

# **A66 Northern Trans-Pennine Project**

**TR010062**

## **5.3 Explanatory Memorandum (Rev 4)**

**APFP Regulations 5(2)(c)**

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A66 Northern Trans-Pennine Project  
Development Consent Order 202x

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**5.3 EXPLANATORY MEMORANDUM**

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**THE A66 NORTHERN TRANS-PENNINE  
DEVELOPMENT CONSENT ORDER 2021[\*]**

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**EXPLANATORY MEMORANDUM**

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**1. SUMMARY**

- 1.1 This explanatory memorandum has been prepared to explain the purpose and effect of the provisions of the draft A66 Northern Trans-Pennine Development Consent Order ("the Order"), in accordance with regulation 5(2)(c) 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 this application for the Order.

**2. PURPOSE OF THE ORDER**

*Nationally Significant Infrastructure Project – construction of a highway*

- 2.1 National Highways Limited ("National Highways") is the strategic highways company appointed by the Secretary of State under section 1 of the Infrastructure Act 2015 by virtue of the Appointment of a Strategic Highways Company Order 2015. National Highways has made an application pursuant to the Planning Act 2008 ("the 2008 Act") to the Secretary of State for a development consent order for the construction, operation and maintenance of the A66 Northern Trans-Pennine Project (referred to in the Order as "the authorised development").
- 2.2 The existing A66 is a key national and regional strategic link; it carries high levels of freight traffic, as well as being an important route for tourism and providing vital connectivity for nearby communities. There are no direct rail alternatives for passenger or freight movements along the corridor. Despite the strategic importance of the A66, the route between the M6 at Penrith and the A1(M) at Scotch Corner is only intermittently dualled. It has six separate sections of single carriageway over the total road length of 80km.
- 2.3 The route also carries local slow moving agricultural and non-motorised traffic making short journeys which can have an impact on other users, especially on the single carriageway sections. The A66 is also an important route for tourism, providing access to the North Pennines Area of Outstanding Natural Beauty (AONB), the Yorkshire Dales and the Lake District National Park. The mix of road standards, together with the lack

of available diversionary routes when incidents occur, affects road safety, reliability, resilience and attractiveness of the route.

- 2.4 If the existing A66 route is not improved, it will constrain national and regional connectivity and threaten the transformational growth envisaged by the Northern Powerhouse agenda.
- 2.5 The A66 Northern Trans-Pennine Project (“the Project”) has been identified as one of the ‘vital infrastructure projects’ forming part of the UK Government’s ‘Project Speed’ announced as part of ‘A New Deal for Britain’ (Prime Minister’s Office, 2020).
- 2.6 Project Speed aims to bring forward proposals to deliver public investment projects more strategically and efficiently by cutting down the time it takes to design, develop and deliver the ‘right things better and faster than before’ and by cutting construction time in half.

*Nationally significant infrastructure project*

- 2.7 The Project is a nationally significant infrastructure project (“NSIP”) within sections 14(1)(h) and 22(1)(a) of the 2008 Act. Under section 22 the relevant NSIP categories are the construction or alteration of a highway wholly within England, in relation to which the Secretary of State or a strategic highways company will be the highway authority and, for construction or alteration, must meet the relevant threshold in subsection (4). In relation to this Project, which is wholly within England, all parts of the new or altered A66 comprised within the Project are expected to be subject to a speed limit of 50 miles per hour or greater and National Highways, the strategic highways company, will be the highway authority. As such the key criterion is whether the area of development exceeds the 12.5 hectares provided by section 22(4) of the 2008 Act. Taken on a whole-of-Project basis, the area of development of the Project considerably exceeds the 12.5 hectare threshold.
- 2.8 The term “area of development” is defined in section 22(9) of the 2008 Act as meaning:
  - (a) in relation to the construction of a highway, the land on which the highway is to be constructed; or
  - (b) in relation to the alteration of a highway, the land on which the part of the highway to be altered is situated; and
  - (c) in relation to both the construction or alteration of a highway, any adjoining land expected to be used in connection with the alteration or construction.
- 2.9 The Project comprises 8 Schemes all of which are located wholly within England and, in relation to the A66, National Highways is and will continue to be the highway authority. With the exception of Scheme 11,

each of the Schemes constitutes either a construction of a highway NSIP under section 22(1)(a), or an alteration of a highway NSIP, under section 22(1)(b), of the 2008 Act. National Highways has carefully considered each of its proposals for the Schemes and considered on a conservative basis the “area of development” for each Scheme as follows:

- (a) Scheme 0102 M6 Junction 40 to Kemplay Bank – this Scheme provides for alterations to the M6 Junction 40 and Kemplay Bank Roundabout. The area of development is greater than 16 hectares, which exceeds the 12.5 hectare threshold for the alteration of a highway.
- (b) Scheme 03 Penrith to Temple Sowerby – this Scheme comprises the alteration of approximately 5km of the existing A66 to widen it to a dual carriageway. The area of development is greater than 28 hectares, which exceeds the 12.5 hectare threshold for the alteration of a highway.
- (c) Scheme 0405 Temple Sowerby to Appleby – this Scheme includes the construction of a new offline bypass around the north of Kirkby Thore, which then passes to the north of Crackenthorpe parallel to the old Roman road before tying into the existing Appleby Bypass. The area of development is greater than 68 hectares, which exceeds the 12.5 hectare threshold for the construction of a highway.
- (d) Scheme 06 Appleby to Brough – this Scheme includes the construction of two offline sections of new dual carriageway and the alteration of approximately 2.6 kilometres of the existing A66 by widening it to a dual carriageway. The area of development for the construction of the two offline sections of dual carriageway alone is greater than 25 hectares, which exceeds the 12.5 hectare threshold for the construction of a highway.
- (e) Scheme 07 Bowes Bypass – this Scheme includes the alteration of approximately 3 kilometres of the existing A66 by widening it to a dual carriageway. The area of development is greater than 13 hectares, which exceeds the 12.5 hectare threshold for the alteration of a highway.
- (f) Scheme 08 Cross Lanes to Rokeby – this Scheme includes the alteration of approximately 4 kilometres of the existing A66 by widening it to a dual carriageway and by the construction of a new offline section. The area of development is greater than 16 hectares, which exceeds the 12.5 hectare threshold for the alteration of a highway.

- (g) Scheme 09 Stephen Bank to Carkin Moor – this Scheme includes the construction of a new offline dual carriageway section of the A66 between Stephen Bank and Carkin Moor. The area of development is greater than 29 hectares, which exceeds the 12.5 hectare threshold for the construction of a highway.
- (h) Scheme 11 Junction 53 Scotch Corner – this Scheme includes alterations to the A1(M) Junction 53 Scotch Corner wholly within the existing highway boundary. The developable area for this Scheme does not exceed the thresholds for the construction or alteration of a highway.

2.10 The Project as a whole satisfies section 22(2) in that the highway will (when constructed) be wholly located in England, National Highways as a 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, as speed limits will be in excess of 50mph. Additionally, each Scheme with the exception of Scheme 11, exceeds the relevant thresholds in section 22(2) and (4) of the 2008 Act and are nationally significant infrastructure projects requiring development consent in their own right.

2.11 As the proposed development is an NSIP, development consent must be obtained from the Secretary of State to authorise it, and an application for a development consent order must be made to the Secretary of State, care of the Planning Inspectorate, under section 37 of the 2008 Act.

#### *Associated development*

2.12 The draft Order also specifically authorises development which is associated with the NSIP. The Secretary of State may, under the provisions of section 115 of the 2008 Act, grant consent for development that is associated with an NSIP.

2.13 Guidance on associated development has been issued by the Secretary of State for Communities and Local Government<sup>1</sup>. 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).

2.14 In some cases there may be some overlap, or the absence of a clear boundary, between associated development and works which form part

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<sup>1</sup> “Guidance on associated development applications for major infrastructure projects” (Department for Communities and Local Government) (April 2013)

of the NSIP. There is a danger that separating the two categories out in the Order could potentially lead to an error defining works one way or another incorrectly, given this potential for overlap between the two categories. For instance, there may be some on-highway, and some off-highway, diversion of the same piece of statutory undertaker equipment.

- 2.15 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 the 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 2008 Act, and so can properly be authorised by the Order. Nonetheless the Applicant recognises that an indicative list as to what parts of the authorised development might constitute the NSIP and what might constitute "associated development" may be of value. The table below lists types of development in Schedule 1 and states indicatively whether those items constitute the NSIP, associated development, or both. As is clear from the table below, there are a number of instances where development could potentially be both part of the NSIP and associated development and from a legal perspective, there is no need to separate out such development in Schedule 1.

<b>Type of development</b>	<b>NSIP, associated development or both</b>
The alteration, construction or improvement of a highway for which National Highways would be highway authority (including the widening and realignment of existing trunk roads, and associated slip roads and structures) within Schemes 0102, 03, 0405, 06, 07, 08, and 09.	NSIP.
Any alteration, improvement or construction of slip roads, local roads, rights of way and walking cycling and horse-riding routes (including associated structures) for which National Highways is not responsible and Scheme 11.	Associated development.
New and altered means of access.	Associated development.
Landscaping.	Both – could be integral to the newly altered, improved or constructed highways for which National Highways would be the highway authority (so part of the

	NSIP) or, in any other context, as part of the associated development.
Utility diversions.	Both – for the reasons set out above.
Drainage works.	Both – for the reasons set out above.
Ecological mitigation.	Both – for the reasons set out above.
Construction compounds.	Associated development.

2.16 In order to ensure that the authorised development is constructed efficiently and without impediment, the Order contains the powers to carry out the ancillary works listed in paragraphs (a) and (b) under the heading ‘Ancillary Works’ in Schedule 1. The use of such measures was explicitly approved in the A19/A1058 Coast Road (Junction Improvement) Order 2016 and extensive provisions were used in both the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and in more recently granted orders such as the A30 Chiverton to Carland Cross Development Consent Order 2020.

### 3. **ANCILLARY MATTERS**

3.1 The draft Order also contains several ancillary matters, i.e. provisions not consisting of development.

3.2 The draft Order seeks to apply and modify statutory provisions in relation to the compulsory acquisition of land and disapply provisions relating to certain other consent regimes. It is for this reason that under sections 117 and 120(5) of the 2008 Act the Order must be made by way of Statutory Instrument. The draft Order is therefore in that form.

3.3 Other ancillary matters include the diversion and stopping up of lengths of existing highways in the vicinity of the route, the classification and re-classification of highways including the trunking and de-trunking of sections of highway, the application of speed limits, the stopping up of private means of access and the creation of new private means of access, and the application and disapplication of legislation relating to the Project.

### 4. **KEY CONCEPTS UNDERLYING THE DCO APPLICATION DOCUMENTS**

4.1 In accordance with drafting conventions, the draft Development Consent Order refers to National Highways as the “undertaker” and for consistency this explanatory memorandum adopts the same convention.



