended scope of 'mitigation works' is any permanent works necessary and appropriate to mitigate the impacts of the Scheme (e.g. landscaping or ecological mitigation works).
 - c. Paragraph (1)(e) has been added to deal with the situation where soil reprofiling work is proposed as part of the authorised development.
 - d. There has been a minor amendment to paragraph (2) to require the notice of intended entry to specify the purpose for which entry is to be taken where land is being entered under paragraph (1)(a)(ii).
 - e. There are amendments to the requirements for restoring the land before returning it to reflect the changes in respect of permanent works, which have been added as paragraph (4)(b). Paragraphs (4)(d), 4(e) and 4(f) have also been added in respect of protective works for statutory undertaker apparatus, soil reprofiling work or where the landowner has agreed that any temporary works may remain in place. The ability to leave temporary works in place by agreement with the owners of the land and, where applicable, the relevant local authority is necessary to ensure that where a future use of the land could benefit from the use of those works this is made possible. This seeks to reduce unnecessary construction works and the environmental impacts of this.
 - f. There is a minor amendment to paragraph (5) where 'any power conferred by' has been omitted, since the provisions are of the article, not of the powers.
 - g. Paragraph (9) has been amended to delete sub-paragraph (b) in the model provisions as National Highways may only temporarily use the land in Schedule 7, and may not acquire new rights over this land. There are no plots identified in Schedule 5 which also appear in Schedule 7. As a result, none of the land referred to in article 40(1)(a)(i) (as referred to in paragraph (9)) could be subject to the acquisition of new rights by National Highways.
 - h. Finally, paragraph (12) has been added to ensure clarity about the extent of the land National Highways may take temporary possession of.
- 4.1.152 The amended article reflects the wording of recent National Highways orders such as the M20 Junction 10a Order (article 31) and the M4 Order (article 28).
- Article 41 - Temporary use of land for maintaining the authorised development*
- 4.1.153 This article provides that National Highways may take temporary possession of land within the Order Limits, as required for the purpose of maintaining the authorised development, at any time within a period of five years from the date on which that part of the authorised development is first opened for use.

-
- 4.1.154 Paragraph (1)(c) authorises the construction of such temporary works and buildings on the land as may be reasonably necessary for that purpose. 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.
- 4.1.155 This power does not apply in relation to houses, gardens or any other buildings for the time being occupied (paragraph (2)).
- 4.1.156 Paragraph (3) requires at least 28 days' notice of intended entry to be served on the owners and occupiers of the land in question save in the circumstances outlined in paragraph (4).
- 4.1.157 Paragraphs (8) to (10) provide for compensation to be paid to owners and occupiers of land of which temporary possession is taken under this article.
- 4.1.158 This article is substantially based on the wording used in the A19/A1058 Order (see article 28), the M4 Order (see article 29), the A19/A184 Testo's Junction Alteration Development Consent Order 2018 (see article 30) and the M20 Junction 6 Order (article 34). It is also based on article 29 of the Model Provisions.
- 4.1.159 This article is required to enable National Highways to carry out maintenance during the maintenance period and is considered appropriate as it would impose a lesser burden than permanently acquiring rights to achieve the same purpose.
- Article 42 - Statutory undertakers*
- 4.1.160 This article allows National Highways to extinguish rights of statutory undertakers and remove and reposition their apparatus. Reference is made to the Order land so that this power is not restricted to apparatus which has been specifically shown on the Land Plans and described in the Book of Reference. In practice it is impractical to show and describe all such apparatus and so a general power for the extinguishment of rights and the removal or relocation of apparatus belonging to statutory undertakers over or within any of the Order land is required.
- 4.1.161 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.
- 4.1.162 Paragraph (2) restricts National Highways' power to extinguish rights or remove or reposition apparatus by excluding apparatus in streets. If the streets in question are to be stopped up as part of the authorised development, then the provisions of article 43 will apply.
- 4.1.163 This article is based on article 31 of the model provisions and previous National Highways orders such as the M20 Junction 10a Order (article 33) and the M4 Order (article 30).

