



**Able Marine Energy Park**  
*Draft Explanatory Memorandum*

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Revision: 1  
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## **1 Summary**

- 1.1 This memorandum explains the purpose and effect of each article of, and Schedules to, the draft Able Marine Energy Park Development Consent Order 201X (“the Order”), as required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009<sup>1</sup>.
- 1.2 The Order is based on the model provisions<sup>2</sup> but occasionally departs from them. Where there is a significant departure from the model provisions, an explanation of the new provision is provided, as required by paragraph 24 of the Infrastructure Planning Commission Guidance Note 2, December 2009.

## **2 Purpose of the Order**

### *Nationally Significant Infrastructure Project – construction of harbour facilities*

- 2.1 The proposed development lies wholly within England and English waters and will have a capacity of more than 5 million tonnes of (non-container /ro-ro) cargo. As a result the proposed development is a nationally significant infrastructure project (“NSIP”) for the purposes of sections 14(1)(j) and 24 of the Planning Act 2008<sup>3</sup> (“the Act”).
- 2.2 As the proposed development is an NSIP any application for a development consent order must be made to the Infrastructure Planning Commission (“the Commission”) under section 37 of the Act.
- 2.3 Able Humber Ports Ltd has made an application to the Commission for an Order to construct and operate a new quay, approximately 1300 metres long, near North Killingholme on the south bank of the Humber Estuary. An environmental habitat will also be created on the north bank, to compensate for the loss of land from the Humber Estuary Natura 2000 site. The purpose of the quay is to allow components and parts for the offshore energy market to be manufactured and exported to their installation sites and elsewhere.

### *Associated development*

- 2.4 In connection with the construction of the quay, the Order specifically authorises associated development being development that is associated with the NSIP. The Commission may, under the provisions of section 115 of the Act, grant consent for development that is associated with the NSIP.
- 2.5 Guidance on associated development has been issued by the Secretary of State for Communities and Local Government<sup>4</sup>. In this guidance, associated development is described as being “*of a type normally brought forward with that sort of primary development*” and “*not be an aim in itself but should be subordinate to and **necessary***”

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

<sup>2</sup> The Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (S.I. 2009/2265)

<sup>3</sup> c.29

<sup>4</sup> “Guidance on associated development: Applications to the Infrastructure Planning Commission (Department for Communities and Local Government) (September 2009).

*for the development and effective operation to its design capacity of the NSIP that is the subject of the application”<sup>5</sup>. (emphasis in bold is from the original)*

- 2.6 The associated development for which the Order seeks authorisation includes the construction of onshore manufacturing and supply chain facilities.
- 2.7 A full, technical explanation of the authorised development is contained in the Environmental Statement (reference TR030001/APP/14a) accompanying this application.

### **3 Ancillary matters**

- 3.1 The Order also contains several ancillary matters, i.e. consent for legal powers not consisting of development.
- 3.2 The main ancillary matter is a power to acquire land or rights compulsorily, or by agreement in accordance with section 120(4) of the Act. The Order also contains powers of compulsory acquisition for land required for the authorised development, or to facilitate, or that is incidental to the authorised development under section 122 of the Act. It also seeks associated powers including the acquisition of rights to construct and maintain the authorised development. A justification for these is set out in the Statement of Reasons that accompanies the application (reference TR030001/APP/13a).
- 3.3 The Order seeks to apply and modify statutory provisions in relation to the compulsory acquisition of land. It is for this reason, under sections 117 and 120(5) of the Act that the Order must be made by Statutory Instrument. The Order is, therefore, drafted in that form.
- 3.4 Other ancillary matters include the diversion of two footpaths, one on each side of the Humber Estuary, and the creation of a harbour authority.

### **4 Draft Order**

- 4.1 The provisions of the Order are now explained in sequence, giving reasons for any significant departure from the model clauses for harbours and model requirements contained in the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009.
- 4.2 Generally, the “authorised project” is referred to as the “authorised development”, as there are no “ancillary works”, the only difference between the two definitions. In what follows, where it states that an article is identical to the model provision, this is except for the replacement of ‘authorised project’ with ‘authorised development’ wherever it occurs.

## **5 Part 1 - Preliminary**

### *Article 1 Citation and commencement*

- 5.1 Article 1 sets out the name of the Order – there is no such provision in the model provisions, but it is felt necessary to name the Order.

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<sup>5</sup> Paragraph 10 of the Guidance

## *Article 2 (article 1 of the model provisions) Interpretation*

5.2 Article 2(1) defines terms used in the remainder of the Order. For example, the term ‘harbour’ is used to refer to the quay, the dredged area in front of it, and all other buildings etc. used in connection with the quay and within the harbour limits. The article departs from the model provisions where the defined term is not used (in which case the definition is omitted); the following definitions are added:

- (a) “the 1984 Act”;
- (b) “AB Ports”;
- (c) “area of jurisdiction”;
- (d) “the Company”;
- (e) “the Crown land plan”;
- (f) “the design drawings”;
- (g) “the dockmaster”;
- (h) “the ecology plan”;
- (i) “the Harbour Authority”;
- (j) “the harbour master”;
- (k) “the heritage plan”;
- (l) “maintain”;
- (m) “Network Rail”;
- (n) “requirement”.