- 4.2 The description of the development authorised by the Order is set out in detail, in the form of a textual description, in Schedule 1, where the component parts of each of the eight Schemes comprised in the Project are set out in a series of 'numbered works', cross-references to which also feature in other DCO application documentation. Some of those numbered works are themselves sub-divided, in recognition of the fact that they have several distinct but interdependent component parts. Following the numbered works for all of the eight Schemes, there is a list of ancillary works. The ancillary works support the carrying out of the numbered works to which they relate and are not to give rise to any materially new or materially different environmental effects in comparison with those assessed in the environmental statement. Ancillary works are set out separately to the numbered works so as to avoid the need to repeat them within the description of each of the numbered works. This approach aids the clarity and legibility of the description of the numbered works.
- 4.3 The Project is unlike other National Highways DCOs submitted or made to date, in that it is divided into different 'Schemes'.
- 4.4 The Schemes adopt the following numbering and naming convention:
- (a) Scheme 0102 – M6 Junction 40 to Kemplay Bank;
  - (b) Scheme 03 – Penrith to Temple Sowerby;
  - (c) Scheme 0405 – Temple Sowerby to Appleby;
  - (d) Scheme 06 – Appleby to Brough;
  - (e) Scheme 07 – Bowes Bypass;
  - (f) Scheme 08 – Cross Lanes to Rokeby;
  - (g) Scheme 09 – Stephen Bank to Carkin Moor; and
  - (h) Scheme 11 – A1(M) Junction 53 Scotch Corner.
- 4.5 Schemes 01 and 02 have combined to form Scheme 0102 (M6 Junction 40 to Kemplay Bank), and in a similar fashion so have Schemes 04 and 05 (Temple Sowerby to Appleby) leading to a total of 8 Schemes listed in Schedule 1. There is no Scheme 10.
- 4.6 The works are then numbered sequentially within each of the Schemes that form part of the A66 Northern Trans-Pennine Project. For example, numbered work 03-1 is the first numbered work within Scheme 03 (Penrith to Temple Sowerby). As noted above, numbered works may also be sub-divided, and where this is the case the work number includes a capital letter reference too, e.g. Work No. 03-1A, Work No. 0405-10A, Work No. 0405-10B, etc.

- 4.7 There is no prescribed approach for dividing a project into a series of numbered works; it is open to an applicant to do this in whatever way is most appropriate for the project for which it seeks development consent. Accordingly, a variety of contrasting approaches can be seen in DCO applications accepted by the Planning Inspectorate to date.
- 4.8 The parameters of where the authorised development can be constructed are set out in article 7 (limits of deviation) by reference to the authorised development described in Schedule 1 and by reference to the Works Plans (Application Document 5.16), the Engineering Section Drawings: Plan and Profiles (Application Document 5.17) and the Engineering Section Drawings: Cross Sections (Application Document 5.18). The limits of deviation in article 7 set the degree of flexibility afforded to the undertaker for the linear works in terms of the lateral deviation from the centrelines, the deviation from the locations of the commencement/termination points of the numbered works and the vertical limits of deviation. These limits of deviation have all been carefully considered in the environmental statement as set out in Chapter 2 (Application Document 3.2).

## 5. **DRAFT ORDER**

- 5.1 The purpose and effect of the provisions of the draft Order are now explained in sequence. Whilst the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (“Model Provisions”) has lapsed, the draft Order is based on those Model Provisions (general and railway), as well as relevant precedents in development consent orders that have been made to date.

## 6. **PART 1 – PRELIMINARY**

### *Article 1 – Citation and commencement*

- 6.1 Article 1 sets out the name of the Order.

### *Article 2 – Interpretation*

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

- 6.3 The following definitions in particular have been included due to the nature of the Project:

- (a) “bridleway”;
- (b) “carriageway”;
- (c) “cycle track”;
- (d) “cycleway”;

- (e) "footway" and "footpath";
- (f) "special road"; and
- (g) "trunk road".

6.4 Other definitions to note include:

- (a) "maintain" which includes inspect, repair, adjust, alter, remove, replace or reconstruct and any derivative of maintain (see article 5 below) in the Order is to be construed accordingly. National Highways considers this is appropriate and has precedent in made DCOs to date, such as the A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016 and in more recent orders such as the A303 Sparkford to Ilchester Dualling Development Consent Order 2021 and the A30 Chiverton to Carland Cross Development Consent Order 2020. Indeed the definition does not go as far as other DCOs such as the Norfolk County Council (Norwich Northern Distributor Road (A1067 to A47(T))) Order 2015 and Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014. It is important for National Highways that it is able to undertake all the elements of maintenance that are included within this definition in order to discharge its functions as the strategic highways company responsible for the operation of England's trunk road network. The definition of "maintain" is qualified by the proviso that maintenance must not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement;
- (b) "the Order land" refers to land which is shown coloured pink and coloured blue on the Land Plans (Application Document 5.13), and which, respectively, comprises the land which National Highways can permanently acquire and the land over which National Highways can create and permanently acquire new rights; and
- (c) "the Order limits" references the Order limits as shown on the works plans and land plans - the extent of the area within which the authorised development may be carried out (subject to limited extensions under articles 14 (protective works to buildings) and 15 (Authority to survey and investigate land)).

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

- 6.5 Paragraph (3) defines measurements as being 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. The provision allows for a small tolerance with respect to any distances and points, although all works are to take place within the limits of deviation where these apply, and within the Order limits in any event. It is commonplace to include such provision in legislation authorising linear infrastructure; see, for example, the M1 Junction 10a (Grade Separation) Order 2013 at article 2(3), the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013 at article 2(3) and more recently the A303 Sparkford to Ilchester Dualling Development Consent Order 2021.
- 6.6 Paragraph (4) provides that areas given in the book of reference, in relation to plot numbers, are approximate, since these are not covered by article 2(3). This is intended to clarify the status of the area measurements in the book of reference, and the purpose and effect of the term 'approximately' in this context is the same as set out in the previous paragraph. The term 'approximately' is required to be read-in to all plot area measurements in the book of reference, as these measurements are given in square metres, and each measurement is rounded up to the nearest whole square metre.
- 6.7 Paragraphs (5) and (6) tie references to lettered/numbered plots and reference points and numbered works in the Order to the relevant plans.
- 6.8 Paragraph (7) clarifies that references to 'materially new or materially different environmental effects in comparison with those reported in the environmental statement' are not to be construed as including the increase of an assessed positive effect or the decrease of an assessed negative effect. The purpose and effect of this drafting is to ensure that that the undertaker is not deterred from solutions that would result in less severe adverse environmental effects or more beneficial positive environmental effects.

#### *Article 3 – Disapplication of legislative provisions*

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

#### Consents

- 6.10 The article also provides for the disapplication of various additional consents or permits during construction which would otherwise be required.

- 6.11 Specifically, sub-paragraph (1)(a) disapplies sections 28E (duties in relation to sites of scientific interest) and 28H (statutory undertakers, etc.: duty in relation to carrying out operations) of the Wildlife and Countryside Act 1981. Section 28E imposes duties on owners and occupiers of land notified as being of special interest to refrain from activities specified in a notice given by Natural England unless those operations are carried out as part of a management agreement or with the consent of Natural England. Section 28H imposes duties on certain public bodies to notify Natural England of the carrying out of operations likely to damage a site of special scientific interest. The disapplication of this provision is necessary to ensure that notification of a proposed site of special scientific interest (“SSSI”) will not impede the delivery of this nationally significant infrastructure project.
- 6.12 National Highways consider that this is justified as the Project has been subjected to extensive environmental impact assessment, wide ranging public consultation and will have been subject to a public examination during which such matters have been addressed. Suitable controls to protect SSSIs are contained in the Environmental Management Plan, compliance with which is secured by the provisions of the Order. The imposition of the further duties under sections 28E and 28H would be inappropriate in the context of this nationally significant infrastructure project, if approved. Consents under section 28E and 28H of the Wildlife and Countryside Act 1981 are not consents prescribed for the purposes of section 150 of the 2008 Act. The disapplication of section 28E has precedent in the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and the A303 (Amesbury to Berwick Down) Development Consent Order 2020<sup>2</sup>.
- 6.13 Sub-paragraphs (1)(b) to (1)(e) provide for the disapplication of consents ordinarily required from the Environment Agency, under the Environmental Permitting (England and Wales) Regulations 2016 (“the EP Regulations”) and the Water Resources Act 1991, and from the lead local flood authority in respect of the Land Drainage Act 1991.
- 6.14 Specifically, these are the requirements to obtain the consent of:
- (a) the drainage body concerned in relation to obstructions in ordinary watercourses under section 23 of the Land Drainage Act 1991;
  - (b) the drainage body concerned in relation to byelaws made under section 66 of the Land Drainage Act 1991;
  - (c) the Environment Agency in relation to byelaws made under or having effect as if made under Schedule 25 to the Water Resources Act 1991; and

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<sup>2</sup> The A303 (Amesbury to Berwick Down) Development Consent Order 2020 was quashed by order of the High Court and remitted back to the Secretary for State for re-determination. The reasons for the quashing were unrelated to the disapplication of section 28E or any other provision in relation to which this Explanatory Memorandum refers to it as a precedent.

(d) the Environment Agency in relation 'flood risk activities' as defined in the EP Regulations.

- 6.15 These are consents for activities which may be a necessary part of constructing the authorised development. To provide certainty that the Project can proceed, the Order disapplies the requirement for a separate statutory consent to be obtained from the Environment Agency and the drainage bodies concerned in relation to these activities. The requirement for a separate consent is intended to be replaced by protective provisions to be agreed for the protection of the drainage authorities and the Environment Agency in Schedule 9 to the Order..
- 6.16 In accordance with section 150 of the 2008 Act, the consent of the Environment Agency and of the drainage bodies concerned to the inclusion of these provisions in the Order, is required. National Highways is progressing discussions with the consenting bodies in that regard and would expect that consent to be forthcoming before the close of the examination.
- 6.17 The Project will require the demolition of a small number of buildings and so National Highways seeks to disapply section 80 of the Building Act 1984. This consent is not a prescribed consent for the purposes of section 150 of the 2008 Act and so the consent of the building authority is not required for its inclusion in the Order.
- 6.18 A disapplication is also sought in respect of the temporary possession provisions of the Neighbourhood Planning Act 2017. This is required as the relevant sections of the Neighbourhood Planning Act 2017 have not been brought into force and subsidiary regulations to that Act have not yet been made and there is therefore no certainty as to the requirements of the replacement temporary possession regime, should it be brought into force. As such, this enables the temporary possession regime created by this Order to be applied. This approach has been accepted by the Secretary of State in development consent orders following the Neighbourhood Planning Act 2017 such as the Silvertown Tunnel Order 2018, the A19/A184 Testo's Junction Alteration Development Consent Order 2018, and more recently the A303 Sparkford to Ilchester Dualling Development Consent Order 2021.