Article 43 - Apparatus and rights of statutory undertakers in stopped up streets

- 4.1.164 This article governs what happens to statutory undertakers' apparatus (pipes, cables etc.) under streets that are stopped up by the Order. Without the article, the statutory undertaker would not have access to the apparatus, since there would no longer be a right of way along the street.
- 4.1.165 Under paragraph (2), National Highways may require a statutory undertaker to remove and relocate the apparatus (or apparatus provided in substitution) elsewhere. Paragraph (3) requires National Highways to compensate the statutory undertaker for the reasonable costs it incurs in doing so.
- 4.1.166 Paragraph (4) provides for a reduction to the amount payable to the statutory undertaker in certain circumstances, including where replacement apparatus is provided that is of a better type, of greater capacity or of greater dimensions and those improvements or increases are not necessary. Paragraph (5) clarifies that the placing of apparatus of a greater length does not count for the purposes of paragraph (4), since it is likely that for most diversions apparatus of greater length will need to be installed. Similarly, joints in apparatus may be necessary and if so, that will not lead to a reduction of the amount payable.
- 4.1.167 Paragraph (6) discounts from the amount paid to the statutory undertaker in compensation any financial benefit to the statutory undertaker that arises as a result of having new rather than old (i.e. older than 7.5 years) apparatus due to the deferment of the timetable for renewal of the apparatus.
- 4.1.168 Paragraph (7) provides that for those parts of the Scheme that involve major highways works, major bridge works or major transport works (which are defined in Part 3 of the New Roads and Street Works Act 1991 and do not include the construction of a new highway), the compensation provisions under that Act will apply instead.
- 4.1.169 Article 43 was included in the model provisions as article 32.

Article 44 - Recovery of costs of new connections

- 4.1.170 This article provides that if any statutory undertaker's apparatus is removed and this interrupts the supply from that apparatus to owners or occupiers of premises such that they have to seek a connection to other apparatus, then their reasonable costs in obtaining a new supply can be claimed from National Highways.
- 4.1.171 This article was included in the model provisions as article 33.

Part 6 - Operations

Article 45 - Felling or lopping of trees and removal of hedgerows

- 4.1.172 This article allows any tree (other than a tree subject to a tree preservation order) or shrub that is near the Scheme to be felled or lopped, or have its roots cut back, if it is considered to obstruct the construction, operation or maintenance of the Scheme or endanger anyone using it. Compensation is payable for any loss or damage caused.

4.1.173 Further, this article also authorises the removal of any hedgerow as defined in the Hedgerow Regulations 1997. The Scheme includes the removal of a number of identified hedgerows (as set out in Part 1 of Schedule 8 (Removal of Hedgerows and Trees subject to a Tree Preservation Order) of the Order) but it does not limit the application of this article to those hedgerows only. This wider application reflects the powers that National Highways would otherwise be able to exercise under the Hedgerow Regulations 1997 to remove any hedgerows when carrying out its functions. This article is based on article 39 of the model provisions and recent National Highways orders such as the M20 Junction 10a Order (article 38), the M4 Order (article 35) and the A14 Order (article 36).

Article 46 - Trees subject to tree preservation orders

4.1.174 This article enables National Highways to fell or lop the roots of any tree which is subject to a tree preservation order to prevent it obstructing or interfering with the construction, maintenance or operation of the authorised development. Compensation is payable if loss or damage is caused.

4.1.175 The article is a Model Provision (article 40) and article 40 of the A30 Chiverton Order save that it also applies generally to any tree subject to a tree preservation order made after the date on which the tree surveys were undertaken which informed the Environmental Statement [APP-070-APP-086] and either within or overhanging the Order Limits.

Part 7 - Miscellaneous and General

Article 47 - Application of landlord and tenant law

4.1.176 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.