5.3 Existing definitions differ in the following other respects:

- (a) “the Order limits” are referred to by reference to the works plan,
- (b) “the relevant planning authority” removes any text not relevant to this project;
- (c) “undertaker” additionally refers to articles 11 and 12; and
- (d) “vessel” has been expanded to accommodate more unusual types of water-borne structures that may be involved in the construction of the quay or its operation.

5.4 Article 2(2) expands the definition of rights over land, in line with the model provision.

5.5 Article 2(3) defines measurements as approximate. It is worded slightly differently to the model provisions but the effect is the same.

## *Article 3 (article 2 of the model provisions) Incorporation of the Harbours, Docks and Piers Clauses Act 1847*

5.6 Article 3 incorporates provisions of the Harbours, Docks and Piers Clauses Act 1847. This Act sets out a series of clauses that can be incorporated in the order authorising a particular project – the model provisions of their time, still in use today. Unlike clauses from the model provisions, however, these are simply incorporated by reference rather than being reproduced in this Order.

5.7 Several sections from the 1847 Act that are incorporated by the model provisions are not incorporated by this Order because they create offences, which cannot be the

subject-matter of an order granting development consent. The only other section that is not incorporated is section 33, whose general right to use the harbour is substituted by article 28. This is because AMEP is to be used by the tenants of the onshore land rather than generally.

- 5.8 Article 2(2)(h) from the model provisions is omitted as it refers to section 53, which is no longer incorporated as it is one of the articles to create an offence.

#### *Article 4 Modification of enactments*

- 5.9 Article 4 is not in the model provisions. It is used to modify certain enactments, which is expedient because it allows the authorisation of AMEP to proceed under a single consent procedure as far as possible. The ability to modify legislation in a Development Consent Order is provided for by section 120(5) of the Act. Paragraph (1) modifies three local Acts relating to the Humber Estuary, so that they do not apply to the project, thus obviating the need for three extra consent processes for the works.
- 5.10 Paragraph (2) modifies section 23 of the Land Drainage Act 1991 so that the promoter does not need to seek a separate consent. The consent of the land drainage board is needed to be able to do this, pursuant to s150 of the Act and paragraph 32 of Part 1 of the Schedule to the Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010 (SI 2010/105). A copy of the consent is attached to the 'other consents' application document, reference TR030001/APP/24. Section 23 of the Land Drainage Act 1991 permits the obstruction of watercourses with the permission of the land drainage board.

## **6 Part 2 – Principal powers**

### *Article 5 (article 3 of the model provisions) Development consent etc. granted by the Order*

- 6.1 Article 5 gives the principal power to construct and operate the project – the development consent.

### *Article 6 (article 4 of the model provisions) Period for completion of the work*

- 6.2 Article 6 gives the time limit within which the works must be completed without obtaining an extension. The model provisions suggest five years or such other period; the Order sets a period of ten years, given the scale of the project and the likely time it may take to be constructed. The project is comparable in scale to the Felixstowe South and Bathside Bay container ports, which also have a ten-year time limit, contained in article 7(1) of the Felixstowe Dock and Railway Harbour Revision Order 2007 (SI 2007/3219) and article 4 of the Harwich Parkeston Quay Harbour Revision Order 2010 (SI 2010/626), respectively.
- 6.3 This ten-year period for completing the works should be contrasted with the five-year period contained in article 32 (which relates to acquiring land) and article 19 (which relates to protective work to buildings). Possession of the land will be taken before the works can start and so this period is necessarily shorter (and is limited to prevent compulsory purchase powers hanging over landowners for an unreasonable length of time) and the timing of the works to buildings power is limited to five years after the project comes into use, which will be later than the deadline for completion.

*Article 7 (article 5 of the model provisions) Jurisdiction of the harbour authority*

- 6.4 The article for the jurisdiction of the harbour is the equivalent to the article for the harbour limits in the model provisions, but is drafted differently. This is principally because this Order is to create a new harbour rather than to extend an existing one. Instead of the model provisions, it is based on article 8 of the London Gateway Port Harbour Empowerment Order 2008 (SI 2008/1261), because there is a similar situation there of a new harbour being carved out of an existing conservancy.
- 6.5 In the case of the London Gateway Port, the Thames Estuary is controlled by the Port of London Authority, whereas in this case the Humber Estuary is controlled by the Humber Conservancy Board. In both orders, the Harbour Authority and dock master just have jurisdiction over the relatively small new harbour area, whereas the harbour master refers to the harbour master of the Humber Conservancy Board, who has jurisdiction over the whole of the estuary, including the new harbour area.