#### Community Infrastructure Levy Regulations 2010

- 6.19 Paragraph (2) 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.

#### Local legislation

- 6.20 Paragraph (4) provides for the disapplication of the historic local legislation listed in the paragraph, in so far as the provisions still in force are incompatible with the exercise by the undertaker of its functions

conferred by this Order. The local legislation in question relates to Victorian enactments authorising the construction of railways.

## 7. **PART 2 – WORKS PROVISIONS**

### *Article 4 – Development consent, etc. granted by the Order*

- 7.1 This article confers the principal power to construct and operate the authorised development. Schedule 1 describes the elements of the authorised development.
- 7.2 Paragraph (2) is a standard provision that has precedent in numerous previous DCOs such as the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016, the Silvertown Tunnel Order 2018 and more recently in the A30 Chiverton to Carland Cross Development Consent Order 2020. It is required to ensure that other schemes or legislation of local application that affect land within the Order limits, or land adjacent to the Order limits, have to take account of the Order. It does not modify the application of general legislation. The provision is necessary in this case to ensure that any enactments of local application affecting land within the Order limits that have not been expressly disapplied by article 3, do not impede the delivery of this nationally significant infrastructure project.

### *Article 5 – Maintenance of the authorised development*

- 7.3 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 (see paragraph 6.4 of this explanatory memorandum). Maintenance of the authorised development, within the meaning that would be authorised by this article, has been assessed in the environmental statement, and the power is constrained, through the definition of “maintain”, by the proviso that maintenance works must not give rise to any materially new or materially different environmental effects in comparison with those reported in the environmental statement.
- 7.4 It should be noted that powers of maintenance are subject to other provisions in the Order, in particular article 9 (construction and maintenance of new, altered or diverted streets and other structures), which makes provision in relation to maintenance by highway authorities and article 7 which establishes the limits of deviation for the works.

### *Article 6 – Planning permission*

- 7.5 This article permits certain development authorised by a planning permission granted under the Town and Country Planning Act 1990 that is within the Order limits to be carried out pursuant to the terms of the planning permission without breaching the Order. This provision is not a model provision, but ensures that National Highways does not breach section 161 of the 2008 Act in carrying out development pursuant to a grant of planning permission.



- 7.6 The provision is necessary in order to provide clarity of regulation between works authorised under the Order and works authorised by a grant of planning permission. Provisions of this nature have been included in a number of previous DCOs, see for example the A30 Chiverton to Carland Cross Development Consent Order 2020.
- 7.7 Paragraph (2) preserves National Highways' existing powers and duties under the Highways Act 1980, the New Roads and Street Works Act 1991 and its permitted development rights.

*Article 7 – Limits of deviation*

- 7.8 The authorised development involves linear and non-linear works. Linear works are shown on the works plans by way of a centre line (shown as a green dashed line). The areas within which non-linear works are to be delivered are also shown on the works plans, edged with a dashed blue line. This article provides for limits of deviation laterally (by reference to the Order limits and to the centre lines shown on the works plans), vertically (by reference to the levels shown on the engineering section drawings (plan and profiles) and the engineering section drawings (cross sections)) and along the line of the project, providing for the variation of the commencement and termination points of the numbered works.
- 7.9 Paragraph (3) provides for the lateral limits of deviation for the linear works. Paragraph (3)(a) provides a “standard” limit of deviation of 3 metres either side from the situation of the centreline shown on the Works Plans. Paragraphs (3)(b) and (4) provide for departures from this “standard” limit of deviation in relation to the specific numbered works identified in the associated tables.
- 7.10 In a similar way, paragraph (5) provides for “standard” vertical limits of deviation of 1 metre upwards or downwards, by reference to the levels shown on the Engineering Section Drawings: Plan and Profiles and the Engineering Section Drawings: Cross Sections (Application Documents 5.17 and 5.18 respectively). Exceptions to these standard vertical limits of deviation are set out in the associated table in relation to specific identified numbered works and paragraph (6) makes provision for the Secretary of State to approve exceedances of these limits where satisfied that to do so would not give rise to any materially new or materially different environmental effects compared with those assessed in the Environmental Statement.
- 7.11 Paragraph (7) makes provision for the commencement and termination points of the linear works shown on the Works Plans to deviate by 3 metres and makes specific exceptions for the numbered works referred to in that paragraph.
- 7.12 The purpose of this article is to provide National Highways with a necessary but proportionate degree of flexibility when constructing the authorised development, reducing the risk that the authorised development as approved cannot later be implemented for reasons

which, at the time the application was made and the development consent was granted, could not reasonably have been foreseen. It also gives a proportionate amount of flexibility for the detailed design of the Project, within the set limits.

- 7.13 The limits of deviation set out in article 7 have been developed through the design and EIA process for the Project; as such the article is an adaptation of the article set out in the Model Provisions, and in terms of principle, it accords with the majority of DCOs made to date. Chapter 2 of the Environmental Statement sets out further information in relation to the limits of deviation that have been assessed and explains each of the exceptions to the standard limits of deviation that are provided for by this article.

*Article 8 – Application of the 1991 Act*

- 7.14 This article provides for the application of the New Roads and Street Works Act 1991 (defined in article 2 as “the 1991 Act”). There is precedent for these provisions in respect of the development consent orders granted for other major highways schemes, for example the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and more recently the A303 Sparkford to Ilchester Dualling Development Consent Order 2021.
- 7.15 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, in fact, carries them out.
- 7.16 Paragraph (3) provides that certain provisions of the 1991 Act listed in that paragraph will not apply. The disapplication of these provisions (which are designed primarily to regulate the carrying out of street works by utility companies in respect of their apparatus) is appropriate given the scale of works proposed under the Order, the specific authorisation given for those works by the Order (particularly article 4 and Schedule 1), and the specific provisions in the Order which would regulate the carrying out of the Order works.
- 7.17 Paragraphs (4) to (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to streets which are to be temporarily closed under the Order. This is for two reasons: first, it prevents any confusion as to whether works in respect of a street subject to a temporary prohibition, restriction or regulation under Article 11 are “street works” for the purposes of the 1991 Act; and second, it simplifies the implementation of the works by providing for a single process in respect of streets which are so subject and those which are not.

- 7.18 Paragraph (7) seeks to preserve the application of the 1991 Act in relation to determining the identity of the street authority for streets affected by the Project. Paragraph (7)(a) provides that nothing in article 9 of the Order (which provides that the streets constructed, altered or diverted under the Order are to be maintained by the local highway authority) affects the ability of the local highway authority (under s.87 of the 1991 Act) to apply Part 3 of the 1991 Act to such streets in advance of those streets becoming publicly maintainable. Paragraph (7)(b) limits the operation of article 9 in relation to street works.
- 7.19 The provision is required in order to clarify the treatment of the authorised development in relation to streets for the purposes of the New Roads and Street Works Act 1991 and is essential to ensure the timely delivery of this nationally significant infrastructure project.

*Article 9 – Construction and maintenance of new, altered or diverted streets and other structures*

- 7.20 The purpose and effect of this article 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 Project. For any other streets paragraphs (1), (2), (3), (4) and (5) specify the body that will be liable for maintenance. Liability for maintenance would transfer to the local highway authority (for new public highways constructed, altered or diverted) and to the street authority (for all other streets constructed, altered or diverted) on completion of the works. Where a footpath, bridleway or byway open to all traffic is altered or diverted along a vehicular private means of access, liability for maintenance lies with the person with the benefit of the vehicular private means of access. In the case of the de-trunked sections of road under the Order, maintenance liability would transfer from the date of de-trunking. Maintenance liability for such de-trunked sections is transferred to the local highway authority and the works must be completed to the local highway authority's reasonable satisfaction. Paragraphs (1), (2), (3), (4) and (5) allow National Highways to make alternative agreements with the local highway (or street) authority concerned.
  - (b) Paragraphs (1), (2), (3) and (5) are subject to paragraphs (6) to (8) inclusive, which make specific maintenance provision in relation to new bridges carrying public and private rights of way.
  - (c) The effect of paragraphs (9) and (10) 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.

- 7.21 This article has precedent in the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and similar provisions have appeared in other highways development consent orders (for example the A30 Chiverton to Carland Cross Development Consent Order 2020). The provision is necessary to clarify maintenance liabilities following the completion of streets comprised in the authorised development.

*Article 10 - Permanent stopping up of streets and private means of access*

- 7.22 This article allows streets and private means of access named in Parts 1, 2, 3, and 4 of Schedule 2 to be stopped up (i.e. the legal public right of way along them to be extinguished).

- 7.23 For the streets and private means of access to be stopped up as specified in Parts 1 and 3 of the Schedule, a substitute street is to be provided. The existing street or private means of access cannot be stopped up until either the street authority is satisfied that the new street or private means of access is fit for purpose, or a temporary street or private means of access is made available while the existing one is stopped up and before the new street or private means of access is ready.

- 7.24 For the streets or private means of access to be stopped up as specified in Parts 2 and 4 of Schedule 2, 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) are met in relation to all the land which abuts either side of the street to be stopped up.

- 7.25 The article has precedent in other made highways DCOs and is required for this Project to make appropriate adjustments to the surrounding highway network and to make provision for private means of access that are affected by the Project.

- 7.26 Paragraphs (7) and (8) make provision that would require National Highways, following the opening for public use of new or altered public rights of way to notify the surveying authority (typically the County Council) of the “as built” alignments of those public rights of way, together with a statement of modifications to the definitive map. This notification is deemed to be a legal event order modifying the definitive map accordingly. The purpose of this provision is to facilitate the prompt updating of the definitive map by avoiding imposing a requirement on the surveying authorities to make legal event orders to modify the definitive map as a consequence of the Project. This approach reflects the position where local highway authorities making Highways Act 1980 orders may combine those with a legal event order under the Wildlife and

Countryside Act 1981 (see the Public Rights of Way (Combined Orders) (England) Regulations 2008).

*Article 11 – Temporary prohibition, restriction or regulation of use or temporary alteration or diversion of streets*

- 7.27 This article allows for the temporary prohibition, restriction or regulation or the temporary alteration or diversion of use of streets for the purposes of the authorised development, whilst ensuring that pedestrian access is provided.
- 7.28 Paragraph (2) confers a power on National Highways where the use of a street has been temporarily closed under this article to use it as a temporary working site, a provision which has precedent in a number of development consent orders for example the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 and the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016. Subject to article 52 (consents, agreements and approvals) the consent of the street authority is required where National Highways is not the street authority.
- 7.29 The article is required for the Project to enable appropriate management of traffic for the purposes of carrying out the Project.