4.1.177 This was included in the model provisions as article 35.

Article 48 - Operational land for purposes of the 1990 Act

4.1.178 The effect of this article is that the land within the Order Limits is to be treated as the operational land of a statutory undertaker for the purposes of the 1990 Act.

4.1.179 This article was included in the model provisions as article 36.

Article 49 - Defence to proceedings in respect of statutory nuisance

4.1.180 Section 158 of the PA 2008 confers statutory authority for the purposes of a defence in civil or criminal proceedings for nuisance. This article provides a defence to proceedings brought in a magistrates' court under s.82(1) of the Environmental Protection Act 1990 in relation to certain nuisances set out in paragraph 79(1) of that Act.

4.1.181 The defence is available if the noise relates to:

- a. The use of premises by National Highways for the purposes of or in connection with the construction or maintenance of the authorised development and is attributable to the carrying out of the authorised development in accordance with a notice served, or consent given, under the Control of Pollution Act 1974.

b. The construction, maintenance or use of the Scheme and cannot reasonably be avoided.

4.1.182 This article provides a defence to those nuisances which may be of relevance to the authorised development, as set out in the Statutory Nuisances Statement **[APP-232]** accompanying the application.

4.1.183 This article is based on article 7 of the model provisions and recent National Highways orders such as the M20 Junction 10a Order (article 42) and the M4 Order (article 38).

Article 50 - Appeals relating to the Control of Pollution Act 1974

4.1.184 This article establishes an appeal process in circumstances 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. Its aim is to streamline the appeal process, thereby minimising the potential for unnecessary delay to the Scheme.

4.1.185 This was not included in the model provisions but was included in the A14 Order as article 44. It has also been included in other non-highways orders³.

Article 51 - Protective provisions

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

4.1.187 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 has sought to include bespoke protective provisions where considered appropriate.

Article 52 - Certification of documents, etc.

4.1.188 This article provides for various application plans and other documents to be certified by the Secretary of State as true copies of those documents referred to in the Order.

Article 53 - Service of notices

4.1.189 This article governs the proper service of notices required to be given under the Order. In particular it allows service by email with the consent of the recipient, and deals with the situation of service on an unknown landowner.

4.1.190 This article was not included in the model provisions but is a sensible addition that has been included in previous orders, such as article 45 of the M20 Junction 10a Order, article 41 of the M4 Order and article 42 of the A14 Order.

³ See paragraph 4 of Schedule 17 to The Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014.

Article 54 - Arbitration

- 4.1.191 This article governs what happens when two parties disagree in the implementation of any provision of the Order. The matter is to be settled by arbitration, and if the parties cannot agree on who the arbitrator should be, this is decided by the President of the Institution of Civil Engineers.

Article 55 - Traffic regulation

- 4.1.192 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 the authorised development.
- 4.1.193 Article 55 would, at any time up to 12 months from the opening of the last part 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:
- a. Revoke, amend or suspend in whole or in part any order made under the Road Traffic Regulation Act 1984.
 - b. Permit, prohibit or restrict the stopping, waiting, loading or unloading of vehicles on any road.
 - c. Authorise the use as a parking place of any road.
 - d. Make provision as to the direction or priority of vehicular traffic.
 - e. Permit or prohibit vehicular access to any road.
- 4.1.194 Under paragraph (3) any restriction etc. made before the end of the 12 month period may continue to have effect after that period has expired.
- 4.1.195 Implementation of any of the measures is subject to the prior approval of the traffic authority in whose area the roads are situated. Requirement is made in paragraphs (4) and (5) for the chief officer of police and the relevant traffic authority to be consulted and notified in advance. The notification period varies depending on what is being proposed.
- 4.1.196 Any restrictions etc. may be suspended, varied or revoked by National Highways within a period of 24 months from the opening of the last part of the authorised development (paragraph (7)).
- 4.1.197 This article was not included in the model provisions but has been included in all previous National Highways orders (for example article 47 of the M20 Junction 10a Order, article 43 of the M4 Order and article 45 of the A14 Order). It is anticipated that this article will be used inter alia to allow National Highways to amend the speed limits on small sections of the public highways adjacent to and connecting to the Order Land for which the County Council is the Highway Authority and traffic authority. These amendments are required to align the existing speed limits with those to be imposed on the altered stretches of highway within the Scheme to which they connect.

