

# M5 Junction 10 Improvements Scheme

## Explanatory Memorandum

### TR010063 - APP 3.2

Regulation 5 (2) (c)

Planning Act 2008

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



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# Infrastructure Planning Planning Act 2008

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

### M5 Junction 10 Improvement Scheme Development Consent Order 202[x]

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#### 3.2 EXPLANATORY MEMORANDUM

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## 1 SUMMARY

- 1.1 This memorandum explains the purpose and effect of each article of, and the Schedules to, the draft M5 Junction 10 Development Consent Order (the "**Order**"), as required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009<sup>1</sup> (the "**APFP Regulations**").
- 1.2 Regulation 5(2)(c) requires this memorandum to explain "*the purpose and effect of provisions in the draft order*".

## 2 PURPOSE OF THE ORDER

- 2.1 Gloucestershire County Council (the "**Applicant**") is applying to the Secretary of State for Transport (the "**Secretary of State**") for a development consent order for the M5 Junction 10 improvements scheme (the "**Scheme**").
- 2.2 In summary the Scheme involves the alteration of the currently northbound only junction to an all-movements junction enabling access/egress both south and north to the M5 motorway. The Scheme includes three key elements comprising the alterations to M5 Junction 10; the widening of the A4019 east of Junction 10 to create a dual carriageway; and the construction of the new West Cheltenham Link Road between the A4019 and the B4634. A detailed description of the Scheme is included in Chapter 2 of the Environmental Statement.

### **Nationally Significant Infrastructure Project**

- 2.3 The Scheme is a Nationally Significant Infrastructure Project ("**NSIP**") under sections 14(1)(h) and 22(1)(a) of the Planning Act 2008 (the "**Act**").
- 2.4 Under section 14(1)(h) of the Act "highway-related development" constitutes an NSIP.
- 2.5 Under section 22(1) of the Act highway-related development is within section 14(1)(h) only if the development falls within one of three specified categories: construction of a highway in a case within subsection (2), alteration of a highway in a case within subsection (3) or improvement of a highway in a case within subsection (5).
- 2.6 The Scheme includes alterations to Junction 10 of the M5 motorway, which is part of the strategic highway network. It therefore constitutes the "alteration" of a highway within the meaning of section 22(3). The Scheme meets the requirements of this definition under section 22(3) as follows:
- (a) The highway is wholly in England (section 22(3)(a));

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<sup>1</sup> S.I. 2009/2264

- (b) National Highways (the strategic highways company) is the highway authority for the highway (section 22(3)(b)); and
  - (c) The area of development is approximately 53 hectares, which is greater than the relevant limit set out in subsection (4), in this case being 15 hectares as the M5 is a motorway (sections 22(3)(c) and 22(4)(a)).
- 2.7 As the Scheme is an NSIP development consent must be obtained from the Secretary of State for Transport to authorise it, and an application for a development consent order must be made to the Planning Inspectorate ("**PINS**"), who administer the DCO process on behalf of the Secretary of State, under section 37 of the Act.
- 2.8 Schedule 1 (authorised development) to the draft Order (Document Reference 3.1) contains a list of numbered works comprising the Scheme.

### **Associated development**

- 2.9 The draft Order 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 the NSIP ("**associated development**").
- 2.10 Guidance on associated development has been issued by the Secretary of State<sup>2</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 requiring "*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).
- 2.11 Annex B to the Guidance gives examples of associated development for different types of infrastructure projects. The highways examples include:
- (a) Replacement roadside facilities where this becomes necessary due to the elimination of an existing facility by highway improvement.
  - (b) Infrastructure associated with cycle/pedestrian access.
  - (c) Off-site landscaping, habitat creation and other environmental works.
  - (d) Off-site drainage works.
  - (e) Alteration/diversion/stopping up of local roads, accesses and other rights of way.

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<sup>2</sup> 'Planning Act 2008: associated development applications for major infrastructure projects' (Department for Communities and Local Government) (April 2013)

(f) Off-site diversion of statutory undertakers' equipment.

2.12 In some cases there may be some overlap between associated development and works which form part of the NSIP. 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.

### **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 relating to the compulsory acquisition of land. It is for this reason that under section 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 temporary and permanent stopping up of lengths of existing highway and private means of access in the vicinity of the Scheme, the classification of highways, the imposition of traffic regulation measures (including the application of speed limits), the creation of new private means of access, and the application and disapplication of legislation.

### **4 THE DRAFT ORDER**

4.1 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 (S.I. 2009/2265) has been repealed, the draft Order is based on the model provisions as well as other development consent orders that have been made to date.

#### **Part 1 – Preliminary**

##### *Article 1 - Citation and commencement*

4.2 Article 1 sets out the name of the Order and the date on which it comes into force.

4.3 This article did not appear in the model provisions. However, it is a standard article that is included in all development consent orders.

##### *Article 2 - Interpretation*

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

4.5 Definitions to note include:

- (a) "Commence" which makes clear that a number of works that would constitute a 'material operation' under the Town and Country Planning Act 1990 do not mean that the authorised development has been 'commenced'. This enables the Applicant to undertake certain preparatory works prior to the submission of relevant details for approval under the requirements, which the Applicant considers proportionate. The works that are excluded from the definition of commencement are either de minimis or have minimal potential for adverse impacts. They may in some cases need to be carried out in order to comply with the pre-commencement requirements (for example, to inform assessments and proposals required to be submitted for approval). The Applicant should be permitted to carry out low impact preparatory works following the grant of the development consent order, while it is working to discharge the pre-commencement requirements, thereby helping to minimise the construction timetable. The extent of those preparatory works is explained in Chapter 2 of the Environmental Statement (Document Reference 6.2).
- (b) "Maintain" which includes inspect, repair, adjust, alter, remove, replace and reconstruct. The Applicant considers this to be a reasonable definition that is narrower than definitions which have appeared in some previous orders<sup>3</sup>. The proper maintenance of the highway is an essential part of ensuring the safety of road users. The Applicant has extensive statutory powers to maintain the road network. It is therefore appropriate for 'maintain' to have a reasonably broad definition, to ensure that the Applicant can carry out whatever maintenance activities it needs to in order to ensure continued public safety. The power to maintain in article 6 is expressed as being a power to "*maintain the authorised development*" and it does not extend to matters beyond the development as authorised.
- (c) "the Order land" which includes the words 'or used permanently or temporarily' as some of the land may only be used temporarily, rather than acquired.
- (d) "the Order limits" which means the red line boundary for the Scheme as shown on the Works Plans and the Land Plans.

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

4.7 Article 2(3) defines measurements as approximate. The purpose of this is to ensure that if, upon construction of the works, it transpires that the distances are marginally different to those listed in the Order, there is no issue over whether the Order permits the works.

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<sup>3</sup> See for example the definition in The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016, which also includes terms such as "demolish" and "improve", amongst others.

Thus this provision allows for a small tolerance, although all works will take place within the limits of deviation. It is now common practice to include such provision in development consent orders and the model provisions included similar wording in article 1(3).

4.8 Article 2(4) provides that areas given in the Book of Reference (Document Reference 4.3) are approximate, since these are not covered by article 2(3). This is intended to clarify the position of the areas in the Book of Reference, and the purpose and effect is the same as set out in the previous paragraph.

4.9 Articles 2(5) and (6) confirm that references to lettered or numbered points and numbered works are to points lettered or numbered on the relevant plans and works numbered in Schedule 1, as appropriate.

*Article 3 – Disapplication of legislative provisions*

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

4.11 Article 3 provides for the disapplication of various consents which would otherwise be required. These are the requirements:

- (a) prohibiting the placing of obstructions in waterways which are not main rivers under section 23 of the Land Drainage Act 1991 (consent is granted by the relevant drainage board, which may be an internal drainage board or a lead local flood authority and in the case of the scheme, is Gloucestershire County Council as lead local flood authority); and
- (b) for a notice of intended demolition under section 80 of the Building Act 1984.

These are consents for activities which may be a necessary part of the Scheme.

4.12 As section 23 consent is prescribed under section 150 of the 2008 Act<sup>4</sup>, the consent of the relevant drainage authority to the inclusion of this provision in the Order will be needed and this consent is being sought.

4.13 Article 3 also disapplies the provisions of the Neighbourhood Planning Act 2017 relating to the temporary possession of land. This is on the basis that the temporary possession of land is dealt with by articles 31 and 32 and the wording of those provisions is well established, as explained in detail below. The 2017 Act contains untested provisions that

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<sup>4</sup> See regulation 5 of and Part 1 of Schedule 2 to the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015.

differ from those in the Order and although they are not yet in force it is therefore necessary to disapply them in case they should come into force in the future.

- 4.14 The Applicant has produced a Consents and Agreements Position Statement (Document Reference 3.3) as part of this application. This sets out in greater detail the Applicant's proposed approach to obtaining the other consents required for the Scheme.

*Article 4 – Maintenance of drainage works*

- 4.15 The purpose of article 4 is to make it clear that any realignment of drainage works or other works to them that are carried out as part of the Scheme do not affect the existing allocation of responsibility for maintenance of those drainage works, unless otherwise agreed in writing between the Applicant and the responsible party. Responsibility for maintenance of drainage works may sit with the Environment Agency, an internal drainage board, a lead local flood authority or a landowner.
- 4.16 This article was not included in the model provisions. However, it appears in numerous previous orders<sup>5</sup> and is considered to be a sensible inclusion to clarify who has responsibility for the maintenance of drainage works.