*Article 12 – Access to works*

- 7.30 This article allows works accesses to public highways to be created. It would give National Highways a general power to form means of access for the purposes of the authorised development, the intention being to provide equivalent powers to those available for schemes authorised under the Highways Act 1980.
- 7.31 Originally envisaged by the Model Provisions, this wording has been used in Orders such as the Northumberland County Council (A1-South East Northumberland Link Road (Morpeth Northern Bypass)) Development Consent Order 2015 and the Silvertown Tunnel Order 2018 and more recently in the A1 Birtley to Coal House Development Consent Order 2021.

*Article 13 – Discharge of water*

- 7.32 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. It closely follows the Model Provision, amended to reflect the subsequent coming into force of the Environmental Permitting (England and Wales) Regulations 2016 and the Homes and Communities Agency changing the name by which it is known.
- 7.33 The effect of this article is that discharge can only be done with the consent of the owner, but consent cannot be withheld unreasonably.

7.34 Paragraph (5) imposes a duty on the undertaker to ensure that water discharged is free from gravel, soil or other solid substance, oil or matter in suspension. This is to ensure that the water discharged does not affect the efficacy of the drain or watercourse into which it is discharged. It should be noted that this provision is not intended to control the discharge of pollution, such matters are regulated under the Environmental Permitting (England and Wales) Regulations 2016 which, as paragraph (6) makes clear, continue to apply.

7.35 This article has precedent in many DCOs, including, for example, the A14 Cambridge to Huntingdon Improvement Scheme Order 2016 and is necessary for this Project in order to establish and regulate National Highways' authority to discharge water

*Article 14 – Protective works to buildings*

7.36 The purpose of this article (which is included in the Model Provisions and the majority of made DCOs to date) is to allow National Highways to undertake protective works such as underpinning to buildings affected by the authorised development and to set out the procedure that will apply in those circumstances.

7.37 Paragraph (4)(b) provides that National Highways is authorised to enter and survey land lying outside the Order limits but which is adjacent to a building (or the curtilage of a building) in respect of which National Highways has the power to undertake protective works, should it be required.

7.38 Paragraph (4) provides National Highways with a power to take possession, or to take exclusive possession, where reasonably required, for the purpose of carrying out protective works.

7.39 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 15 – Authority to survey and investigate land*

7.40 This article gives National Highways the power to enter certain land for the purpose of surveying and testing. It provides that National Highways must give 14 days' notice before exercising the power of entry, and that compensation is payable for any loss or damage caused.

7.41 Paragraph (7) applies section 13 of the Compulsory Purchase Act 1965, thereby providing an enforcement mechanism (by way of a warrant) where entry onto land under the article is refused.

7.42 Paragraphs (1) to (5) have precedent in the Model Provisions and the majority of made DCOs to date. Paragraphs (6) and (7) have precedent in the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016. 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 2018. 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 Project, or on the Project, from outside its limits. This is particularly relevant with respect to ecological receptors that are liable to move into and out of the Order limits.

*Article 16 – Removal of human remains*

- 7.43 The purpose and effect of this article is to disapply section 25 of the Burial Act 1857 and related legislation, 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 16 is based on a Model Provision and is required to ensure that the appropriate treatment of such remains does not delay the implementation of authorised development.
- 7.44 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 and the A303 (Amesbury to Berwick Down) Development Consent Order 2020. Paragraph (13) requires that the undertaker seeks and complies with a direction from the Secretary of State under paragraph (15) regarding the treatment of such remains following their removal.
- 7.45 Paragraph (18) applies section 239 (use and development of burial grounds) of the Town and Country Planning Act 1990 to land, and rights over land, acquired under the Order and permits the use of such land notwithstanding any obligation or restriction imposed under ecclesiastical law or law relating to burial grounds, save as provided for in the remainder of the article. Paragraph (19) excludes the application of the Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950. The drafting in paragraphs (18) and (19) has precedent in the River Humber Gas Pipeline Replacement Order 2016, although the Order does not apply section 238 (use and development of consecrated land) of the Town and Country Planning Act 1990 as there is no consecrated land within the Order limits.
- 7.46 Taken together the effect of article 16 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 17 – Felling or lopping of trees and hedgerows*

- 7.47 This article allows any tree or shrub that is overhanging the authorised development to be felled or lopped, or have its roots cut back, if it is considered to obstruct the construction, operation or maintenance of the authorised development or endanger anyone using it. Compensation is payable for any loss or damage caused.
- 7.48 Paragraph (2) also makes provision for works to be carried out to the trees protected by tree preservation orders as described in Schedule 3 (trees subject to tree preservation orders) and shown on the Tree Preservation Order Trees Location Plans (Application Document 5.24).
- 7.49 The article is included to ensure that National Highways has adequate powers to construct, operate and maintain the authorised development.
- 7.50 This article is included in the Model Provisions and the majority of made DCOs to date and is required for the Project to ensure that trees or hedgerows do not obstruct the construction, operation or maintenance of this nationally significant infrastructure project.

### *Article 18 – Maintenance of drainage works*

- 7.51 The purpose and effect of this article is to make it clear that any realignment of award drains or other works to them that are carried out as part of the authorised development do not affect the existing allocation of responsibility for maintenance of those drains, unless this is agreed between National Highways and the responsible party.

## **8. PART 3 – POWERS OF ACQUISITION AND POSSESSION OF LAND**

### *Article 19 – Compulsory acquisition of land*

- 8.1 This article authorises the compulsory acquisition of the Order land. It grants National Highways the power to acquire such land as is required for the authorised development. This is subject to articles 22 (compulsory acquisition of rights and restrictive covenants) and 27 (acquisition of subsoil, etc., only), which are explained below.
- 8.2 The drafting of this provision broadly follows the approach taken in the Network Rail (North Doncaster Chord) Order 2012, the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013, the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 and the Silvertown Tunnel Order 2018. The provision is necessary to secure the delivery of the Project as set out in more detail in the Statement of Reasons accompanying the application.



*Article 20 – Compulsory acquisition of land – incorporation of the minerals code*

- 8.3 By incorporating Parts 2 and 3 of Schedule 2 to the Acquisition of Land Act 1981, this article exempts 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 or minerals. Such an article is included in the Model Provisions and the majority of made transport DCOs to date and is necessary to exempt mines and mineral interests from compulsory acquisition under the Order.

*Article 21 – Time limit for exercise of powers to possess land temporarily or to acquire land compulsorily*

- 8.4 This article gives National Highways five years to issue ‘notices to treat’ or to execute ‘general vesting declarations’ to acquire the land that is subject to the power of compulsory acquisition under the Order. These are the two procedural methods by which the process of compulsorily acquiring land may be undertaken should the Order be made. The article also provides that land subject to the power of temporary possession for the carrying out of the authorised development, under article 29 (temporary use of land for constructing the authorised development), may not be occupied after the end of that same period unless the land is already being occupied by National Highways in exercise of the powers of the Order. Such an article is included in the Model Provisions and the majority of made DCOs to date.

*Article 22 – Compulsory acquisition of rights and restrictive covenants*

- 8.5 This article allows for rights over land to be acquired as well as (or instead of) the land itself, and also for new rights and restrictive covenants to be created over land for the benefit of National Highways.
- 8.6 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 19 (compulsory acquisition of land). The public benefit of this is that it would allow National Highways, if appropriate, to reduce the area of outright acquisition and rely on the creation and acquisition of rights instead. A provision of this kind is usual in Transport and Works Act Orders and Hybrid Bills, and has been followed in a number of development consent orders, for example the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 and more recently the A1 Birtley to Coal House Development Consent Order 2021.
- 8.7 Paragraph (2) provides that, for the land described in Schedule 4, 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 4.

- 8.8 The power to impose restrictive covenants allows for the possibility of reducing the area of outright acquisition and therefore enables a more proportionate exercise of compulsory acquisition powers. It is in the public interest and has precedent in Transport and Works Act Orders and the Silvertown Tunnel Order 2018.
- 8.9 Paragraph (3) provides that, where National Highways needs only to acquire rights or restrictive covenants over land, it is not obliged to acquire any greater interest in that land. It is subject to the provisions of section 8 of the 1965 Act, which provide for counter-notices to be served in relation to the acquisition of part of certain landholdings, as modified by Schedule 5 (modification of compensation and compulsory purchase enactments for the creation of new rights and restrictive covenants) to the Order.
- 8.10 Paragraph (4) introduces Schedule 5 which modifies the compulsory purchase and compensation provisions under general legislation. The modifications do not affect the entitlement to compensation, but generally ensure that the compensation code applies equally to the additional categories of acquisition covered by the Order – the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories and is commonplace in DCOs such as the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and more recently the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022. For the purpose of section 126(2) of the 2008 Act, the relevant compensation provisions are modified only to the extent necessary to ensure that they apply properly to the acquisition of rights, and not to affect the amount of compensation to which landowners would be entitled.
- 8.11 Schedule 5 has been drafted to take account of the Housing and Planning Act 2016.

*Article 23 – Private rights over land*

- 8.12 This article applies to extinguish private rights generally. This enables National Highways to take land with a clear, unencumbered title, thereby minimising impediments to the delivery of the Project. It also provides for the extinguishment of private rights over such parts of the Order land as are already in the ownership of National Highways, when any activity authorised by the Order interferes with or breaches those rights. In respect of land subject to the compulsory acquisition of rights or imposition of restrictive covenants, existing rights are extinguished only to the extent that the continued exercise of the existing right would be inconsistent with the enjoyment by National Highways of the rights acquired, or restrictive covenants imposed, under the Order. This approach is proportionate and draws on numerous precedents such as Rookery South (Resource Recovery Facility) Order 2011, A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016

and more recently the A30 Chiverton to Carland Cross Development Consent Order 2020.

*Article 24 – Power to override easements and other rights*

- 8.13 This article provides a power to override easements and other rights and reflects the terms of section 120(3) and (4), and paragraphs 2 and 3 of Part 1 of Schedule 5 to the 2008 Act. This article has precedent in, for example, article 32 of the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 and the A303 (Amesbury to Berwick Down) Development Consent Order 2020. 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.
- 8.14 Notwithstanding the coming into force of section 203 of the Housing and Planning Act 2016 (which introduced a new power to override easements and restrictive covenants to certain specified authorities), the power to override easements and other rights is required in respect of the functions under the Order where National Highways has not acquired land, for example, in relation to the exercise of articles 14 (authority to survey and investigate land), 15 (protective works to buildings) and 17 (felling and lopping of trees and hedgerows) to which the provisions of article 23 (private rights) do not apply.