Article 56 - Removal of human remains

- 4.1.198 The purpose and effect of this article is to disapply section 25 of the Burial Act 1857 and replace it with an alternative procedure for managing the removal of any human remains disturbed during the course of carrying out the authorised development. Article 56 is based on a model provision and is required to ensure that the appropriate treatment of such remains does not delay the implementation of the authorised development.
- 4.1.199 This article departs from the model provision in that paragraph (12) excludes the requirement to give notice before the removal of remains which the undertaker is satisfied were interred more than 100 years ago and that no relative or personal representative of the deceased is likely to object to their removal. This approach has precedent in the Crossrail Act 2008. Paragraph (13) requires that the undertaker seeks and complies with direction from the Secretary of State under paragraph (14) regarding the treatment of such remains following their removal.
- 4.1.200 Paragraph (17) applies section 239 of the 1990 Act to land, and rights over land, acquired under the Order and permits the use of such land notwithstanding any obligation or restriction imposed under ecclesiastical law or law relating to burial grounds, save as provided for in the remainder of the article. Paragraph (18) excludes the application of Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950. The drafting in paragraphs (17) and (18) has precedent in the River Humber Gas Pipeline Replacement Order 2016, although, the Order does not apply section 238 (use and development of consecrated land) of the 1990 Act as there is no consecrated land within the Order Limits.
- 4.1.201 Taken together the effect of Article 56 is to replace the existing and disparate regimes for regulating the removal of human remains and consolidate the applicable provisions in a single article in the Order. It is required by National Highways to ensure that archaeological remains are recovered appropriately without causing unacceptable delay to the implementation of this nationally significant infrastructure project.

Article 57 - Crown rights

- 4.1.202 This article prevents National Highways from acquiring any Crown land, or from otherwise interfering with it, without the written consent of the relevant Crown authority. The Crown's consent may be given unconditionally or subject to terms and conditions.
- 4.1.203 This article reflects the provisions of section 135 of the PA 2008. It was not included in the model provisions but was included in the A19/A1058 Order as article 37.

Article 58 - Works in the River Great Ouse

- 4.1.204 This article provides for suspension of the public right of navigation over the River Great Ouse within the Order Limits where necessary to construct the Scheme.

- 4.1.205 Paragraphs (2) to (9) deal with the mechanics of suspending the public right of navigation. This involves applying to the Environment Agency for any suspension and sets out what such an application must contain. The article generally follows the process set out in the Anglian Water Authority Act 1977 that the Environment Agency would ordinarily follow prior to navigation rights being suspended, although this article places the obligation on National Highways to ensure compliance with the requirements without placing an additional burden on the Environment Agency and allowing National Highways to control the process.
- 4.1.206 This article also ensures that any application for the suspension of navigational rights (a) cannot be unreasonably withheld or delayed; and (b) is deemed to be granted after a period of 28 days if no decision is made, beginning with the day any application for consent is made.

Article 59 – The Cadent Diversion Works

- 4.1.207 This article makes express provision for the Pipeline diversion works to be carried out pursuant to planning permission granted under Part 3 of the 1990 Act. This article is required in order to recognise that the Pipeline diversion works are proposed to be carried out in advance of granting of the Order and therefore that the requirements in Schedule 2 of the Order will not apply. Should National Highways or Cadent Gas Limited serve notice on the Secretary of State and the relevant planning authority that it will cease to rely on any planning permission and that it will carry out the Pipeline diversion works pursuant to the Order then the requirements in Schedule 2 of the Order will apply. Nothing in this article prevents the powers within the Order being used in relation to the Pipeline diversion.
- 4.1.208 This article was not included in the model provisions but does broadly follow an approach set out in article 4 of the Hinkley Point C (Nuclear Generating Station) Order 2013.