**Part 2 - Principal Powers**

*Article 5 – Development consent etc. granted by the Order*

- 4.17 Article 5 provides the principal power to construct and operate the authorised development within the Order limits. Schedule 1 describes the authorised development.
- 4.18 Development consent is subject to the provisions of the Order, including the requirements listed in Schedule 2. This is based on article 2 of the model provisions, with the only substantive difference being that article 5(1) does not refer to consent being granted for ancillary works, since there are not considered to be any such works in this case.
- 4.19 Article 5(2) was not included in the model provisions but has been included in previous orders<sup>6</sup>. It provides that any enactment applying to land within or adjacent to the Order limits has effect subject to the provisions of the Order. Because the Order amends and disapplies various enactments that apply to and affect the authorised development, or would otherwise do so, this helps to clarify the interaction between the provisions of the Order and other legislation.
- 4.20 Article 5(2) is also necessary to ensure that there are no local acts or other legislation that might hinder the construction and operation of the authorised development. Although

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<sup>5</sup> See for example article 23 of the A428 Black Cat to Caxton Gibbet Order 2022, article 4 of the A47 Blofield to North Burlingham Order 2022 and article 5 of the M25 Junction 28 Order 2022.

<sup>6</sup> See e.g. article 5(2) of the A47 Blofield to North Burlingham Order 2022 and article 4(2) of the A428 Black Cat to Caxton Gibbet Order 2022.

the Applicant has carried out a proportionate search for local legislation and has not found any that it considers needs to be disapplied or modified by the Order, that is not conclusive and it is possible that such legislation exists. The Applicant has therefore taken a precautionary approach in including article 5(2), which has been accepted in other orders and is well precedented. The inclusion of this provision ensures that the construction and operation of this NSIP is not jeopardised by any incompatible statutory provisions which might exist.

- 4.21 In terms of the limits of the provision and how far “adjacent” extends from the Order limits, it is noted that article 20 (authority to survey and investigate the land) grants the Applicant the power to enter not only onto land within the Order limits, but also onto other land “*which may be affected by the authorised development*”. The extent of ‘adjacent’ land would therefore need to be judged on a case by case basis and in practice would be to the extent necessary for the construction and operation of the authorised development.

*Article 6 – Maintenance of authorised development*

- 4.22 This article sets out the scope within which the undertaker may maintain the development. The definition of “maintain” is contained in article 2(1). Article 6 was included in the model provisions as article 3.
- 4.23 Powers of maintenance are subject to the other provisions of the Order and any agreements made under the Order.

*Article 7 – Planning permission*

- 4.24 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 is not a model provision, but ensures that the undertaker does not breach section 161 of the 2008 Act in carrying out certain development pursuant to a grant of planning permission, provided that development is not of itself an NSIP or part of one, or required to complete or enable the use or operation of any part of the authorised development.
- 4.25 This article has been included in recent highways orders<sup>7</sup>.

*Article 8 – Limits of deviation*

- 4.26 Article 8 confirms that in carrying out the authorised development the undertaker may:
- (a) deviate laterally from the lines or situations shown on the works plans to the extent of the limits of deviation shown on those plans; and

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<sup>7</sup> See for example article 7 of the A428 Black Cat to Caxton Gibbet Order 2022 and article 7 of the A47 Blofield to North Burlingham Order 2022.

- (b) deviate vertically from the levels of the authorised development shown on the engineering section drawings, to a maximum of 0.5 metres upwards or 1 metre downwards or in respect of the excavation of the borrow pits, the flood storage area or the flood compensation areas, to a maximum of 2 metres downwards but to any distance upwards to ground level.
- 4.27 These maximum limits of deviation do not apply where the undertaker is able to demonstrate to the Secretary of State's satisfaction, following consultation with the relevant planning authority and the local highway authority, that a deviation in excess of these limits would not give rise to any materially new or worse environmental effects compared to those reported in the Environmental Statement.
- 4.28 This wording was not included in the model provisions but has become common wording in development consent orders<sup>8</sup>. The ability to deviate within the prescribed limits of deviation is important to ensure that, if the precise 'as built' alignments or elevations are slightly different to those indicatively shown on the application plans, no question arises as to whether or not the works are permitted by the Order. The detailed design of the Scheme will take place following the grant of the Order (see Requirement 11) and the limits of deviation therefore ensure that the undertaker and its contractor have sufficient flexibility to design and construct the authorised development post consent, including making costs savings where possible.
- 4.29 The limits of deviation referred to in this article and shown on the application plans have been taken into account in the preparation of the Environmental Statement and the potential impacts of a deviation within the permitted limits have been assessed. The undertaker is only permitted to exceed the limits specified in this article if they can demonstrate to the Secretary of State's satisfaction that no materially new or worse adverse environmental effects would arise.

*Article 9 - Benefit of Order*

- 4.30 Article 9 overrides section 156(1) of the 2008 Act (as permitted by section 156(2)) to give the benefit of the Order to the undertaker rather than anyone with an interest in the land. It would be impracticable for a variety of landowners to implement parts of the Order in an uncoordinated manner, which might be the case if section 156(1) were to apply.
- 4.31 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 the Applicant could benefit from these works.

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<sup>8</sup> Recent examples include article 8 of the A428 Black Cat to Caxton Gibbet Order 2022, article 8 of the A47 Blofield to North Burlingham Order 2022 and article 7 of the M25 Junction 28 Order 2022.

- 4.32 Paragraph (1) is based on article 4 of the model provisions, amended to clarify that it is subject to paragraph (2) and that it is the Applicant that benefits from the provisions of the Order, rather than particular articles applying for the benefit of other specified parties as per the model provisions. Paragraph (2) was not included in the model provisions but has been included in a number of previous orders<sup>9</sup>.

*Article 10 - Consent to transfer benefit of Order*

- 4.33 This article allows the benefit of the Order to be transferred or leased to others by the undertaker. The exercise of any transferred benefits or rights is subject to the same restrictions, liabilities and obligations as would apply under the Order if those benefits or rights were exercised by the undertaker. The consent of the Secretary of State is required for a transfer or grant, except where it is made to a specified company in respect of a particular work.
- 4.34 This article is based on article 5 of the model provisions. It differs in that it allows a transfer or grant to a specified company to take place without the Secretary of State's consent, on the basis that it is appropriate for those companies to be able to carry out those works. The companies listed in paragraph (5) are National Highways and those whose apparatus is required to be diverted.

**Part 3 – Streets**

*Article 11 – Street works*

- 4.35 Article 11 allows the undertaker to interfere with and execute works in or under the streets within the Order limits for the purposes of the authorised development. The authority given by this article is a statutory right for the purposes of sections 48(3) and 51(1) of the New Roads and Street Works Act 1991. Certain provisions of the 1991 Act apply to works carried out under this article, subject to the provisions of article 12 (application of the 1991 Act).
- 4.36 Article 11 is based on article 8 of the model provisions and previous orders. It departs from the model provisions in that it authorises interference with any street within the Order limits, rather than just those specified in a schedule. The application of sections 54 to 106 of the New Roads and Street Works Act 1991 is also expressed to be subject to article 12, which applies and modifies that Act. The definition of 'apparatus' that was included as paragraph (4) in the model provisions is omitted because that term is already defined in article 2.

*Article 12 – Application of the 1991 Act*

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<sup>9</sup> Articles 9(2), 9(2) and 8(2) of the A428, A47 and M25 orders respectively.

- 4.37 Article 12 provides for the application of the New Roads and Street Works Act 1991. Although not included in the model provisions, there is precedent for these provisions in previous orders<sup>10</sup>.
- 4.38 Paragraphs (1) and (2) provide that certain works carried out under the authority of the Order are to be "major highway works" for the purposes of the 1991 Act. The effect of this is to clarify that the cost-sharing provisions relevant to the diversion of utility apparatus (which would apply to such works under the 1991 Act if carried out by the highway authority) will apply in respect of the works authorised by the Order, irrespective of who carries them out.
- 4.39 Paragraph (3) provides that certain provisions of the 1991 Act listed in that paragraph will not apply. The disapplication of these provisions (which are designed primarily to regulate the carrying out of street works by utility companies in respect of their apparatus) is appropriate given the scale of works proposed under the Order, the specific authorisation given for those works by the Order and the specific provisions in the Order which regulate the carrying out of the Order works.
- 4.40 Paragraphs (4) to (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to streets which are to be temporarily stopped up, altered or diverted under the Order. This is for two reasons: first, it prevents any confusion as to whether works in respect of a temporarily affected street are 'street works' for the purposes of the 1991 Act; and secondly, it simplifies the implementation of the works by providing for a single process in respect of streets which are stopped up and those which are not.
- 4.41 Paragraph (7)(a) provides that nothing in article 13 affects the operation of section 87 of the 1991 Act, which allows a local highway authority to declare that a street in its area is likely to become a maintainable highway and consequently that Part 3 of the 1991 Act applies to that street.
- 4.42 Paragraph (7)(b) confirms that the Applicant is not to be taken to be the street authority for a street for the purposes of Part 3 of the 1991 Act merely by being under a duty to maintain it under article 13. The Applicant is the highway authority for the local road network and is under a duty to maintain it. Accordingly it is also the street authority for the local road network. Other bodies are responsible for other parts of the road network, and responsibility is allocated in article 13. However, article 13 also allows the Applicant to agree a different maintenance position in writing on a case by case basis, and this power may be used from time to time in respect of specific works, or parts thereof. This provision therefore ensures that, if the Applicant did enter into such an agreement, the

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<sup>10</sup> See for example articles 11, 11 and 10 of the A428, A47 and M25 orders respectively.