*Article 25 – Modification of Part 1 of the 1965 Act*

- 8.15 The purpose of this article is to make the provisions that apply to the implementation of the compulsory acquisition of land through the notice to treat and notice of entry procedure in Part 1 of the Compulsory Purchase Act 1965 work in a manner that is consistent with the terms of the Order.
- 8.16 This article modifies the provisions of Part 1 of the Compulsory Purchase Act 1965 as applied to the Order by section 125 of the 2008 Act.
- 8.17 Paragraph (2) modifies the provisions in section 4A of the Compulsory Purchase Act 1965 (which was introduced by the Housing and Planning Act 2016) that extend the time limit for service of a notice of entry where the CPO is subject to a legal challenge. This paragraph makes two modifications. The first is to replace the reference in section 4A of the Compulsory Purchase Act 1965 to challenges to the CPO being made under section 23 of the Acquisition of Land 1981, with a reference instead to challenges to a DCO being made under section 118 of the Planning Act 2008. The second is to change the reference to a 3 year time limit for the service of notice to treat in section 4 of the Compulsory Purchase Act 1965, with a reference to the 5-year time limit in article 21 of the Order.
- 8.18 Paragraph (3) makes minor changes to the procedure (introduced by the Housing and Planning Act 2016) for serving notices to treat and enter on ‘newly identified persons’ which recognise that the undertaker may

already be in possession of the land as a result of the exercise of other powers in the Order, such as article 29 (temporary use of land for constructing the authorised development).

- 8.19 Paragraph (4) changes the reference in section 22 (interests omitted from purchase) of the Compulsory Purchase Act 1965 to the 3 year time limit in section 4 of that Act, to a reference to the five year time limit in article 21 of the Order.
- 8.20 Paragraph (5) makes two modifications. The first is to substitute the references to section 2A of the Acquisition of Land Act 1981 (a provision introduced by the Housing and Planning Act 2016), in paragraph 1(2) and 14(2) of Schedule 2A to the Compulsory Purchase Act 1965 (which was also introduced by the Housing and Planning Act 2016), with references to article 27(4) (acquisition of subsoil, etc., only) of the Order. Section 2A of the Acquisition of Land Act 1981 allows a CPO to modify the application of the counter-notice procedure under Schedule 2A to the Compulsory Purchase Act 1965 in relation to certain below ground interests and article 27(4) of the Order makes a similar provision. The second modification is to insert a new interpretation provision in Schedule 2A to the Compulsory Purchase Act 1965. This is to address the fact that the language in Schedule 2A uses the term "possession" in a sense that means the acquiring authority has served the requisite notices to treat and notices to enter and has then taken possession of the land. The drafting of Schedule 2A to the Compulsory Purchase Act 1965 does not contemplate the acquiring authority having the power to take possession of the land temporarily under articles 29 and 30 of the Order, or to enter land under articles 14 (protective works to buildings) and 15 (authority to survey and investigate land). Therefore, article 25(5)(b) inserts a new provision into Schedule 2A that clarifies that possession of land under those provisions does not constitute "possession" for the purposes of the counter-notice procedures in Schedule 2A.
- 8.21 This provision reflects changes introduced by the Housing and Planning Act 2016. These modifications have broad precedent in Schedule 14 to the High Speed Rail (London – West Midlands) Act 2017 and most recently the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022 and is consistent with the Department for Transport's DCO drafting practice generally.

#### *Article 26 – Application of the 1981 Act*

- 8.22 This article applies the provisions of the 1981 Act to compulsory acquisition under the Order. Vesting declarations are one of two procedures for the compulsory acquisition of land (the other being by means of serving a notice to treat). Vesting declarations allow title in the land concerned to pass to the acquiring authority more quickly than using the notice to treat method. They also enable several parcels of land to be acquired under the same legal instrument and therefore more efficiently than under the notice to treat procedure and are National Highways' preferred procedure for the compulsory acquisition of land.

- 8.23 Paragraph (3) modifies section 1 (application of the Act) so that the provision in the 1981 Act that set its scope is not inconsistent with the provisions of the 1981 Act being applied by the draft Order. In this case the undertaker would be “any other body or person authorised to acquire land by means of a compulsory purchase order”, taking into account that article 26(10) of the Order (discussed below) requires the 1981 Act to be read as though references to a CPO were references to a DCO.
- 8.24 Paragraph (4) omits reference to provisions in section 5(2) of the 1981 Act that are no longer required once you read “compulsory purchase order” as “development consent order” as required by paragraph (10).
- 8.25 Paragraph (5) omits the 3 year time limit for the execution of a general vesting declaration contained in section 3A of the 1981 Act, which was introduced by the Housing and Planning Act 2016. This section was added to clarify previously inconsistent case law as to how the 3 year period after which a vesting declaration may not be executed is to be calculated. The 3 year time limit is omitted by article 26(5) because article 21 (time limits) of the draft Order provides for a 5 year time limit.
- 8.26 Paragraph (6) relates to section 5B of the 1981 Act which was introduced by the Housing and Planning Act 2016, which makes provision to extend the 3 year time limit in cases where the compulsory purchase order is the subject of a legal challenge. Paragraph (6) substitutes a mention of the 3 year time limit for implementing the CPO in section 23 (grounds for application to High Court) of the Acquisition of Land Act 1981, with wording that applies section 118 (legal challenges relating to applications for orders granting development consent) of the Planning Act 2008, taking into account the 5 year time limit specified in article 21 of the draft Order. The effect is, where the Order is subject to a legal challenge, the time limit for making a general vesting declaration is extended in the same way as a CPO, save that the 5 year time limit in article 21 applies, rather than the 3 year time limit in section 5A of the 1981 Act (which is omitted by paragraph (4) above).
- 8.27 Paragraph (7) modifies the provisions in section 6 of the 1981 Act which refer to a notice of confirmation of a CPO required under section 15 of the Acquisition of Land Act 1981, to instead refer to the notice required to be served under section 134 (notice of authorisation of compulsory acquisition) of the Planning Act 2008.
- 8.28 Paragraph (8) omits wording in the 1981 Act that acknowledges the modifications made to the constructive notice to treat that arises from a general vesting declaration under section 4 of the Acquisition of Land Act 1981. Reference to section 4 of the Acquisition of Land Act 1981 is unnecessary because article 37 (disregard of certain interests and purposes) serves the same purpose.
- 8.29 Paragraph (9) amends the counter-notice provisions contained in Schedule A1 to the 1981 Act (the Housing and Planning Act 2016 replaced Schedule 1 with Schedule A1) by replacing the reference in

paragraph 1(2) of Schedule A1 to section 2A of the Acquisition of Land Act 1981, with a reference to article 27(4) (acquisition of subsoil etc., only) of the Order. Section 2A of the Acquisition of Land Act 1981 makes provision for a CPO to modify the application of the counter-notice procedure under Schedule A1 to the 1981 Act in relation to certain below ground interests; article 27(4) of the Order makes a similar provision.

- 8.30 Paragraph (10) requires references in the 1981 Act to be read as references to the Compulsory Purchase Act 1965, as applied by section 125 of the Planning Act 2008 and as modified by Schedule 5 to the Order. In effect, this requires for the purposes of this Order, all references to a compulsory purchase order in the 1981 Act to be read as though they were references to a development consent order that authorises compulsory acquisition, as modified by Schedule 5 to the Order. Schedule 5 to the Order includes provisions to facilitate the acquisition of rights over land or the imposition of restrictive covenants.
- 8.31 Such an article has been included in the Model Provisions and the majority of DCOs made to date but the drafting used in the Order has been adapted, following the M20 Junction 10a Development Consent Order 2017 and the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022, to take account of the Housing and Planning Act 2016.

*Article 27 – Acquisition of subsoil, etc., only*

- 8.32 This article allows National Highways to compulsorily acquire land, rights or both, below the surface or in the airspace, as required for the Project and its protection from subsequent development and other conflicting events or actions, instead of acquiring all of the land up to and including the surface and airspace.
- 8.33 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 landowners and lower compensation payments. It is considered to be in the public interest to provide this flexibility at the point at which National Highways begins to acquire the necessary land.
- 8.34 The drafting of this article is based on the precedents found in the Model Provisions and DCOs such as the Northumberland County Council (A1-South East Northumberland Link Road (Morpeth Northern Bypass)) Development Consent Order 2015 and the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022.

*Article 28 - Rights over or under streets*

- 8.35 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 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.

- 8.36 This article has been included in the Model Provisions and the majority of DCOs made to date, see for example the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022.

*Article 29 – Temporary use of land for constructing the authorised development*

- 8.37 The purpose of this article is to allow the land set out in Schedule 6 (land of which only temporary possession may be taken) to be occupied and used temporarily while the works are carried out. The land identified in Schedule 6 is land which is required during construction of the authorised development but not required permanently.

- 8.38 This article also allows for the temporary occupation of any of the land intended for permanent acquisition, or for the acquisition of new rights, but which has, or which have, not yet been acquired.

- 8.39 The drafting is broadly in line with such articles in made DCOs such as the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014, but has been adapted to make it clear what can be done on Schedule 6 land, and what can be done on land intended for permanent acquisition, or for the creation and permanent acquisition of rights. This is in line with recent precedents, for example, the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022.

- 8.40 Such possession requires not less than 14 days' prior notification to the owner and occupier of the land. This period accords with the precedents of the A19/A184 Testo's Junction Alteration Development Consent Order 2018, the M20 Junction 10a Development Consent Order 2017 and the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022 all of which were made following the enactment of the Neighbourhood Planning Act 2017 (which contains provisions not yet in force that would require a greater period of notice).

- 8.41 The article provides for any of the authorised development listed in Schedule 1 (authorised development), in particular, to be built and remain on land that has been temporarily occupied. The rationale for this is that it enables National Highways to carry out permanent works on land occupied temporarily prior to permanent acquisition. On the completion of the works National Highways will know, with a precision that is not available at an earlier stage, the extent of the land it requires permanently and can ensure that no more land than is actually required to accommodate the Project once implemented, is acquired permanently.

- 8.42 The time limits set out in article 21 (time limit for exercise of powers to possess land temporarily or to acquire land compulsorily) apply to this article.

*Article 30 – Temporary use of land for maintaining the authorised development*

- 8.43 This article provides that National Highways may take temporary possession of land within the Order limits required for the purpose of maintaining the authorised development and to construct such temporary works as may be reasonably necessary for that purpose. Owners and occupiers of the land must be given not less than 28 days' notice and that notice must include details of the purpose for which National Highways requires the land. They are also entitled to compensation. The power is exercisable within a period of 5 years from the time the particular part of the authorised works is first (a) opened for use; or (b) brought into operational use (as the case may be).
- 8.44 This power does not apply with respect to houses, gardens or any other buildings for the time being occupied.
- 8.45 The drafting reflects precedents such as the Northumberland County Council (A1-South East Northumberland Link Road (Morpeth Northern Bypass)) Development Consent Order 2015, the A14 Cambridge to Huntingdon Improvement Scheme Order 2016 and the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022. 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 31 – Statutory undertakers*

- 8.46 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 impracticable 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.
- 8.47 As the land where this power may be exercised is shown on the land plans, and the beneficiaries of such rights are identified 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.
- 8.48 This article has precedent in a number of made orders, for example, in the M20 Junction 10a Development Consent Order 2017 and more recently the A30 Chiverton to Carland Cross Development Consent Order 2020 and is necessary to ensure the timely delivery of this nationally significant infrastructure project. The exercise of this article is subject to the protective provisions contained in Schedule 9.