Article 60 – Use of private roads for construction

- 4.1.209 This article authorises the temporary passage by National Highways (or other persons who are transferred this statutory right pursuant to article 11) – 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 40 of the Order.
- 4.1.210 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 40 (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 may need to use private roads inside the Order Limits.

- 4.1.211 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.
- 4.1.212 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).

5 Requirements

- 5.1.1 The requirements in Part 1 of Schedule 2 are the equivalent of planning conditions. They apply to the carrying out and operation of the authorised development and reflect the processes and procedures usually employed by National Highways when implementing a scheme such as this.
- 5.1.2 Approvals will be sought from the Secretary of State for Transport. In practice this would involve certain internal approvals being obtained from independent teams within National Highways before the details are formally submitted by the project team within National Highways to the Secretary of State for approval.
- 5.1.3 National Highways understands that decision-making by the Secretary of State would follow similar internal processes to those employed in taking other quasi-judicial decisions (for example, in deciding whether to make a DCO or a Transport and Works Act Order), meaning a separation within the Department for Transport's Strategic Roads Division of those involved in discharging requirements from those involved in delivery of the Scheme through their relationships with National Highways.
- 5.1.4 The requirements provide that the various schemes, details and plans to be approved must, where appropriate, reflect the mitigation measures included in the Environmental Statement [APP-070–APP-086]. 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. The requirements provide that the approved schemes, details and plans must be implemented as approved, unless further amendments to them are approved. A general provision to this effect is provided at requirement 21.
- 5.1.5 Turning to the purpose and effect of requirements 1 to 21:
- 5.1.6 **Requirement 1** contains a number of definitions used in Part 1 of Schedule 2. This was included in the model provisions as requirement 1, however, the definitions reflect the latest guidance as explained further below.
- 5.1.7 **Requirement 2** provides that the authorised development must not begin later than 5 years from the date of the Order comes into force. This was based on the model provisions as requirement 2.
- 5.1.8 **Requirement 3** requires a Second Iteration Environmental Management Plan (Second Iteration EMP) to be submitted to and approved by the Secretary of State, following consultation with the relevant planning authority, the Environment Agency, Natural England and the relevant local highway authority, so far as is relevant to their functions, prior to commencement of the authorised development. The Second Iteration EMP can be submitted in parts which relate to the relevant part of the Scheme to be constructed. It will be based substantially on the First Iteration Environmental Management Plan (First Iteration EMP) submitted as part of the application [TR010044/APP/6.8v4]. The outline plans submitted as part of the First Iteration EMP will become more refined and detailed for the purposes of the Second Iteration EMP. The Second Iteration

EMP may also contain additional detailed plans as required by National Highways.