Applicant would not be taken to be the street authority for roads other than those forming part of the local road network for the purposes of the 1991 Act.

- 4.43 Paragraph (7)(c) clarifies that the provisions relating to responsibility for maintenance of streets in article 13 do not affect the application of Part 3 of the 1991 Act to maintenance works which are street works for the purposes of the 1991 Act. 'Street works' is defined in section 48(3) of the 1991 Act as including works for the maintenance of apparatus (but excluding works for road purposes) that are executed in pursuance of a statutory right or a street works licence.

*Article 13 - Construction and maintenance of new, altered or diverted streets and other structures*

- 4.44 The purpose and effect of article 13 is as follows:

- (a) Under section 1(2) of the Highways Act 1980 the Applicant is the highway authority for, and therefore is responsible for maintaining, the local road network, including those to be provided as part of the Scheme. For any other highways and streets, this article determines the body that will be liable for maintenance. Liability for maintenance would transfer to the strategic highway authority or to the street authority as appropriate on completion of the works. Paragraphs (1) to (4) allow the Applicant to make contrary agreements with the strategic highway authority or street authority concerned.
- (b) Paragraphs (1) to (3) are subject to paragraphs (5) and (6), which make specific maintenance provisions in relation to bridges.
- (c) The effect of paragraphs (7) and (8) is that in any action for damages against the Applicant alleging failure to maintain a street, the Applicant will have the defence that it had taken such care as was reasonably required in the circumstances to secure that the street was not dangerous for traffic. This ensures that the provision in section 58 of the Highways Act 1980 applies to the Applicant not only in respect of the roads for which it is the highway authority but also other roads and is consistent with the approach taken in previous development consent orders<sup>11</sup>.

- 4.45 Article 13 was not included in the model provisions but has been included in numerous previous highways orders.

*Article 14 - Classification of roads, etc.*

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<sup>11</sup> See for example articles 12(14) and (15), 12(7) and (8) and 11(5) and (6) of the A428, A47 and M25 orders respectively.

- 4.46 The designation of highways, the specification of the classes of traffic authorised to use a highway and speed limits are ancillary matters which may be included in a development consent order<sup>12</sup>. These and other related matters are addressed by this article. These matters are integral to the implementation of the Scheme and it is therefore appropriate to include them in the Order as ancillary matters.
- 4.47 Article 14(1) and (2) provide for the roads described in Part 1 of Schedule 3 to become special roads from the date that they are complete and open to traffic.
- 4.48 Paragraph (3) provides for the roads described in Part 2 of Schedule 3 to become classified roads from the date that they are complete and open to traffic.
- 4.49 Paragraph (4) provides for the roads described in Part 3 of Schedule 3 to become unclassified roads from the date that they are complete and open to traffic.
- 4.50 Paragraph (5) imposes speed limits on certain sections of the Scheme as described in Part 4 of Schedule 3.
- 4.51 Paragraph (6) confirms that the traffic regulation measures described in Part 5 of Schedule 3 will apply to certain sections of the Scheme as described in that Part.
- 4.52 Paragraph (7) confirms that the public rights of way described in Part 7 of Schedule 3 will be provided and open for use from the date on which the authorised development is open to traffic unless otherwise agreed with the strategic highway authority.
- 4.53 Paragraph (8) provides that the orders specified in Part 6 of Schedule 3 are to be varied or revoked as specified in that Part on such day as the undertaker may determine.
- 4.54 The purpose of paragraph (9) is to confirm that the matters covered in paragraphs (1) to (7) could be varied or revoked in the future without the need to apply under the 2008 Act for an amendment to the Order, including where appropriate through the making of a Traffic Regulation Order. As paragraphs (1) to (4) deal with the classification of roads as either special roads, classified roads or unclassified roads, it is considered that paragraph (9) is most likely to be used in connection with paragraphs (5) and (6).
- 4.55 Article 14 was not included in the model provisions but has been included in numerous previous highways orders.

*Article 15 - Temporary stopping up and restriction of use of streets*

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<sup>12</sup> Planning Act 2008 section 120(5) and Schedule 5, paragraphs 19 and 20.

- 4.56 This article allows for the temporary stopping up, alteration, diversion or restriction of streets for the purposes of the Scheme, whilst ensuring that essential pedestrian access to and from premises along that street is maintained if necessary (paragraph (3)).
- 4.57 Paragraph (2) confers a power on the Applicant where a street has been temporarily stopped up under this article to use it as a temporary working site.
- 4.58 Under paragraph (4) the consent of the street authority is required where the Applicant is not the street authority. The street authority may attach reasonable conditions to any consent, but must not unreasonably withhold or delay consent.
- 4.59 Paragraph (5) provides a right to compensation for any person suffering loss due to the suspension of a private right of way under this article.
- 4.60 Paragraph (6) states that a street authority which fails to notify the Applicant of its decision in respect of an application for consent within 28 days of the application being made is deemed to have given its consent. This time limit is considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by the Applicant in a timely fashion. As an NSIP, the Scheme should not be at risk of being held up due to a failure to respond to an application for consent. This provision has been included in previous highways orders<sup>13</sup>.

*Article 16 - Permanent stopping up and restriction of use of streets and private means of access*

- 4.61 This article allows the streets and private means of access identified in Schedule 4 to be stopped up (i.e. the legal right of way along them to be extinguished).
- 4.62 Paragraph (2) relates to the streets and private means of access to be stopped up as specified in Parts 2 and 4 of Schedule 4, for which a substitute is to be provided. It requires the substitute to be completed and open for use, or a temporary alternative route to be available, before the street or private means of access in question is stopped up.
- 4.63 For the highways and private means of access to be stopped up as specified in Parts 1 and 3 of Schedule 4, no substitute is to be provided. Such a highway or private means of access may not be stopped up unless the condition referred to in paragraph (3) and set out in paragraph (4) is met.
- 4.64 Paragraph (6) provides a right to compensation for any person suffering loss due to the suspension or extinguishment of a private right of way under this article.
- 4.65 Since the definition of a 'street' in section 48 of the New Roads and Street Works Act 1991 includes highways and footways, the stopping up and diversion of footpaths and

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<sup>13</sup> See for example articles 16(6), 16(6) and 13(6) of the A428, A47 and M25 orders respectively.

footways are dealt with by article 16 and Schedule 4 as well and there is no need for a separate provision.

- 4.66 This article was included in the model provisions as article 9.

*Article 17 - Access to works*

- 4.67 This article allows accesses to be created within the Order limits. It is anticipated that this article will be relied on by the Applicant to provide temporary accesses as required during the construction period, with all permanent means of access (including private means of access) forming part of the authorised development. This article departs from the model provisions (article 12) to provide the Applicant with a general power to provide means of access, the intention being to provide similar powers to those available under the Highways Act 1980<sup>14</sup>.

- 4.68 The provisions of this article confer slightly broader powers than those contained in the Act, which allows a highway authority to provide “*a new means of access to any premises*” where it considers it “*necessary or expedient in connection with the construction, improvement or alteration of a highway*” to do so. The statutory power is subject to securing the consent of the authority which is, or which will become, the highway authority for that highway. The inclusion of this article is considered to be appropriate as it will help to ensure that the authorised development can be carried out expeditiously by allowing the Applicant to create new temporary accesses as and where required, particularly in response to requests from landowners, occupiers and other affected parties.

**Part 4 – Supplemental powers**

*Article 18 - Discharge of water*

- 4.69 This article sets out the circumstances in which the Applicant is entitled to discharge water into a watercourse, public sewer or drain, and its purpose is to establish statutory authority for doing so.
- 4.70 The effect of paragraph (3) is that this can only be done with the consent of the owner or the person otherwise having authority to give consent. Consent can be given subject to reasonable terms and conditions, but cannot be unreasonably withheld.
- 4.71 Paragraph (5) requires the undertaker to take reasonably practicable steps to ensure that any water that is discharged is as free as may be practicable from gravel, soil or other solid substance, oil or matter in suspension.
- 4.72 Paragraph (7) states that a person who fails to notify the Applicant of their decision in respect of an application for consent/approval within 28 days of the application being

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<sup>14</sup> See section 129 (further provisions with respect to new means of access).

made is deemed to have granted consent/approval. This time limit is considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by the Applicant in a timely fashion. As an NSIP, the Scheme should not be at risk of being held up due to a failure to respond to an application for consent/approval. This provision has been included in numerous previous highways orders<sup>15</sup>.

*Article 19 - Protective works to buildings*

- 4.73 The purpose of this article is to allow the Applicant to undertake protective works to buildings affected by the authorised development. It was included in the model provisions as article 15.