*Article 32 – Apparatus and rights of statutory undertakers in stopped up streets*

- 8.49 This article (which reflects the Model Provisions) governs what happens to statutory undertakers' apparatus (pipes, cables, etc.) under streets that are stopped up pursuant to 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. National Highways may require such a statutory undertaker to relocate the apparatus elsewhere, although it will compensate the statutory utility for doing so. Paragraph (6) discounts from this compensation the increase in value to the statutory utility of having new rather than old (i.e. older than 7½ years) apparatus.
- 8.50 Paragraph (7) provides that in certain cases (most notably where an existing highway is crossed by a trunk road) the cost of relocating apparatus will be subject to alternative cost sharing arrangements between National Highways and the statutory undertaker which are provided for in regulations made under section 85 of the 1991 Act.

*Article 33 – Recovery of costs of new connection*

- 8.51 This article (which reflects the Model Provisions) provides that if a gas, water, electricity or sewerage undertaker's or public communications provider's apparatus is removed thereby interrupting the service to owners or occupiers of premises, their costs incurred in obtaining a new service can be recovered from National Highways.

*Article 34 – Special category land*

- 8.52 Under section 131 of the 2008 Act an order granting development consent is subject to Special Parliamentary Procedure when it authorises compulsory acquisition of land to which section 131 applies (i.e. a common, open space or fuel or field garden allotment). The exception is if the Secretary of State is satisfied, under section 131(3), that certain tests are met, including if the Secretary of State is satisfied that replacement land has been or will be given in exchange for the order land, and the replacement land has been or will be vested in the prospective seller and subject to the same rights, trusts and incidents as attach to the order land (section 131(4) of the 2008 Act). Under section 132 of the 2008 Act, an Order granting development consent is also subject to Special Parliamentary Procedure when it authorises the creation and compulsory acquisition of rights over land ("Order rights") to which section 132 applies (i.e. common, open space or fuel or field garden allotment). The exception is if the Secretary of State is satisfied that certain tests under section 132(2) of the 2008 Act apply.
- 8.53 This article deals with the replacement of special category land comprising open space, and comprising common land, that is required for the authorised development. The article makes provision for the special category land to be acquired and to vest in the undertaker once

the Secretary of State has approved (in consultation with the planning authority) a scheme for the provision of the replacement land as open space or as common land (as the case may be), and the relevant planning authority has certified that the approved scheme has been implemented to its reasonable satisfaction.

- 8.54 On the date on which the scheme for the replacement land is certified as having been satisfactorily implemented the replacement land will vest, in the case of the replacement open space referred to in paragraph (2)(b)(i) in the person in whom the open space special category land was previously vested. The replacement common land referred to in paragraph (2)(b)(ii) will vest in the relevant planning authority. In either case the replacement land will be subject to the same rights, trusts and incidents as attached to the special category land required for the Project.

#### *Article 35 – Crown rights*

- 8.55 This article protects the Crown's position in relation to its own estates, rights, powers, privileges, authorities and exemptions and ensures that the Crown's written consent is required where any land, hereditaments or rights are to be taken, used or interfered with under the Order. The Order land includes most notably land within the ownership of the Secretary of State for Defence. Given the known presence of Crown landholdings in the Order Land, this article has been included to ensure that any acquisition of other landholdings, or the creation or extinguishment of rights over land, cannot create any interference with the rights of the Crown. This article reflects the provisions of section 135 of the 2008 Act. It is unnecessary to define in the Order the terms "Crown Land" and "the appropriate Crown authority" as a definition is provided in section 227 of the 2008 Act and so, by virtue of the Interpretation Act 1978, those definitions will automatically apply to the Order.

#### *Article 36 – Relocation of Brough Hill Fair*

- 8.56 The purpose and effect of this article is to enable any customary or prescriptive rights that may subsist in relation to the holding of the Brough Hill Fair to be relocated to the replacement Brough Hill Fair Site. This article does not have specific precedent in the Model Provisions but draws upon provisions often included in other Orders for the provision of replacement open space. It is required in order to facilitate the relocation of Brough Hill Fair, the existing site of which is not considered to be open space special category land within the meaning of section 131(12) of the 2008 Act.
- 8.57 Paragraph (1) provides that the undertaker is not to take exclusive possession of the existing Brough Hill Fair site until the Secretary of State has approved a scheme for the provision of the replacement Brough Hill Fair site and the Secretary of State has certified that the scheme has been satisfactorily implemented and the replacement Brough Hill Fair site is suitable and available for use by the persons that enjoy the Brough Hill Fair rights. The provision uses the term "exclusive possession" as the

trigger for two reasons. Firstly, as the existing Brough Hill Fair site is Crown land, more commonly used triggers such as “on the exercise of the relevant Order powers” are inappropriate. Secondly, the provision seeks to safeguard the exercise of the existing Brough Hill Fair rights until the replacement site is established and it is the exclusive possession of the existing site by the undertaker that would, if permitted, interfere with the exercise of those rights. However, the term would still permit the undertaker to enter the existing Brough Hill Fair site for the purposes of construction if required (for example, to carry out surveys) provided that such an entry does not constitute exclusive possession. The Applicant considers this achieves an appropriate balance.

- 8.58 Paragraph (2) provides more information as to what is to be included in the scheme for the replacement Brough Hill Fair site and how that scheme is to be developed and thereafter managed. The scheme is required to ensure that the replacement site is laid out in a way the provides a suitable replacement by including facilities that are at least the equivalent to those on the existing site on the date the Order comes into force. This ensures a minimum standard is provided whilst not prohibiting the provision of improved facilities. It also requires particular regard to be given to safety and security considerations. This paragraph also requires the undertaker to consult the representatives of the Gypsy community that enjoy the Brough Hill fair rights and the owners and occupiers of land adjacent to the replacement Brough Hill Fair site, the relevant planning authority and the local highway authority on the proposed replacement Brough Hill Fair scheme.
- 8.59 Paragraph (3) gives effect to the relocation of the Brough Hill Fair rights by vesting the existing Brough Hill Fair rights in the replacement Brough Hill Fair site and releasing the existing Brough Hill Fair site from those rights. It is triggered on the undertaker taking exclusive possession of the existing Brough Hill Fair site, following certification by the Secretary of State of the satisfactory implementation of the approved replacement scheme.
- 8.60 Paragraph (4) requires the undertaker to publicise the date of the relocation of the Brough Hill Fair rights in a locally circulating newspaper and by notifying representatives of the Gypsy and Traveller community as soon as reasonably practicably after it has taken place.
- 8.61 Paragraph (5) is a saving provision to ensure that the provisions of this article do not prohibit the undertaker from implementing the replacement Brough Hill Fair site scheme once it has been approved. This is necessary because part of the replacement Brough Hill Fair site overlaps with the existing Brough Hill Fair site.
- 8.62 Paragraph (6) makes provision for the Secretary of State to approve amendments to the replacement Brough Hill Fair scheme before it is fully implemented. Any such amendments must be prepared in accordance with the standards and consultation prescribed in paragraph (2).

- 8.63 Paragraph (7) is a saving provision that would ensure that the exercise of the powers conferred by this article are not to be construed in any legal proceedings relating to the nature and extent of the Brough Hill Fair rights, as constituting an interruption to the enjoyment of those rights. Its purpose to preserve the status quo in relation to any such proceedings.
- 8.64 Paragraph (8) sets out the key defined terms and identifies the location of the existing and replacement Brough Hill Fair sites.
- 8.65 It is important to note that this article seeks only to change the geographical location in which the Brough Hill Fair rights may be exercised. It does not in any way seek to alter the nature, status or character of the Brough Hill Fair rights that subsist. This article therefore ensures that there is continuity to the aspects of intangible cultural heritage expressed at the existing Brough Hill Fair site as far as practicable, as there can be no interruption to those activities unless the scheme for the replacement Brough Hill Fair site has been developed in consultation with the Gypsy and Traveller community, approved by the Secretary of State and then satisfactorily implemented.

*Article 37 – Disregard of certain interests and improvements*

- 8.66 This article provides for the Tribunal to disregard certain interests in and enhancements to the value of land for the purposes of assessing compensation with respect to its compulsory acquisition where the creation of the interest or the making of the enhancement was designed with a view to obtaining compensation or increased compensation.
- 8.67 It complies with section 126 of the 2008 Act as it does not have the effect of modifying or excluding the application of an existing provision relating to compulsory purchase compensation. The article has precedent in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 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 and more recently in the Great Yarmouth Third River Crossing Development Consent Order 2020.
- 8.68 The wording of this article mirrors section 4 (assessment of compensation) of the Acquisition of Land Act 1981 (in this paragraph "the 1981 Act"). It is necessary to specifically apply the effect of section 4 of the 1981 Act in the Order. This is because the 1981 Act only applies to a compulsory purchase to which any other statutory instrument has applied its provisions and neither the 2008 Act, nor standard Order provisions, apply the 1981 Act. Sections 120(3) and 120(5)(a) and Schedule 5 (by virtue of section 120(3)) of the 2008 Act allow the application in a DCO of statutory provisions which relate to the payment of compensation.

*Article 38 – Set-off for enhancement in value of retained land*

- 8.69 This article provides that in assessing the compensation payable to any person in respect of the acquisition of any land, the Tribunal must 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.
- 8.70 This article complies with section 126(2) of the 2008 Act as it does not have the effect of modifying the application of an existing provision relating to compulsory purchase compensation. The article has precedent in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 and TWAOs such as the London Underground (Northern Line Extension) Order 2014, the Midland Metro (Wolverhampton City Centre Extension) Order 2016 and more recently in the Great Yarmouth Third River Crossing Development Consent Order 2020.
- 8.71 The principle in this article was established in section 7 of the Land Compensation Act 1961 (effect of certain actual or prospective development of adjacent land in same ownership) and is now reflected in section 6B of that Act following amendments made by the Housing and Planning Act 2016, which needs to be applied. Sections 120(3) and 120(5)(a) of and Schedule 5 (by virtue of section 120(3)) to the 2008 Act allow the application in a DCO of statutory provisions which relate to the payment of compensation.