- 5.1.9 **Requirement 4** provides that on completion of the authorised development the Third Iteration Environmental Management Plan (Third Iteration EMP), must be submitted to and approved by the Secretary of State, following consultation with the relevant planning authority and the relevant highway authority, so far as is relevant to their functions. The Third Iteration EMP will govern maintenance of the Scheme during its operation.
- 5.1.10 Requirements 3 and 4 reflect the terminology set out in LA 120 - Environmental Management Plans, which was introduced in November 2019 (Revision 0) (LA 120) and subsequently updated in March 2020 (Revision 1). LA 120 forms part of the Design Manual for Roads and Bridges (DMRB), which contains information about current standards relating to design, assessment and operation of motorway and all-purpose trunk roads in the United Kingdom.
- 5.1.11 Terminology relating to the environmental management plans presented in recent National Highways Orders such as the M42 Junction 6 Order typically reflect the conventions set out within Interim Advice Note 183/14 Environmental Management Plans (IAN 183/14), which was withdrawn upon publication of LA 120.
- 5.1.12 IAN 183/14 adopted the following conventions: Outline Environmental Management Plan (now First Iteration EMP); the Construction Environmental Management Plan (now Second Iteration EMP); and the Handover Environmental Management Plan (now Third Iteration EMP).
- 5.1.13 **Requirement 5** provides that where National Highways is required to consult other organisations under a requirement, it must when applying for the discharge of that requirement include a report setting out the consultation it has undertaken and its response to any comments received as a result of the consultation. Under paragraph (2) a copy of the report must be provided to the consultees in question promptly after the application to discharge the requirement is submitted.
- 5.1.14 **Requirement 6** requires the preparation of a landscaping scheme for approval by the Secretary of State prior to the authorised development coming into use. Natural England, the relevant planning authority and the relevant local highway authority must be consulted, so far as is relevant to their functions, on the landscaping scheme, which must be substantially in accordance with the landscaping mitigation measures set out in the First Iteration EMP and must be based on the landscaping principles of the environmental masterplan contained within the Environmental Statement Figures at Figure 2.4 [REP9-037].
- 5.1.15 Requirement 6 is based on requirement 7 of the model provisions and recent National Highways orders such as requirement 5 of the M42 Junction 6 Order.
- 5.1.16 Requirement 6 also provides for the implementation and maintenance of landscaping in accordance with the scheme prepared under this requirement. Paragraph (5) provides for the replacement of trees and shrubs which become diseased or damaged within a period of 5 years after planting.

-
- 5.1.17 This element of requirement 6 was included in the model provisions as requirement 8.
- 5.1.18 **Requirement 7** provides that permanent and temporary fencing that would be adjacent to the new dual carriageway forming part of the authorised development (i.e. the trunk road) must be constructed and installed in accordance with National Highways' Manual of Contract Documents for Highway Works unless otherwise agreed in writing with the Secretary of State. It is based on requirements 12 and 13 of the model provisions, amended to reflect that standards are already set out in the Manual of Contract Documents. This wording has been included in recent National Highways orders such as requirement 12 of the M42 Junction 6 Order.
- 5.1.19 **Requirement 8** makes provision for dealing with any contaminated land and groundwater discovered during construction of the works. This requirement specifies requirements that will apply if any unexpected contamination is encountered during construction.
- 5.1.20 The Environment Agency is included as a consultee under this requirement.
- 5.1.21 This requirement is based on requirement 15 of the model provisions and recent National Highways orders such as requirement 7 of the M42 Junction 6 Order.
- 5.1.22 **Requirement 9** states that the authorised development must be carried out, operated and maintained in accordance with the archaeological mitigation strategy.
- 5.1.23 The archaeological mitigation strategy [TR010044/EXAM/9.23v3] sets out the requirements for the overarching written scheme of investigation, site specific written schemes of investigation and archaeological method statements with which the undertaker must comply.
- 5.1.24 **Requirement 10** provides that where any previously unidentified protected species are found during construction, construction works near their location are to cease and National Highways must immediately report it to the Ecological Clerk of Works. National Highways must then prepare a written protection and mitigation scheme.
- 5.1.25 Under paragraph (2) the undertaker must implement the written scheme immediately and construction in the area specified must not recommence until any necessary licences are obtained to enable mitigation measures to be implemented.
- 5.1.26 This requirement is based on requirement 34 of the model provisions and recent National Highways orders such as requirement 7 of the A585 Windy Harbour Order.