*Article 20 - Authority to survey and investigate the land*

- 4.74 This article gives the Applicant the power to enter land for the purpose of surveying and investigating. It provides that the Applicant must give 14 days' notice before exercising the powers of entry. Compensation is payable for any loss or damage caused.

- 4.75 Paragraphs (1) to (5) were included in the model provisions as article 16. Paragraph (6), which provides for deemed consent in cases where there is no response to an application for consent under this article, was not included in the model provisions but is now a standard provision following its inclusion in numerous previous orders<sup>16</sup>. Paragraph (7) addresses the situation where the Applicant is prevented from taking lawful entry under this article and also has precedent in numerous previous orders.

**Part 5 - Powers of Acquisition**

*Article 21 - Compulsory acquisition of land*

- 4.76 This article authorises the acquisition of land by compulsory purchase. It grants the power to acquire the land that is required for the Scheme. This is subject to articles 24 (compulsory acquisition of rights and imposition of restrictive covenants) and 31 (temporary use of land for carrying out the authorised development), which are explained below.

- 4.77 Article 21 is based on article 18 of the model provisions, with the following differences:

- (a) Paragraph (2) is omitted as the vesting of land is governed by the Compulsory Purchase (Vesting Declarations) Act 1981, which applies as though the Order were a compulsory purchase order by virtue of article 28 (application of the 1981

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<sup>15</sup> See for example articles 20(8), 21(7) and 19(8) of the A428, A47 and M25 orders respectively.

<sup>16</sup> See for example article 22(8), 23(6) and 22(6) of the A428, A47 and M25 orders respectively.

Act). Article 26 (private rights over land) also provides for all private rights over land subject to compulsory acquisition to be extinguished.

- (b) Paragraph (3) relating to compensation for loss arising due to the extinguishment or suspension of a private right of way is omitted because that is dealt with separately in articles 15(5), 16(6) and 26(5).
- (c) Paragraph (2) refers to article 25 (compulsory acquisition of rights) rather than model article 25, which related to the acquisition of land limited to subsoil lying more than 9 metres beneath the surface and is not included in the Order.

*Article 22 - Compulsory acquisition of land – incorporation of the mineral code*

- 4.78 This article incorporates Parts 2 and 3 of Schedule 2 to the Acquisition of Land Act 1981, exempting existing rights in minerals from the scope of compulsory acquisition unless they are expressly named and conveyed. It also makes provision for a situation where the owner of mines or minerals wishes to work such mines or minerals.
- 4.79 Article 22 was included in the model provisions as article 19.

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

- 4.80 This article gives the Applicant five years to issue notices to treat or to execute a general vesting declaration to acquire the land that may be compulsorily acquired under the Order. These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should the Order be made.
- 4.81 The article also sets a five year time limit on the power to take temporary possession of land under article 31, although it does not prevent the Applicant from remaining in possession of land after that time if it took possession within the five year limit.
- 4.82 This article was included in the model provisions as article 20.

*Article 24 - Compulsory acquisition of rights and imposition of restrictive covenants*

- 4.83 This article allows for rights over land to be acquired as well as the land itself, and also for new rights to be created over land. This includes the power to impose restrictive covenants.
- 4.84 It provides for such rights as may be required to be acquired by the Applicant over land which it is authorised to acquire under article 21. The public benefit of this is that it would allow the Applicant to reduce the area of outright acquisition if possible and rely on rights instead.
- 4.85 Paragraph (2) provides that for the land described in Schedule 5, the Applicant's powers of compulsory acquisition are limited to the acquisition of such rights, and the imposition

of such restrictive covenants, as may be required for the purposes set out in that Schedule.

- 4.86 The power to impose restrictive covenants will allow for the possibility of reducing the area of outright acquisition and thus enable a more proportionate exercise of compulsory powers. It is therefore in the public interest and has precedent in other highways orders.
- 4.87 Paragraph (3) provides that the power to impose restrictive covenants under paragraph (1) is exercisable only in respect of the plots specified in column (1) of Schedule 5.
- 4.88 Paragraph (4) provides that where the Applicant only needs to acquire rights over land it is not obliged to acquire any greater interest in that land.
- 4.89 Paragraph (5) applies Schedule 6, which imposes modifications to the compulsory purchase and compensation provisions under general legislation. They do not affect the entitlement to compensation, but generally ensure that the compensation code applies to the additional categories of acquisition covered by the Order and the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories (done to allow lesser land interests to be acquired).
- 4.90 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/creation of rights and the imposition of restrictive covenants, and not to affect the amount of compensation to which landowners would be entitled.
- 4.91 Article 24 is based on article 21 of the model provisions and previous highways orders<sup>17</sup>. It differs from the model provisions in the following respects:
- (a) Paragraph (1) allows the Applicant to acquire existing rights and create new rights over any of the Order land, rather than just the rights described in the Book of Reference. Although the Applicant has sought to identify all of the plots which are to be subject to the acquisition or creation of rights and has set these out in the Book of Reference, land plans and Schedule 5 to the Order, this provision ensures that the Applicant retains the flexibility to acquire or create rights over land where that land might otherwise have to be acquired outright.
  - (b) Paragraph (2) of the model article is omitted, for the same reasons set out in paragraph 4.77(a) above.

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<sup>17</sup> See for example articles 27, 27 and 28 of the A428, A47 and M25 orders respectively.

- (c) Paragraph (2) is included to clarify that the land identified in Schedule 5 may only be subject to the acquisition or creation of rights or imposition of restrictive covenants, and may not be subject to outright acquisition.
- (d) Paragraph (3) provides that restrictive covenants may only be imposed under this article in relation to the land specified in Schedule 5.
- (e) Paragraph (4) refers to Schedule 2A to the Compulsory Purchase Act 1965, as modified by Schedule 6, rather than section 8 of the Compulsory Purchase Act 1965. The effect is to limit the possible exceptions to this article to cases where part only of a house, building, factory, park or garden belonging to a house is being acquired.
- (f) Paragraph (5) does not refer to compensation for the extinguishment or suspension of any private right of way under this article, since that is dealt with by article 26. Instead it confirms that Schedule 6 has effect for the purpose of modifying compensation provisions to ensure that they apply to the compulsory acquisition or creation of rights, or imposition of restrictive covenants, under this article.

*Article 25 – Public rights of way*

- 4.92 Article 25(1) provides for the public rights of way specified in Parts 1 and 2 of Schedule 4 and shown on the Streets, Rights of Way and Access Plans (Document Reference 2.5) to be extinguished. The rights of way are extinguished following the expiry of a site notice which must be erected at each end of the way to be extinguished no less than 28 days prior to the extinguishment.
- 4.93 The creation of substitute and new public rights of way is dealt with in article 14(9) (classification of roads, etc.). Justification for the stopping up of public rights of way where no substitute is being provided is included in the Statement of Reasons (Document Reference 4.1).
- 4.94 Article 25 is based on article 10 of the model provisions and previous highways orders<sup>18</sup>. It differs from the model provisions in that it refers to the rights of way set out in Schedule 4, rather than rights of way specified in the article itself. It also provides a different trigger for the extinguishment of existing rights of way, rather than the various options specified in paragraph (1) of the model provision (which included the date of publication of the order). Paragraph (2) of the model provision, which dealt with the creation of alternative sections of rights of way, is omitted on the basis that article 14(9) deals with the creation and opening for use of any new or replacement public rights of way. Instead, paragraph

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<sup>18</sup> See for example articles 28, 28 and 26 of the A428 and A47 orders and the M25 Junction 10/A3 Wisley Interchange Order 2022 respectively.

(2) requires the undertaker to erect a site notice at each end of the right(s) of way to be extinguished at least 28 days in advance. The definitions in paragraph (3) of the model provision are omitted as they are not used.

*Article 26 - Private rights over land*

- 4.95 This article provides for the extinguishment of private rights over land that is subject to compulsory acquisition under the Order. In so far as the Applicant acquires land, acquires or creates new rights over land or imposes restrictive covenants under the Order, where the continuance of private rights over that land would be inconsistent with the exercise of the right being acquired or created, or restrictive covenant imposed, then the private rights in question will be extinguished.
- 4.96 Paragraph (3) provides that rights over Order land that is already owned by the Applicant are extinguished on commencement of any activity authorised by the Order which interferes with or breaches those rights.
- 4.97 Paragraph (4) provides that all private rights over land which the undertaker takes temporary possession of under the Order will be suspended and unenforceable for as long as the undertaker remains in lawful possession of the land.
- 4.98 Paragraphs (5) to (8) make provision for compensation and for circumstances where rights are preserved.
- 4.99 Paragraph (9) sets out a list of matters deemed to be private rights.
- 4.100 Article 26 is based on article 22 of the model provisions and previous highways orders<sup>19</sup>. It differs from the model provisions in the following respects:
- (a) It applies to all private rights, not just private rights of way. This is to reflect the broad nature of private rights that may exist over the Order land.
  - (b) Paragraph (2) is included to confirm that where land is subject to the acquisition or creation of rights or the imposition of restrictive covenants, any other rights in that land are extinguished if their continuance would be incompatible with the right or covenant being acquired or created by the undertaker.
  - (c) Paragraph (3) (paragraph (2) of the model provisions) is amended to refer to the Order land, rather than "the limits of land which may be acquired shown on the land plan", and to clarify the circumstances in which other rights in land owned by the Applicant will be extinguished.