*Article 39 – No double recovery*

- 8.72 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.
- 8.73 The principle of equivalence, namely that a claimant in a compulsory purchase matter is to be compensated for no more than and no less than the loss suffered, is long established and no part of the compensation code conflicts with this principle.
- 8.74 This article has precedent in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014, the National Grid (Richborough Connection Project) Development Consent Order 2017 and more recently in the Great Yarmouth Third River Crossing Development Consent Order 2020.

9. **PART 4 - OPERATIONAL PROVISIONS**

*Article 40 - Classification of roads, etc.*

- 9.1 The designation of highways is an ancillary matter which may be included in a development consent order in accordance with section 120(5) of, and paragraph 19 of Schedule 5 to, the 2008 Act. These and other related matters (e.g. de-trunking) are addressed by this article, which is integral to the implementation of the authorised development and makes

appropriate provision to integrate it within the surrounding highway network.

- 9.2 Paragraph (1) confirms the classification of the roads referred to in the corresponding Parts of Schedule 7. The classification takes effect from the date that such roads are completed and opened for traffic. Paragraph (6) gives effect to the de-trunking of the parts of the existing A66 that are listed in Schedule 7 and which take effect on a date to be determined by the undertaker. This discretion to determine the date of de-trunking ensures that an orderly handover to the local highway authority can take place in relation to the duty to maintain the de-trunked road in accordance with the provisions of article 9.

#### *Article 41 – Clearways*

- 9.3 This article applies clearways to the mainline elements of the Project. It is necessary to ensure safe and proper operation of the authorised development, and to ensure that the Project delivers its intended benefits. It is therefore considered appropriate to be included in the Order as an ancillary matter under section 120(3) of the 2008 Act.
- 9.4 Paragraph (1) prohibits waiting on any part of a road specified as a clearway in Part 2 of Schedule 8 except upon the direction, or with the permission, of a uniformed constable or uniformed traffic officer. Paragraphs (2) and (3) set out the circumstances in which it would be lawful for a vehicle to wait on any part of a road specified in Part 2 of Schedule 8. Paragraph (4) provides that the clearway provisions can be varied or revoked without the need to apply under the 2008 Act for an amendment to the Order.

#### *Article 42 – Traffic regulation measures*

- 9.5 The specification of the classes of traffic authorised to use a highway, and speed limits to be applied to highway, are ancillary matters which may be included in a development consent order in accordance with section 120(3) of, and paragraph 20 of Schedule 5 to, the 2008 Act. The purpose of this article (which has precedent in, for example, the A19/1058 Coast Road (Junction Improvement) Development Consent Order 2016 and the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016, and more recently in the Great Yarmouth Third River Crossing Development Consent Order 2020) is to provide National Highways with powers to make deemed traffic regulation orders, so that it can implement traffic regulation measures (e.g. restrictions on the use of roads) in connection with the authorised development.
- 9.6 It includes a number of specific traffic regulation measures that are required to enable the Project to operate properly and to be integrated into the existing highway network. These measures are set out in Schedule 8 (and brought into effect by paragraph (1)), as well as more general powers by virtue of paragraph (3).

- 9.7 Implementation in certain circumstances is subject to the prior approval of the traffic authority in whose area the roads are situated and consultation with the relevant chief officer of police.
- 9.8 The inclusion of the article in the Order is essential for the safe operation of the highway network comprised in, and in the vicinity of Project, during its construction and operation.

10. **PART 5 – MISCELLANEOUS AND GENERAL**

*Article 43 – Benefit of the Order*

- 10.1 This article overrides section 156(1) of the 2008 Act (as permitted by section 156(2)) to give the benefit of the Order to National Highways rather than anyone with an interest in the land. It would be wholly 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.
- 10.2 The purpose of paragraph (2) is to clarify the exceptions where the Order will self-evidently benefit others e.g. rights for statutory undertakers, and mitigation works outlined in the Schedule 1 description of the works. Without this provision, there would be a contradiction since strictly speaking only National Highways could benefit from these works.

*Article 44 – Consent to transfer benefit of Order*

- 10.3 This article would allow powers under the Order to be transferred to others by National Highways with the consent of the Secretary of State. 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; the A63 (Castle Street Improvement, Hull) Development Consent Order 2020; the A585 Windy Harbour to Skippool Highway Development Consent Order 2020; and the M42 Junction 6 Development Consent Order 2020.

*Article 45 – Application of landlord and tenant law*

- 10.4 This article provides that landlord and tenant law will be overridden so as not to prejudice the operation of any agreement entered into under article 44 (consent to transfer benefit of Order).

*Article 46 – Operational land for purposes of the 1990 Act*

- 10.5 This article declares that the Order land is to be treated as the operational land of a statutory undertaker for the purposes of the Town and Country Planning Act 1990.

*Article 47 – Defence to proceedings in respect of statutory nuisance*

- 10.6 This article provides a defence to statutory nuisance proceedings brought under the Environmental Protection Act 1990 in respect of noise emitted from premises. The defence is only available if:
- (a) the noise is created in the course of the carrying out or maintenance of the works authorised by the Order in accordance with a notice given under sections 60 or 61 of the Control of Pollution Act 1974; or
  - (b) is a consequence of the construction, maintenance or use of the authorised development and cannot reasonably be avoided.
- 10.7 Section 61(9) of the Control of Pollution Act 1974 does not apply if the consent relates to the use of premises by National Highways for the purposes of or in connection with the construction or maintenance of the authorised development.
- 10.8 This article has been included in a number of development consent orders to date including for example the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and more recently in the Great Yarmouth Third River Crossing Development Consent Order 2020, and is necessary to clarify the scope of the defence of statutory authority arising from the grant of the Order.

*Article 48 – Protective provisions*

- 10.9 This article introduces Schedule 9, which contains provisions protecting the interests of third parties.
- 10.10 Schedule 9 currently contains protective provisions for the benefit of the following parties affected by the Project:
- (a) electricity, gas, water and sewerage undertakers;
  - (b) electronic communications code network operators, updated to take account of changes to the Electronic Communications Code;
  - (c) National Grid Electricity Transmission PLC;
  - (d) National Grid Gas PLC;
  - (e) the Environment Agency;
  - (f) Network Rail Infrastructure Limited; and
  - (g) drainage authorities.
- 10.11 The provisions in Parts 1 and 2 are well established standard provisions to protect the interests of those with their benefit. The status of negotiations with the named entities in relation to the terms of their corresponding protective provisions are reported in document 7.12



Statutory Undertakers Status of Negotiations Schedule submitted at Deadline 5.

*Article 49 – Certification of plans, etc.*

- 10.12 This article provides for various plans and other documents to be certified by the Secretary of State as true copies of those documents referred to in the Order. The documents in question (with their reference and revision numbers) are listed in Schedule 10. A form of this article is included in the Model Provisions and in the majority of DCOs made to date.

*Article 50 – Service of notices*

- 10.13 This article governs how any notices that may be served under the Order are deemed to have been served properly. In particular it allows service by email with the consent of the recipient, and deals with the situation of service on an unknown landowner. The provision is necessary because the service of notice provisions under sections 229 and 230 of the 2008 Act only apply to notices served under the 2008 Act itself and do not apply to notices served under the Order. This article has precedent in a number of development consent orders, for example, the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and more recently the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022.

*Article 51 – Arbitration*

- 10.14 This article governs what happens when two parties disagree in relation to the implementation or interpretation of any provision of the Order. A dispute must be referred to arbitration, and if the parties cannot agree on an arbitrator the appointment will be decided by the President of the Institution of Civil Engineers. A form of this article is in the Model Provisions and in the majority of made DCOs to date, for example the A30 Chiverton to Carland Cross Development Consent Order 2020 and the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022.

*Article 52 – Consents, agreements and approvals*

- 10.15 This article provides for the mechanics of the consents, agreements and approvals (listed in the definition of “application” in paragraph (4)) that need to be obtained by National Highways under the Order. In summary, it ensures that any consents, agreements or approvals (a) cannot be unreasonably withheld or delayed; and (b) are deemed to be granted after a period of 28 days if no decision is made, beginning with the day any application for a consent, agreement or approval is made.
- 10.16 Any application for a consent, agreement or approval must include a written statement that the 28 day ‘guillotine’ provision is in force.
- 10.17 The purpose of the article is to draw together the usual provisions for consents, agreements and approvals under the Order, rather than

including them for each consent, agreement or approval required under the Order which National Highways considers is repetitive.

- 10.18 The Applicant considers that 28 days, the equivalent of a month, is sufficient time for a relevant authority (as defined in article 52(4)) to either grant consent or to refuse it and that it is in the public interest that the benefits the Project would deliver are not unduly delayed.

*Article 53 – Environmental Management Plans*

- 10.19 This article secures the environmental mitigation for the construction, operation and maintenance of the authorised development in respect of mitigation that does not relate to the mitigation embedded within the design (in relation to which see article 54 (detailed design) below).
- 10.20 The first iteration Environmental Management Plan (Application Document 2.7) (“the first iteration EMP”) contains all of the provisions that would normally be contained in an EMP. It also contains all of the provisions that would normally be contained in requirements to a DCO, with the result that the Order does not contain a Schedule setting out any requirements. The EMP sets out the parties that are to be consulted, what they are to be consulted on, how they are to be consulted and how National Highways must take into account the feedback and how that feedback and consideration is to be reported.
- 10.21 As the provisions of this article are so fundamental to how the Project is to be constructed, operated and maintained they are contained in the operative provisions (i.e. as an article) rather than being included in a Schedule. The location of the drafting, whether it is an article or contained in a Schedule to the DCO has no bearing on its effectiveness or enforceability.
- 10.22 Paragraph (1) prohibits the commencement of any part of the authorised development until the Secretary of State has approved a second iteration EMP for that part.
- 10.23 Paragraphs (2) and (3) require the authorised development to be constructed substantially in accordance with the approved second iteration EMP and maintained and operated substantially in accordance with the third iteration EMP, securing compliance with the provisions contained within those approved documents. The article uses the term “substantially in accordance with” rather than “in accordance with” to provide a degree of flexibility to enable outline documents to be developed into “full” documents.
- 10.24 Paragraph (4) sets out what is to be included in a second iteration EMP and how a second iteration EMP is to be prepared. It does so by requiring a second iteration EMP:
- (a) to be substantially in accordance with the first iteration EMP (the version of the EMP that is certified shortly after the DCO is made,

if development consent is granted, in accordance with article 49 (certification of plans, etc.)); and

- (b) to the extent that any part of the second iteration EMP is not in substantial accordance with the first iteration EMP, the Secretary of State must be satisfied that the approval would not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement.