- 5.1.27 **Requirement 11** provides that no part of the authorised development can commence until a traffic management plan for the construction of the authorised development has been prepared and approved by the Secretary of State following consultation with the relevant highway authority. The traffic management plan can be prepared in parts to accord with the construction programme, and is to be prepared substantially in accordance with the Outline Construction Traffic Management Plan [TR010044/APP/7.4v5] submitted with the application. This requirement consolidates various requirements of the model provisions (such as 22 and 33) and is based on recent National Highways orders such as requirement 11 of the M20 Junction 10a Order, requirement 18 of the M4 Order and requirement 11 of the A30 Chiverton Order.
- 5.1.28 **Requirement 12** provides that the authorised development must be designed in detail and carried out so that it is in accordance with the preliminary scheme design shown on the Works Plans [APP-009-APP010], the Engineering Section Drawings [APP-017-APP-022] and the General Arrangement Plans [APP-011], the principles set out in the environmental masterplan (Figure 2.4 within [REP9-037]) and the design principles set out in the Scheme Design Approach and Design Principles document [REP9-015] unless otherwise agreed in writing by the Secretary of State following consultation with the relevant planning authority, where appropriate. This means that any variations to the Scheme design (which must be within the limits of deviation) are subject to approval by the Secretary of State.
- 5.1.29 The Secretary of State must be satisfied that any amendments to the preliminary design would not give rise to any materially new or materially different environmental effects compared to those reported in the Environmental Statement.
- 5.1.30 Requirement 12(1) allows for a proportionate and acceptable level of flexibility in the final design of the Scheme, 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 environmental assessment.
- 5.1.31 As requirement 12(1) links any such changes to the environmental effects reported in the Environmental Statement, that which is permitted by requirement 12 can be distinguished from the provisions concerning “tailpiece” provisions in paragraphs 17.3 to 17.6 of Advice Note Fifteen.
- 5.1.32 This requirement is based on requirements 4 to 6 of the model provisions and recent National Highways orders such as requirement 12 of the M20 Junction 10a Order, requirement 3 of the A14 Order and requirement 3 of the M42 Junction 6 Order.
- 5.1.33 **Requirement 13** provides that no part of the authorised development can commence until written details of the surface and foul water drainage system, reflecting the Engineering Section Drawings (Drainage Layout) and including means of pollution control, have been submitted to and approved in writing by the Secretary of State following consultation with the relevant authority on matters relating to their function.

-
- 5.1.34 This requirement is based on requirement 14 of the model provisions and recent National Highways orders such as requirement 8 of the A19 Downhill Order.
- 5.1.35 **Requirement 14** provides that no part of authorised development can commence until a detailed floodplain compensation scheme for that part of the authorised development has been submitted to and approved by the Secretary of State in consultation with the relevant planning authority and the Environment Agency. However, where that authorised development is at the River Great Ouse the Secretary of State need only consult with the Environment Agency as the body responsible for the River Great Ouse.
- 5.1.36 **Requirement 15** provides that any works to the grade II listed milestones and the non-designated milestone must be carried out in accordance with the archaeological mitigation strategy.
- 5.1.37 **Requirement 16** confirms that the dismantling of the listed building known as Brook Cottages comprised within Work No.21 must be carried out in accordance with the Brook Cottages heritage strategy unless otherwise agreed with the Secretary of State.
- 5.1.38 Once the soft strip has been completed in accordance with the Brook Cottages heritage strategy, a report is to be provided to Historic England in consultation with Bedford Borough Council. This report will contain information on the heritage interest and significance of Brook Cottages, details of its physical condition and options for dismantling, storing and reconstructing the historic fabric.
- 5.1.39 Historic England and Bedford Borough Council then have a period of 35 days to consider National Highways' proposals and advise on suitability of relocation.
- 5.1.40 National Highways must then dismantle the fabric in accordance with the method confirmed by Historic England. The details regarding reconstruction, if appropriate, are subject to approval by the Secretary of State. Such details include, appropriate future use, a suitable receptor, transportation method, schedule of works and timetable for reconstruction.
- 5.1.41 **Requirement 17** provides that no part of the authorised development may be brought into use until a written scheme of the proposed highway lighting for that part of the authorised development has been submitted to and approved in writing by the Secretary of State following consultation with the relevant local authority on matters relating to their function.
- 5.1.42 Under paragraph (2) the lighting scheme must either reflect the mitigation measures referred to in Chapters 8, Biodiversity **[APP-077]** and 14, Climate **[APP-083]** of the Environmental Statement or, where the mitigation measures proposed are materially different, include evidence that the standard of highway lighting proposed would not give rise to any materially new or materially different environmental effects compared to those reported in the Environmental Statement. The lighting scheme must include the specification, energy efficiency, level of provision, light spillage, intensity and brightness of the highway lighting.