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<sup>19</sup> See for example articles 29, 29 and 29 of the A428, A47 and M25 orders respectively.

- (d) Paragraph (4) is included to clarify the position where the Applicant takes temporary possession of land.
- (e) Paragraph (5) (paragraph (4) of the model provisions) is modified to include a reference to section 152 of the Planning Act 2008.
- (f) Sub-paragraph (7)(a)(i) is amended to also refer to the acquisition of rights or imposition of restrictive covenants.
- (g) Paragraph (9) sets out what are considered to be 'private rights over land'. This is necessary to clarify the nature of the private rights to which this article applies.

*Article 27 – Modification of Part 1 of the 1965 Act*

4.101 The purpose of this article is to ensure consistency between the terms of the Order and the Compulsory Purchase Act 1965, as applied by section 125 of the 2008 Act. It has been included in numerous previous highways orders<sup>20</sup>.

*Article 28 – Application of the 1981 Act*

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

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

- (a) Paragraph (3) modifies section 1(2) so that section 1 applies to the Applicant.
- (b) Paragraph (4) modifies section 5 to remove the reference to situations where the compulsory purchase order is subject to special parliamentary procedure.
- (c) Paragraph (5) omits section 5A, on the basis that the Order prescribes the time limit for compulsory acquisition in article 23.
- (d) Paragraph (6) modifies the statutory reference in section 5B(1), on the basis that the 2008 Act contains equivalent provisions that apply in respect of development consent orders. The cross-reference to section 5A is also modified, to reflect that the time limit is set out in article 23.
- (e) Paragraph (7) modifies the statutory references in section 6(1)(b), on the basis that the 2008 Act contains equivalent provisions that apply in respect of development consent orders.

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<sup>20</sup> See for example articles 33, 30 and 30 of the A428, A47 and M25 orders respectively.

- (f) Paragraph (8) modifies paragraph 1(2) of Schedule A1 to change the reference to compulsory purchase orders excluding land that is 9 metres or more below the surface from the counter-notice procedure to article 29(3), which has the same effect in relation to the acquisition of subsoil or airspace only.
- (g) Paragraph (9) clarifies that references to the Compulsory Purchase Act 1965 in the 1981 Act are to be construed as references to the 1965 Act as applied by section 125 of the 2008 Act and as modified by article 27, on the basis that both section 125 and article 27 modify the provisions of the 1965 Act.

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

4.105 Article 28 is based on article 23 of the model provisions and previous highways orders<sup>21</sup>. Due to extensive changes to the relevant provisions of the 1981 Act since the model provisions came into force, the wording of this article departs significantly from the model provisions and the Applicant has instead sought to follow the precedent established by recent orders.

*Article 29 - Acquisition of subsoil or airspace only*

4.106 This article allows the Applicant to acquire, or acquire or create rights in, the subsoil or airspace below or above land, rather than having to acquire the land itself.

4.107 The purpose of this article is to give the Applicant the flexibility to minimise so far as is possible the extent of interests to be acquired, with consequently less impact on landowners and lower payments of compensation, both of which are in the public interest.

4.108 This article is based on article 24 of the model provisions, which related to subsoil only, and numerous previous highways orders<sup>22</sup>.

*Article 30 - Rights under or over streets*

4.109 The purpose of this article is to allow the Applicant 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.

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<sup>21</sup> See for example articles 34, 31 and 31 of the A428, A47 and M25 orders respectively.

<sup>22</sup> See for example articles 35, 32 and 32 of the A428, A47 and M25 orders respectively.

4.110 This article was included in the model provisions as article 27.

*Article 31 - Temporary use of land for carrying out the authorised development*

4.111 The purpose of this article is to allow the land set out in Schedule 7 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Scheme but which is not required permanently. This article also allows for the temporary occupation of any of the land intended for permanent acquisition that has not yet been acquired.

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

- (a) First, the ability to occupy land temporarily that is subject to powers of permanent acquisition but that has not yet been acquired (paragraph (1)(a)(ii)) has been added. This allows the Applicant to occupy land without having to acquire it immediately. There is a consequential amendment to paragraph (3) to cater for the two types of land.
- (b) Secondly, paragraph (1)(d) has been added so that permanent works specified in column (2) of Schedule 7, and any other permanent mitigation works in connection with the authorised development, may be constructed on land that has been temporarily occupied, rather than having to acquire such land for this purpose. The rationale for this is that it reduces the amount of land that is required to be subject to outright acquisition. The intended scope of 'mitigation works' is any permanent works necessary and appropriate to mitigate the impacts of the Scheme (e.g. landscaping or ecological mitigation works).
- (c) There has been a minor amendment to paragraph (2) to require the notice of intended entry to specify the purpose for which entry is to be taken where land is being entered under paragraph (1)(a)(ii).
- (d) There are amendments to the requirements for restoring the land before returning it to reflect the changes in respect of permanent works, which have been added as paragraph (4)(b). Paragraph (4)(c) is also added in respect of protective works for statutory undertaker apparatus.
- (e) There is a minor amendment to paragraph (5) where 'any power conferred by' has been omitted, since the provisions are of the article, not of the powers.
- (f) Finally, paragraph (11) has been added to ensure clarity about the extent of the land the Applicant may take temporary possession of.

- 4.113 The amended article reflects the wording of recent highways orders<sup>23</sup>.
- 4.114 The inclusion of this article is important to ensure that the authorised development can be carried out efficiently and expeditiously following the making of the Order. The Applicant is entitled to either occupy and use land pending its permanent acquisition, or to temporarily occupy and use land that is not to be permanently acquired, with provision made for the restoration of the land and the payment of compensation to the affected landowners and occupiers for any loss or damage arising. These powers are considered to be reasonable given the status of the authorised development as an NSIP.
- 4.115 If the powers conferred by this article were not included then the Applicant would be forced to seek permanent rights over, or the permanent acquisition of, all of the land required for the authorised development, which would be disproportionate for those plots which have been identified as being suitable for temporary occupation and use.

*Article 32 - Temporary use of land for maintaining the authorised development*

- 4.116 This article provides that the Applicant may take temporary possession of land within the Order limits, as required for the purpose of maintaining the authorised development, at any time within a period of five years from the date on which that part of the authorised development is first opened for use.
- 4.117 Paragraph (1)(c) authorises the construction of such temporary works and buildings on the land as may be reasonably necessary for that purpose. Under paragraph (6) all temporary works must be removed before the Applicant gives up possession under this article and the land must be restored to the reasonable satisfaction of the owners.
- 4.118 This power does not apply in relation to houses, gardens or any other buildings for the time being occupied (paragraph (2)).
- 4.119 Paragraph (3) requires at least 28 days' notice of intended entry to be served on the owners and occupiers of the land in question.
- 4.120 Paragraphs (7) to (9) provide for compensation to be paid to owners and occupiers of land of which temporary possession is taken under this article.
- 4.121 This article was included in the model provisions as article 29.

*Article 33 - Statutory undertakers*

- 4.122 This article allows the Applicant 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

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<sup>23</sup> See for example articles 37, 34 and 34 of the A428, A47 and M25 orders respectively.

described in the Book of Reference. In practice it is impractical to show and describe all such apparatus and so a general power for the extinguishment of rights and the removal or relocation of apparatus belonging to statutory undertakers over or within any of the Order land is required.

- 4.123 As the land over which this power may be exercised is shown on the Land Plans (Document Reference 2.2), and the beneficiaries of such rights are described in the Book of Reference (Document Reference 4.3), the requirements of Regulations 5(2)(i)(iii) and 7(1)(c) of the APFP Regulations are satisfied.
- 4.124 Paragraph (2) restricts the Applicant's power to extinguish rights or remove or reposition apparatus by excluding apparatus in streets. If the streets in question are to be stopped up as part of the authorised development then the provisions of article 34 (apparatus and rights of statutory undertakers in stopped up streets) will apply.
- 4.125 This article is based on article 31 of the model provisions and previous highways orders<sup>24</sup>. It differs from the model provisions in the following respects:
- (a) The article is expressed to be subject to article 24(3), the protective provisions and paragraph (2).
  - (b) Sub-paragraph (1)(a) refers to the acquisition of rights and the imposition of restrictive covenants. It also refers to the Order land rather than "within the limits of the land to be acquired and described in the book of reference".
  - (c) Sub-paragraph (c) is omitted as rights are referred to in sub-paragraph (a).
  - (d) Paragraph (2) is included to clarify that this article does not apply where statutory undertakers have apparatus in a street which is to be stopped up under the Order. In those circumstances the provisions of article 34 will apply.

*Article 34 - Apparatus and rights of statutory undertakers in stopped up streets*

- 4.126 This article governs what happens to statutory undertakers' apparatus (pipes, cables etc.) under streets that are stopped up by the Order. Without this article the statutory undertaker would not have access to the apparatus, since there would no longer be a right of way along the street.
- 4.127 Under paragraph (2) the Applicant may require a statutory undertaker to remove and relocate the apparatus (or apparatus provided in substitution) elsewhere. Paragraph (3) requires the Applicant to compensate the statutory undertaker for the reasonable costs it incurs in doing so.