- 10.25 Paragraph (4) also requires the second iteration EMP to be prepared in accordance with the consultation and determination provisions which are contained in the first iteration EMP (the terms of which would be fixed when the DCO is made, if development consent is granted). This ensures that the appropriate consultees are consulted on the matters relevant to their functions and ensures a clear and common process for consultation across the Project. The “consultation and determination provisions” defined in paragraph (12) by reference to the relevant provisions of the first iteration EMP which would effectively become fixed when the Order is made, if granted. The consultation and determination provisions contained in the first iteration EMP set out a two stage consultation process that is to be carried out by the Applicant prior to determinations made by the Secretary of State or the Applicant under this article. It also requires the production of a summary report of those two stages of consultation. As such, the Applicant considers it to be unnecessary to provide on the face of the article any further provision relating to consultation because it is adequately secured by reference to the first iteration EMP.
- 10.26 Paragraph (5) provides the Secretary of State with a discretion to approve amendments to a second iteration EMP, on the application of the undertaker. Any amendments to a second iteration EMP approved by the Secretary of State must comply with the requirements of paragraph (4) in terms of what amendments may be approved and the consultation that must be carried out in relation to them. This provides a degree of flexibility to the measures contained in the second iteration EMP subject to the Secretary of State’s approval and by following a clear and transparent consultation process with the relevant consultees.
- 10.27 Paragraphs (6) to (9) deal with amendments to the second iteration EMP that may be made by the undertaker without the approval of the Secretary of State.
- 10.28 Paragraph (6) permits the undertaker to amend a second iteration EMP subject to paragraphs (7), (8) and (9).
- 10.29 Paragraph (7) establishes the limits within which the undertaker may approve amendments to the second iteration EMP. The undertaker may only approve amendments if they are (i) substantially in accordance with the second iteration EMP approved by the Secretary of State and (ii) would not give rise to materially new or materially different environmental

effects in comparison with those reported in the Environmental Statement. The scope of amendments that may be approved by the undertaker under this paragraph are considerably more limited than what may be approved by the Secretary of State under paragraph (5). Additionally, any such amendments must be prepared in accordance with the consultation and determination provisions contained in the first iteration EMP.

- 10.30 Paragraphs (8) and (9) relate to the supervision by the Secretary of State of the exercise of the power by the undertaker to approve amendments to the second iteration EMP under paragraph (7). This is broadly similar to a power to “call-in” a planning application.
- 10.31 Paragraph (8) requires the undertaker to provide the Secretary of State with a copy of the relevant documentation relating to the proposed determination, including a copy of the summary report of the consultation carried out and other relevant information, before determining whether to make an amendment to the second iteration EMP. The undertaker must not make such a determination until (i) a period of 14 days has expired from the receipt by the Secretary of State of the information relating to the proposed determination or (ii) the Secretary of State has notified the undertaker that it may proceed to determine the application. This ensures that the Secretary of State is kept informed of the amendments to the second iteration EMP proposed to be made by the undertaker, including the views of consultees, and is provided with a reasonable period of time to intervene if it is considered appropriate to do so.
- 10.32 Paragraph (9) is concerned with giving the Secretary of State the power to intervene in the undertaker’s proposed determinations under paragraph (6). It allows the Secretary of State to direct the undertaker not to make the determination and that instead the determination is to be made by the Secretary of State. Where such a direction is made it is to be determined by the Secretary of State as though it was a request made by the undertaker under paragraph (5) and subject to the slightly wider scope of discretion afforded to the Secretary of State by virtue of paragraph (4).
- 10.33 Paragraph (10) deals with the transition from construction of the authorised development to the operation and maintenance of the authorised development. It requires, on completion of each part of the authorised development, the preparation of a third iteration EMP for that part. The third iteration EMP must reflect the measures relevant to the operation and maintenance of that part of the authorised development contained in the relevant second iteration EMP. This paragraph also permits the undertaker to amend the third iteration EMP but such amendments must always reflect the measures relevant to the operation and maintenance of that part of the authorised development contained within the second iteration EMP. This provides a degree of flexibility, within the scope of the approved second iteration EMP, to make amendments to the third iteration EMP during operation and maintenance.

- 10.34 Paragraph (11) permits steps taken to comply with this article before the DCO comes into force to be “counted as” having been done under this article. This provision is commonly included in requirements to a DCO and is a sensible provision which facilitates early progress to be made by the undertaker in meeting its duties under this article.
- 10.35 Paragraph (12) contains the key definitions used in this article.
- 10.36 The EMP explains in greater detail the background behind National Highways’ approach to environmental mitigation for this Project and why it is taking this approach in the circumstances of this Project and its status as a vital infrastructure project under ‘Project Speed’.

*Article 54 – Detailed design*

- 10.37 This article secures a detailed design that is in substantial accordance, subject to article 7 (limits of deviation), with the design principles, the works plans and the engineering section drawings (plan and profiles) and engineering section drawings (cross-sections). Its drafting is based on that typically included in the requirements to development consent Order granted to National Highways, although it goes somewhat further that is usually the case by requiring accordance with the design principles (defined in article 2(1) by reference to a document titled “Project Design principles”). The Project Design Principles sets out a series of Project-wide design principles that guide the development of the detailed design of the Project, together with a series of Scheme specific design principles that secure relevant embedded mitigation, and elements of ‘good design’ as set out in the National Networks National Policy Statement.
- 10.38 Paragraph (2) enables the Secretary of State, following consultation with the relevant planning authority, the Environment Agency, Historic England and Natural England, to approve departures from those documents, provided that the Secretary of State is satisfied that to do so would not give rise to materially new or materially different environmental effects from those assessed in the environmental statement. Paragraph (3) gives effect to the approved changes.
- 10.39 In common with the majority of development consent Orders granted to the undertaker, this article makes no provision for the detailed design to be approved by the Secretary of State. Such approval is not considered to be necessary as National Highways, as the body responsible for setting the design standards for England’s trunk road network has the expertise required to carry out the design of such works.

*Article 55 – Time limit for when development must begin*

- 10.40 This article provides for a time limit for when development must begin. This article displaces the default time limit that would be imposed by section 154 of the 2008 Act via regulation 6 of the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015 which provides for a period of 5 years from the date

the Order is made. Instead, this article provides for the 5 year period to run from the date that the Order comes into force, ensuring that the full 5 year period remains available to the undertaker. Paragraph (2) applies section 155 of the 2008 Act to any determination as to when development has begun.

## 11. **SCHEDULES**

### *Schedule 1 - Authorised development*

- 11.1 Schedule 1 sets out the component parts of the authorised development, which is described in detail in Chapter 2 of the environmental statement.
- 11.2 As with many of the Schedules that follow, it is structured to reflect each of the 8 Schemes that comprise the Project.
- 11.3 A list of ancillary works is included at the end of Schedule 1. The ancillary works listed in Schedule 1 support, and are ancillary to, the carrying out of the numbered works and may not give rise to any materially new or materially different environmental effects than those assessed in the environmental statement. They must relate to the numbered works, since they must be “For the purposes of or in connection with the construction of any of the works and other development mentioned above”, as set out in the paragraph preceding the list of ancillary works in Schedule 1.
- 11.4 In terms of location, article 7(1) (limits of deviation) confirms that the authorised development must be constructed within the Order limits. Any ancillary work would also be expected to be in the same general location as the numbered work to which it relates.
- 11.5 Ancillary works are set out separately to the numbered works so as to avoid the need to repeat them within the description of each of the numbered works. This approach aids the clarity and legibility of the description of the numbered works.

### *Schedule 2 – Permanent stopping up of highways and private means of access and provision of new highways and private means of access*

- 11.6 This Schedule is introduced by, and relates to, article 10 (permanent stopping up of streets and private means of access) and the Rights of Way and Access Plans (Application Document 5.19). It is divided into 4 Parts and within each Part is organised on a Scheme by Scheme basis.

### *Schedule 3 – Trees Subject to Preservation Orders*

- 11.7 This Schedule is introduced by, and relates to, article 17(2) (felling or lopping of trees and hedgerows) and the Tree Preservation Order Trees Location Plans (Application Document 5.24). It provides details of the works required to trees that are subject to tree preservation orders and is organised on a Scheme by Scheme basis.

### *Schedule 4 – Land in which only new rights etc., may be acquired*

- 11.8 This Schedule is introduced by, and relates to, article 22(2) (compulsory acquisition of rights and restrictive covenants) and the suite of compulsory acquisition documentation, in particular the Land Plans, Crown Land Plans, Special Category Land Plans (Application Documents 5.13, 5.14 and 5.15 respectively) and the Book of Reference (Application Document 5.7). This Schedule lists all of the plots of land shown on the Land Plans in blue to denote the plots over which National Highways seeks the power to acquire compulsorily new rights and restrictive covenants rather than seek the power to compulsorily acquire the land. It is organised on a Scheme by Scheme basis. For further information in relation to powers of compulsory acquisition sought by National Highways, please see the Statement of Reasons (Application Document 5.8).

*Schedule 5 – Modification of compensation and compulsory purchase enactments for the creation of new rights and restrictive covenants*

- 11.9 This Schedule is introduced by, and relates to, article 22(4) (compulsory acquisition of rights and restrictive covenants). Its provisions are discussed in more detail above in relation to article 22.

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

- 11.10 This Schedule is introduced by, and relates to, article 29(1)(a)(i) (temporary use of land for constructing the authorised development) and the suite of compulsory acquisition documentation, in particular the Land Plans (Application Document 5.13), and the Book of Reference (Application Document 5.7). This Schedule lists all of the plots of land shown on the Land Plans in green to denote the plots of land over which National Highways seeks only the power to temporarily possess. It is organised on a Scheme by Scheme basis. For further information in relation to powers of temporary possession sought by the National Highways, please see the Statement of Reasons (Application Document 5.8).

*Schedule 7 – Classification of roads, etc.*

- 11.11 This Schedule is introduced by, and relates to, article 40 (classification of roads) and the Classification of Roads Plans (Application Document 5.20). It is organised into Parts describing the roads to be classified, which are presented on a Scheme by Scheme basis.

*Schedule 8 – Traffic Regulation Measures*

- 11.12 This Schedule is introduced by article 41 (clearways) and relates to that article and article 42 (traffic regulation measures) and the Traffic Regulation Measures (Clearways and Prohibitions) Plans and the Traffic Regulation Measures (Speed Limits) Plans (Application Documents 5.22 and 5.23 respectively). It is organised into three Parts and each Part is presented on a Scheme by Scheme basis.

*Schedule 9 – Protective Provisions*

- 11.13 This Schedule is introduced by article 48 (protective provisions). It is organised into Parts that correspond to the bodies with the benefit of those provisions. Parts 1 and 2 contain general protective provisions for electricity, gas, water and sewerage undertakers and electronic communications code operators and Part 7 contains provisions for the protection of drainage authorities. The remaining Parts contain provisions for the protection of specific named entities.

*Schedule 10 – Documents to be certified*

- 11.14 This Schedule relates to article 49 (certification of plans, etc.) and lists the documents that are to be certified in accordance with the terms of that article.