-
- 5.1.43 This requirement is based on requirements 21 (external lighting) and 27 (control of artificial light emissions) of the model provisions and previous National Highways orders including requirement 14 of the A14 Order. It goes into more detail as to the standard of highway lighting to be provided than the model provisions did.
- 5.1.44 Paragraph (4) confirms that this requirement does not restrict the lighting that may be used during the construction or maintenance of the authorised development. Lighting during the construction phase will be regulated by the Second Iteration EMP.
- 5.1.45 **Requirement 18** provides that no part of the authorised development may commence until written details of the noise mitigation, including low noise surfacing and noise barriers, have been submitted to and approved in writing by the Secretary of State following consultation with the relevant planning, so authority.
- 5.1.46 Under paragraph (2) the written details must either reflect the mitigation measures referred to in Chapter 11, Noise and Vibration of the Environmental Statement [**APP-080**] or, where the mitigation proposed is materially different, include evidence that the mitigation proposed would not give rise to any materially new or materially different environmental effects compared to those reported in the Environmental Statement.
- 5.1.47 This requirement is based on requirement 25 of the model provisions and previous National Highways orders including requirement 12 of the A14 Order.
- 5.1.48 **Requirement 19** provides for construction hours for the works on specified days, with none on Sundays or bank holidays. However, the requirement does allow start up and shut down and certain essential activities, such as demolition works to bridges, works over the East Coast Mainline railway, oversize deliveries, junction tie in works, etc. to be undertaken outside of these times and days, or for any other works subject to the prior agreement with the relevant planning authority.
- 5.1.49 **Requirement 20** states that the pre-commencement works must be carried out in accordance with the biodiversity pre-commencement plan and the pre-commencement plan.
- 5.1.50 The biodiversity pre-commencement plan [**REP8-004**] and the pre-commencement plan [**TR010044/EXAM/9.48v4**] ensure that the necessary controls are secured for any works that, due to the definition of 'commencement' discussed above at paragraph 4.1.6(b), could occur prior to the approval of the Second Iteration EMP in accordance with requirement 3 of the Order.
- 5.1.51 **Requirement 21** provides that the authorised development must be carried out in accordance with the flood risk assessment, including its mitigation measures, so that no part of the authorised development is predicted to result in any exceedance of the flood levels to properties and land shown in the flood risk assessment.

-
- 5.1.52 If any part of the authorised development is to be undertaken which is not in accordance with the flood risk assessment, then it must be demonstrated to the Secretary of State's satisfaction, in consultation with the Environment Agency, that either the part of the authorised development concerned would not result in an exceedance of any of the flood levels shown in the flood risk assessment, outside of an agreed 10mm variance modelling tolerance, or that all affected landowners agree to the predicted exceedance of the flood levels shown in the flood risk assessment drawings. The wording of this requirement is broadly in line with Requirement 15 of the A14 Order.
- 5.1.53 **Requirement 22** requires National Highways to submit details of an operational traffic monitoring scheme for the locations identified. The Requirement lists a number of details that should be included in the scheme, which must be provided to the Secretary of State for approval, following consultation with the local highway authority, prior to any part of the authorised development being open for traffic. The operational traffic monitoring must be carried out in accordance with the approved details, unless otherwise agreed in writing by the Secretary of State.
- 5.1.54 **Requirement 23** confirms that details approved pursuant to the requirements include any amendments that may subsequently be approved by the Secretary of State. This is based on requirement 37 of the model provisions.
- 5.1.55 Part 2 of Schedule 2 provides a clear procedure for the discharge of requirements by the Secretary of State. 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. This also includes an obligation on National Highways to publish an electronic register of requirements, which would track where each requirement is in the process.
- 5.1.56 Any steps 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.
- 5.1.57 Part 2 of Schedule 2 is based on recent National Highways orders such as the M20 Junction 10a Order.