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<sup>24</sup> See for example articles 39, 36 and 37 of the A428, A47 and M25 orders respectively.

4.128 Paragraph (4) provides for a reduction to the amount payable to the statutory undertaker in certain circumstances, including where replacement apparatus is provided that is of a better type, of greater capacity or of greater dimensions and those improvements or increases are not necessary. Paragraph (5) clarifies that the placing of apparatus of a greater length does not count for the purposes of paragraph (4), since it is likely that for most diversions apparatus of greater length will need to be installed. Similarly, joints in apparatus may be necessary and if so that will not lead to a reduction of the amount payable.

4.129 Paragraph (6) discounts from the amount payable to the statutory undertaker any financial benefit to the statutory undertaker that arises as a result of having new rather than old (i.e. older than 7.5 years) apparatus due to the deferment of the timetable for renewal of the apparatus. The basis for the 7.5 year timeframe is the '*Measures Necessary Where Apparatus is Affected by Major Works (Diversionary Works) A Code of Practice*' (TSO, June 1992) which contains a formula for calculating the value of the benefit.

4.130 Paragraph (7) provides that for those parts of the scheme that involve major highway works, major bridge works or major transport works (which are defined in Part 3 of the New Roads and Street Works Act 1991 and do not include the construction of a new highway), the compensation provisions of that Act will apply instead.

4.131 This article was included in the model provisions as article 32.

*Article 35 - Recovery of costs of new connections*

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

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

**Part 6 - Operations**

*Article 36 - Felling or lopping of trees and removal of hedgerows*

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

4.135 Further, this article also authorises the removal of any hedgerow as defined in the Hedgerow Regulations 1997.

4.136 This article is based on article 39 of the model provisions and recent highways orders<sup>25</sup>. It differs from the model provisions in the following respects:

- (a) Paragraph (1) refers to any vegetation on or overhanging land within the Order limits, rather than any tree or shrub “near any part of the authorised project”.
- (b) Sub-paragraph (2)(c) requires the Applicant to take steps to avoid a breach of the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2017.
- (c) Paragraphs (4) and (5) are added to extend the powers of the undertaker to also apply to hedgerows, since these may also need to be removed in order for the authorised development to be carried out.

*Article 37 – Trees subject to tree preservation orders*

4.137 This article enables the Applicant to fell, lop or cut back the roots of any tree which is subject to a tree preservation order, as specified in Schedule 8, to prevent it obstructing or interfering with the construction, maintenance or operation of the authorised development or from causing a danger to persons using it. Compensation is payable if loss or damage is caused.

4.138 This article is based on article 40 of the model provisions and previous highways orders.

*Article 38 – Removal of human remains*

4.139 This article prescribes a process for the removal and re-interment or cremation of any human remains present within the Order limits. It is necessary to cater for circumstances where previously unidentified remains may be identified during the construction of the Scheme.

4.140 Under paragraph (3) the undertaker is required to publish public notices of the intended removal of the remains. There is then a period of 56 days for any personal representative or relative of the deceased person to give notice to the undertaker that they intend themselves – to carry out the removal, which if accepted by the undertaker will be carried out at the undertaker's cost.

4.141 Paragraph (12) explains that the notice procedure prescribed by this article does not apply where the remains were interred more than 100 years ago and no relative or personal representative of the deceased is likely to object to the remains being removed. This is to clarify that the notice procedure does not apply in respect of historical remains.

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<sup>25</sup> See for example articles 42, 39 and 23 of the A428, A47 and M25 orders respectively.

- 4.142 Paragraph (14) confirms that the removal of any remains under this article must be carried out in accordance with any directions given by the Secretary of State.
- 4.143 Paragraph (16) confirms that section 25 of the Burial Act 1857 (which makes it an offence to remove human remains unless the conditions in that section are complied with) does not apply to a removal carried out in accordance with this article.
- 4.144 This article was included in the model provisions as article 17. It is also based on other recent highways orders<sup>26</sup>.

## **Part 7 - Miscellaneous and General**

### *Article 39 - Application of landlord and tenant law*

- 4.145 This article governs the leasing of land by the Applicant to any other person. Essentially it allows the terms of the lease to override any statutory provisions relating to landlord and tenant law.
- 4.146 This article was included in the model provisions as article 35.

### *Article 40 - Operational land for purposes of the 1990 Act*

- 4.147 This effect of this article is that the land within the Order limits is to be treated as the operational land of a statutory undertaker for the purposes of the Town and Country Planning Act 1990 and the Town and Country Planning (General Permitted Development) (England) Order 2015/596. Although section 264 is entitled “cases in which land is to be treated as not being operational land”, subsections (3) and (4) set out cases in which land is to be treated as operational land.
- 4.148 This article was included in the model provisions as article 36.

### *Article 41 - Defence to proceedings in respect of statutory nuisance*

- 4.149 Section 158 of the 2008 Act confers statutory authority for the purposes of a defence in civil or criminal proceedings for nuisance. This article provides a defence to proceedings brought in a magistrates’ court under section 82(1) of the Environmental Protection Act 1990 in relation to a variety of nuisances set out in paragraph 79(1) of that Act.
- 4.150 This provision is often misunderstood. A broad defence to civil and criminal proceedings for nuisance is provided by section 158 of the 2008 Act. However, the view taken under the NSIP regime is that section 158 does not extend to the relatively rare situation in which if somebody considers that the local authority ought to be tackling a nuisance using its statutory nuisance powers, but it is not, that person may apply to the magistrates' court

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<sup>26</sup> See for example article 52 of the A428 order and article 46 of the A303 Sparkford to Ilchester Dualling Order 2021.

under section 82 of the Environmental Protection Act 1990. Accordingly, this article extends the effect of section 158 to cover this scenario.

4.151 Because section 158 does not distinguish between different types of nuisance, the logical position is that this article should also apply to all categories of nuisance. However, as a matter of practice other schemes have been more discriminating and have asked whether there is any possibility of a statutory nuisance occurring, leading to specific types of nuisance being referred to. The Applicant has followed this approach by seeking to restrict the application of this article so that it only applies to nuisances that have been identified as potentially resulting from the authorised development, as set out in the Statement of Statutory Nuisance (Document Reference 6.16) accompanying the application. This ensures that this article is focused only on those nuisances that may be of relevance, whilst also reflecting the logic of section 158.

4.152 The defence is available if the nuisance relates to:

- (a) the use of premises by the undertaker for the purposes of or in connection with the construction or maintenance of the authorised development and is attributable to the carrying out of the authorised development in accordance with a notice served, or consent given, under the Control of Pollution Act 1974; or
- (b) the construction, maintenance or use of the Scheme and cannot reasonably be avoided.

4.153 This article is based on article 7 of the model provisions and recent highways orders<sup>27</sup>. It differs from the model provisions in that it does not just apply to nuisances arising under paragraph (g) of section 79(1) of the Environmental Protection Act. The references to section 65 of the Control of Pollution Act 1974 are omitted because that section has been repealed. Sub-paragraph (b)(i) of the model provisions is omitted as it is not relevant and sub-paragraph (b)(ii) is included as sub-paragraph (1)(a)(iii).

#### *Article 42 – Protective provisions*

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

#### *Article 43 – Crown rights*

4.155 This article prevents the undertaker from acquiring any Crown land, or from otherwise interfering with it, without the written consent of the relevant Crown authority. Under paragraph (1)(b) the undertaker also requires the written consent of the relevant Crown

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<sup>27</sup> See for example articles 46, 42 and 43 of the A428, A47 and M25 orders respectively.

authority to compulsorily acquire an interest belonging to any other person in any Crown land. The Crown's consent may be given unconditionally or subject to terms and conditions.

- 4.156 This article reflects the provisions of section 135 of the 2008 Act. It was not included in the model provisions but has been included in numerous previous highways orders that have affected Crown land<sup>28</sup>.

*Article 44 – Certification of plans etc.*

- 4.157 This article provides for various application plans and documents listed in Schedule 10 (documents to be certified) to be certified by the Secretary of State as true copies of those documents following the making of the Order. This is based on article 41 of the model provisions, the difference being that the documents are listed in Schedule 10 rather than the article itself.

*Article 45 - Service of notices*

- 4.158 This article governs the service of notices required to be given under the Order. In particular it allows service by email with the consent of the recipient (paragraph (1)(c)), and deals with the situation of service on an unknown landowner or occupier (paragraph (4)).
- 4.159 This article was not included in the model provisions but is a sensible addition that has been included in numerous previous orders.

*Article 46 - Arbitration*

- 4.160 This article governs what happens when two parties disagree about any provision of the Order. Unless the Upper Tribunal (Lands Chamber) has jurisdiction the matter is to be settled by arbitration. If the parties cannot agree on who the arbitrator should be then this will be decided by the President of the Institution of Civil Engineers.
- 4.161 This article was included in the model provisions as article 42.

**5 SCHEDULES**

*Schedule 1 - Authorised development*

- 5.1 Schedule 1 describes the authorised development, which is described in detail in Chapter 2 of the Environmental Statement.

*Schedule 2 - Requirements*

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<sup>28</sup> See for example articles 53, 50 and 36 of the A428, A47 and M25 orders respectively.

- 5.2 The requirements in Schedule 2 are the equivalent of planning conditions. They apply to the carrying out and operation of the authorised development and reflect the processes and procedures usually employed by the Applicant when implementing a scheme such as this.
- 5.3 Most approvals will be sought from the county planning authority. In practice this would involve the details being formally prepared and submitted by the project team to an independent team within GCC for approval. This approach has precedent in previous highways orders granted to local highway authorities<sup>29</sup>.
- 5.4 Decision-making by the county planning authority would follow similar internal processes to those employed in taking other decisions where GCC has an interest in the application, meaning a separation within GCC of those involved in discharging requirements from those involved in delivery of the Scheme.
- 5.5 The requirements provide that the various schemes, details and plans to be approved must, where appropriate, reflect the measures included in the Environmental Statement. The requirements also provide that the approved schemes, details and plans must be implemented as approved, unless further amendments to them are approved. A general provision to this effect is provided at requirement 16.

*Requirement 1 - Interpretation*

- 5.6 Requirement 1 contains a number of definitions used in the requirements. This was included in the model provisions as requirement 1.

*Requirement 2 - Time limits*

- 5.7 Requirement 2 specifies the time limit for commencing the authorised development as being five years from the date on which the Order comes into force. This was included in the model provisions as requirement 2.

*Requirement 3 - Environmental Management Plan*

- 5.8 Requirement 3 requires a construction stage environmental management plan (“EMP (2<sup>nd</sup> iteration)”) to be prepared in consultation with the relevant planning authority and the strategic highway authority and submitted to and approved by the county planning authority prior to commencement of the relevant part of the authorised development. It specifies that the EMP (2<sup>nd</sup> iteration) must be substantially in accordance with the design stage environmental management plan (1<sup>st</sup> iteration) submitted as part of the application.

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<sup>29</sup> See for example the Great Yarmouth Third River Crossing Development Consent Order 2020; the Lake Lothing (Lowestoft) Third Crossing Order 2020 and the Norfolk County Council (Norwich Northern Distributor Road (A1067 to A47(T))) Order 2015.

The environmental management plan (1<sup>st</sup> iteration) is included with the application documents and specifies what the full EMP (2<sup>nd</sup> iteration) is to include.

- 5.9 The requirement also specifies the authorised working hours for the scheme, which are to be from 07:00 to 19:00 Monday to Saturday with certain permitted exceptions where there are compelling reasons why works should be carried out outside of those hours, or where otherwise agreed in advance by the relevant planning authority.
- 5.10 On completion of the authorised development the EMP (2<sup>nd</sup> iteration) must be converted into the end of construction stage environmental management plan ('EMP (3<sup>rd</sup> iteration)'), which sets out the information and measures that are required for the continued operation and maintenance of the authorised development. The EMP (3<sup>rd</sup> iteration) is then subject to approval by the county planning authority under paragraph (4).
- 5.11 Requirement 3 is based on requirement 19 of the model provisions, which referred instead to a code of construction practice. It is also based on recent highways orders<sup>30</sup>, subject to modifications in the defined terms used to reflect a recent update to the Design Manual for Roads and Buildings.

#### *Requirement 4 - Details of consultation*

- 5.12 Requirement 4 provides that where the Applicant is required to consult other organisations under a requirement, it must when applying for the discharge of that requirement include a report setting out the consultation it has undertaken and its response to any comments received as a result of the consultation. A copy of the report must be provided to the consultees in question when the application to discharge the requirement is submitted.
- 5.13 The Applicant is required to ensure that any consultation responses it receives under the requirements are reflected in the details that it submits for approval, but only so far as it is appropriate, reasonable and feasible for it to do so, taking into account such matters as cost and engineering practicality (paragraph (3)). If consultation responses are not incorporated then the Applicant must explain why in its report (paragraph (4)).
- 5.14 Requirement 4 was not included in the model provisions but has been included in previous highways orders<sup>31</sup>.

#### *Requirement 5 - Landscaping*

- 5.15 Requirement 5 requires the preparation of a landscaping scheme for approval by the county planning authority prior to commencement of the relevant part of the authorised

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<sup>30</sup> See for example requirement 4 of the A47 Blofield order and requirement 4 of the M25 Junction 28 order.

<sup>31</sup> See for example requirement 4 of the A30 Chiverton to Carland Cross order, requirement 4 of the M20 Junction 10a order and requirement 30 of the M4 Junctions 3 to 12 order.

development. The relevant planning authority and the strategic highway authority must both be consulted on the scheme, which must be based on the environmental masterplan and the results of the arboricultural walkover survey and tree survey required under subparagraph (2).

- 5.16 Requirement 5 is based on requirement 7 of the model provisions and recent highways orders<sup>32</sup>. It differs from the model provisions in that the Applicant is also required to carry out surveys prior to commencement, and the landscaping scheme that is prepared must be based on the environmental masterplan and the results of those surveys. The details that the scheme is required to include also differ, which is considered to be appropriate given that the scheme is for landscaping and not, for example, to show the location of below ground services.

*Requirement 6 - Implementation and maintenance of landscaping*

- 5.17 Requirement 6 provides for the implementation and maintenance of landscaping in accordance with the scheme approved under Requirement 5. Sub-paragraph (3) provides for the replacement of trees and shrubs which become diseased or damaged within a period of five years after planting.
- 5.18 Requirement 6 was included in the model provisions as requirement 8.

*Requirement 7 - Fencing*

- 5.19 Requirement 7 provides that permanent and temporary fencing must be constructed and installed in accordance with the *Manual of Contract Documents for Highway Works* unless otherwise agreed in writing with the county planning authority following consultation with the relevant planning authority and the strategic highway authority. It is based on requirements 12 and 13 of the model provisions, amended to reflect that standards are already set out in the *Manual of Contract Documents*, which is an industry-wide publication. This wording has been included in recent highways orders<sup>33</sup>.

*Requirement 8 – Land and groundwater contamination*

- 5.20 Requirement 8 makes provision for dealing with any contaminated land or groundwater discovered during construction of the works. Prior to commencement of development the Applicant must prepare a contamination risk assessment in respect of controlled waters for approval by the county planning authority.

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<sup>32</sup> See for example requirement 5 of the A30 Chiverton to Carland Cross order, requirement 5 of the A19/A184 Testo's Junction order and requirement 5 of the M20 Junction 10a order.

<sup>33</sup> See for example requirement 7 of the A30 Chiverton to Carland Cross order, requirement 12 of the A19/A184 Testo's Junction order and requirement 7 of the M20 Junction 10a order.

- 5.21 Sub-paragraphs (3) to (5) specify additional requirements that will apply if any unexpected contamination is encountered during construction.
- 5.22 The Environment Agency is included as a consultee under this requirement.
- 5.23 This requirement is based on recent highways orders<sup>34</sup>. Although a model requirement dealing with contamination was included in the model provisions (requirement 15), it was less comprehensive and only required the undertaker to deal with contamination likely to cause “*significant harm to persons or pollution of controlled waters or the environment*”. It also made no provision for dealing with unexpected contamination encountered during construction.

#### *Requirement 9 - Archaeology*

- 5.24 Requirement 9 sets out requirements for archaeological investigations. A scheme of archaeological investigation and mitigation reflecting the measures included in ES chapter 11, the EMP (1<sup>st</sup> iteration) and the Archaeological Management Plan approved as part of the EMP (2<sup>nd</sup> iteration) must be prepared and approved by the county planning authority before any part of the authorised development can commence. The authorised development must then be carried out in accordance with the approved archaeological investigation and mitigation scheme and sub-written schemes of investigation.
- 5.25 A programme of archaeological reporting, post excavation and publication required as part of the archaeological investigation and mitigation scheme and sub-written schemes of investigation must be prepared in consultation with the County Archaeologist and implemented within a reasonable timescale.
- 5.26 Sub-paragraphs (4) to (6) put in place a process for investigating and recording remains that are revealed during construction that were not previously identified.
- 5.27 This requirement is based on recent highways orders<sup>35</sup>. Although a model archaeology requirement was included in the model provisions (requirement 16), it was less comprehensive and made no detailed provision for dealing with unexpected remains discovered during construction.

#### *Requirement 10 - Protected species*

- 5.28 Requirement 10 provides that where any previously unidentified protected species are found during construction, construction works near their location are to cease and the undertaker must immediately report it to the Ecological Clerk of Works. The undertaker must then prepare a written protection and mitigation scheme.

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<sup>34</sup> See for example requirement 8 of the A30 Chiverton to Carland Cross order, requirement 8 of the M20 Junction 10a order and requirement 12 of the M4 Junctions 3 to 12 order.

<sup>35</sup> See for example requirement 9 of the A428 order and requirement 9 of the A47 Blofield order.

- 5.29 Under sub-paragraph (3) the undertaker must implement the written scheme immediately and construction in the area specified in the written scheme must not recommence until any necessary licences are obtained to enable mitigation measures to be implemented.
- 5.30 This requirement is based on requirement 34 of the model provisions and previous highways orders<sup>36</sup>. It differs from the model provisions in that it does not just relate to European protected species. It also does not require further survey work, on the basis that survey work will have already been carried out as part of the environmental impact assessment. Instead it sets out the procedure to be followed if protected species are found that have not already been identified and for which appropriate mitigation measures may not therefore have already been secured.

*Requirement 11 - Detailed design*

- 5.31 Requirement 11 provides that the authorised development must be designed in detail and carried out so that it is compatible with the preliminary scheme design shown on the Works Plans, the General Arrangement Plans, the Environmental Masterplan and the Engineering Drawings and Sections, unless otherwise agreed in writing by the county planning authority following consultation with the relevant planning authority and strategic highway authority, where appropriate. This means that any variations to the Scheme design (which must be within the limits of deviation) are subject to approval.
- 5.32 The county planning authority must be satisfied that any amendments to the preliminary design would not give rise to any materially new or worse adverse environmental effects compared to those reported in the Environmental Statement.
- 5.33 This requirement consolidates requirements 4 to 6 of the model provisions and is also based on recent highways orders<sup>37</sup>.

*Requirement 12 - Surface and foul water drainage*

- 5.34 Requirement 12 provides that no part of the authorised development may commence until written details of a surface and foul water drainage system, reflecting the mitigation measures in the Environmental Statement and including means of pollution control, have been prepared in consultation with the relevant planning authority, the strategic highway authority and the Environment Agency and approved in writing by the county planning authority.
- 5.35 This requirement was included in the model provisions as requirement 14.

*Requirement 13 - Flood compensatory storage*

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<sup>36</sup> See for example requirement 10 of the A30 Chiverton to Carland Cross order, requirement 10 of the M20 Junction 10a order and requirement 13 of the M4 Junctions 3 to 12 order.

<sup>37</sup> See for example requirement 12 of the A428 order and requirement 3 of the A47 Blofield order.

- 5.36 Requirement 13 provides that no part of the authorised development may commence until a detailed flood compensatory storage scheme for that part has been submitted to and approved in writing by the county planning authority following consultation with the relevant planning authority and the strategic highway authority. The scheme must provide suitable flood storage for any flood waters that would be displaced during the 1 in 100 year event, with a 53% allowance made for climate change. The scheme must be implemented as approved and subsequently maintained.
- 5.37 This requirement was not included in the model provisions but has precedent in previous highways orders<sup>38</sup>.

*Requirement 14 - Noise mitigation*

- 5.38 Requirement 14 provides that no part of the authorised development may commence until written details of proposed noise mitigation, including noise barriers and any very low noise surfacing, have been submitted to and approved in writing by the county planning authority following consultation with the relevant planning authority and the strategic highway authority.
- 5.39 Under sub-paragraph (2) the written details must either reflect the mitigation measures referred to in the Environmental Statement and the Noise and Vibration Management Plan or, where the mitigation proposed is materially different, include evidence that the mitigation proposed would not give rise to any materially new or worse adverse environmental effects compared to those reported in the Environmental Statement.
- 5.40 This requirement is based on requirement 25 of the model provisions and previous highways orders<sup>39</sup>.

*Requirement 15 - Highway lighting*

- 5.41 Requirement 15 provides that no part of the authorised development may commence until a written scheme of the proposed highway lighting for that part of the authorised development has been submitted to and approved in writing by the county planning authority following consultation with the relevant planning authority and the strategic highway authority.
- 5.42 Under paragraph (2) the standard of the highway lighting to be provided must either reflect the standard of highway lighting referred to in the Environmental Statement or, where the standard of highway lighting proposed is materially different, include evidence that the standard of highway lighting proposed would not give rise to any materially new or worse

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<sup>38</sup> See for example requirement 14 of the A428 order and requirement 14 of the M20 Junction 10a order.

<sup>39</sup> See for example requirement 18 of the A428 order and requirement 14 of the A303 Sparkford to Ilchester order.

adverse environmental effects compared to those reported in the Environmental Statement.

- 5.43 The standard of the highway lighting must include the specification, level of provision, light spillage, intensity and brightness of the highway lighting.
- 5.44 This requirement is based on requirements 21 (external lighting) and 27 (control of artificial light emissions) of the model provisions and previous highways orders<sup>40</sup>. It goes into more detail as to the standard of highway lighting to be provided than the model provisions did.
- 5.45 Paragraph (4) confirms that this requirement does not restrict the lighting that may be used during the construction or maintenance of the authorised development. Lighting during the construction phase will be regulated by the EMP (2<sup>nd</sup> iteration).

*Requirement 16 - Approvals and amendments to approved details*

- 5.46 Requirement 16 confirms that details approved pursuant to the requirements include any amendments that may subsequently be approved by the county planning authority. This was included in the model provisions as requirement 37.
- 5.47 Part 2 of Schedule 2 provides a clear procedure for the discharge of requirements by the Secretary of State. It sets out clear time limits for decisions to be made and makes provision for circumstances where the Secretary of State requires further information to be provided in relation to an application for the discharge of a requirement. This also includes an obligation on the Applicant to publish an electronic register of requirements under paragraph 19, which would track where each requirement is in the process.
- 5.48 Under paragraph 20 any steps the Applicant takes to comply with the requirements before the Order is made will be treated as effective in complying with the requirements once the Order is made, thereby avoiding the need to repeat such steps.
- 5.49 In the event of a dispute between the Applicant and the Secretary of State regarding the discharge of any of the requirements, that dispute would stand to be referred to arbitration in accordance with article 47.

*Schedule 3 - Classification of Roads, etc.*

- 5.50 This Schedule sets out which roads will be special roads, classified roads and unclassified roads following completion of the works. Part 4 identifies proposed speed limits and Part 5 identifies proposed traffic regulation measures, including prohibitions of U-turns and bus lanes. Part 6 provides for the revocation and variation of certain existing

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<sup>40</sup> See for example requirement 14 of the A30 Chiverton to Carland Cross order and requirement 14 of the A14 Cambridge to Huntingdon order.

traffic regulation orders to be revoked or modified. Part 7 identifies public rights of way which are to be created under the Order by reference to the Streets, Rights of Way and Access Plans.

*Schedule 4 - Permanent stopping up of highways and private means of access & provision of new highways and private means of access*

5.51 This Schedule sets out those highways and private means of access that are to be permanently stopped up, and new highways and private means of access to be provided, pursuant to Articles 16 (permanent stopping up and restriction of use of streets and private means of access) and 25 (public rights of way). The highways and private means of access in question are identified by reference to the Streets, Rights of Way and Access Plans.

5.52 Part 1 identifies highways to be stopped up for which no substitute is to be provided. Part 2 identifies highways to be stopped up for which a substitute is to be provided, and new highways which are otherwise to be provided (i.e. where there is no related stopping up of an existing highway). Part 3 identifies private means of access to be stopped up for which no substitute is to be provided, which may only be stopped up in accordance with the terms of Article 16(3) and (4). Part 4 identifies private means of access to be stopped up for which a substitute is to be provided, and new private means of access which are otherwise to be provided (i.e. where there is no related stopping up of an existing private means of access).

*Schedule 5 - Land in which only new rights etc. may be acquired*

5.53 This Schedule identifies the land in which new rights may be acquired pursuant to Article 24 (compulsory acquisition of rights and imposition of restrictive covenants) by reference to the Land Plans. As well as acquiring permanent rights in this land the Applicant may also take temporary possession of it under Article 31 (temporary use of land for carrying out the authorised development).

*Schedule 6 - Modification of compensation and compulsory purchase enactments for creation of new rights and imposition of restrictive covenants*

5.54 This Schedule provides for the modification of legislation relating to compensation and compulsory purchase for the purpose of giving effect to the provisions of the Order relating to the creation of new rights and the imposition of restrictive covenants. The aim is to ensure that the relevant legislation applies to the creation of new rights and the imposition of restrictive covenants in a way that is equivalent to the way in which it applies to the outright acquisition of the land.

*Schedule 7 - Land of which temporary possession may be taken*

- 5.55 This Schedule identifies the land which the Applicant may only take temporary possession of under the Order, as provided for in Article 31(1)(a)(i) (temporary use of land for carrying out the authorised development). The relevant land is shaded green on the Land Plans.

*Schedule 8 - Trees subject to tree preservation orders*

- 5.56 This Schedule identifies those trees that are the subject of tree preservation orders that will or may be subject to works as part of the authorised development.

*Schedule 9 - Protective provisions*

- 5.57 This Schedule sets out protective provisions for the protection of third party utility companies and other undertakers whose apparatus is, or may be, affected by the authorised development. Part 1 contains protective provisions for the protection of electricity, gas, water and sewerage undertakers. Part 2 contains protective provisions for the protection of electronic communications code network operators. Part 3 contains protective provisions for the protection of National Highways Limited as the strategic highway authority.

- 5.58 The draft protective provisions are based on extensive precedent established by the protective provisions contained in previously made orders. In all cases the Applicant either has agreed, or is seeking to agree, the relevant protective provisions with each relevant organisation. In terms of the National Highways protective provisions in particular, National Highways have made a number of comments on the current draft which are being considered by the Applicant. In this regards the Applicant and National Highways are actively engaging with the aim of seeking agreement to a set of provisions acceptable to both parties as soon as possible.

*Schedule 10 - Documents to be certified*

- 5.59 This Schedule lists the documents to be certified by the Secretary of State pursuant to Article 44 (certification of plans etc.).

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