*Article 8 Agreements etc. entered into by the Company*

- 6.6 This article allows agreements predating the coming into force of the Order to have effect on the harbour authority despite it not existing at that time, principally so that the promoter can reach agreement with AB Ports about how their jurisdictions will operate without waiting for the Order to come into force. It is identical to article 9 of the London Gateway Port Order referred to in the previous paragraph. An agreement might declare that it was operative upon the harbour authority once it was constituted, but this could arguably have no effect given that a harbour authority is a creature of statute.

*Article 9 (article 6 of the model provisions) Maintenance of authorised development*

- 6.7 This article sets out the scope within which the promoter may maintain the development. It is identical to the model provisions article except that ‘authorised development’ is used for ‘authorised project’, as elsewhere, and since the definition of maintenance includes ‘alter’, ‘replace’ and ‘reconstruct’ these words have been omitted from the article.

*Article 10 (article 7 of the model provisions) Provision of works*

- 6.8 This article sets out the general works that can be provided and operated in the proposed harbour. The title of the article has been changed from ‘subsidiary works’ to ‘provision of works’ since this better reflects its meaning, and by giving authority to operate the project, the article affords statutory authority for interference with the rights of navigation to the project and ancillary works.
- 6.9 Article 10(1) contains a list of additional items that may be constructed in the harbour. The list differs from the model provisions in two respects: “railway lines” has been added, since there is a railway line within the harbour. The word ‘work’ has also been replaced with ‘authorised development’, since it is not defined.
- 6.10 Article 10(2) gives some further works that may be constructed and maintained. The list in part (a) has several more elements in it than the model provisions (which just have ‘dolphins and pontoons’). The other elements (berthing heads, mooring posts,

ladders, buoys, bollards, fenders, rubbing strips and fender panels and fender units) are ancillary to the main development and are similar in nature to dolphins and pontoons since they will allow vessels to use the quay more easily. A recent precedent for the extended list is the Port of Bristol (Deep Sea Container Terminal) Harbour Revision Order 2010 (SI 2010/2020) (article 4(2)(a)). In part (b), the text ‘alter the position of’ has been replaced with ‘divert, remove or replace’ as a more practical provision. Part (c) has been added to reflect the provision of landscaping as well as on-site environmental mitigation. This is also taken from the Bristol order.

- 6.11 Article 10(3) declares that the works permitted by this Order benefit from permitted development. It is identical to the model provisions.

*Article 11 (article 8 of the model provisions) Benefit of Order*

- 6.12 Article 11 overrides section 156(1) of the Act (as permitted by section 156(2)) to give the benefit of the Order to the promoter rather than anyone with an interest in the land. It would be impractical for a variety of landowners to implement parts of the Order in an uncoordinated manner, which might be the case if s156(1) were to remain.
- 6.13 The model provision has been used, with ‘the Order’ substituted for the list of provisions and ‘the Company’ for the body or bodies with the benefit.

*Article 12 (article 9 of the model provisions) Consent to transfer benefit of Order*

- 6.14 This article allows powers under the Order to be transferred to others. The article follows the model provision (please note there is some text missing from article 9(1)(a) in the version on [www.legislation.gov](http://www.legislation.gov)), where the Secretary of State has been inserted as the person or body who grants a transfer, although the word ‘statutory’ has been removed from article 12(1)(b), since the associated rights transferred may not all be statutory and this allows the removal of article 27 of the model provisions.

## **7 Part 3 - Streets**

*Article 13 (article 10 of the model provisions) Street works*

- 7.1 This article allows works to be carried out in the streets specified in Schedule 2. Neither of the roads in the Schedule are trunk roads. The article follows the model provision.

*Article 14 (article 12 of the model provisions) Temporary stopping up of streets*

- 7.2 Note that article 11 of the model provisions has not been used since no streets are to be permanently stopped up.
- 7.3 This article allows streets to be stopped up temporarily for the works. The streets listed in Schedule 4 may be stopped up after consultation with the street authority (i.e. North Lincolnshire Council), and for any other street, the street authority (which could include East Riding of Yorkshire Council) must give consent to the stopping up.



*Article 15 (article 13 of the model provisions) Access to works*

- 7.4 This article allows accesses to public highways to be created – for those accesses listed in Schedule 5, without further approval, and for any other access, with the approval of the planning authority after consulting the highway authority. If the approval is not forthcoming within 28 days, it will be deemed to have been given.
- 7.5 The article follows the model provision except for two changes: first, it is only accesses to public highways that are within the scope of this article, and secondly, the deemed approval of the planning authority if it does not respond in 28 days has been added. This is to reduce the risk to the project schedule from delays in obtaining consent.

*Article 16 (article 14 of the model provisions) Agreements with street authorities*

- 7.6 This article allows the promoter and the street authority (i.e. North Lincolnshire Council or East Riding of Yorkshire Council) to enter into agreements about the street works necessitated by the project.
- 7.7 The article is an abbreviated version of the model provision. Model provision 14(1)(a) and (b) have been replaced by a more general power to enter into agreements about streets that need alteration due to the project.

*Article 17 (article 15 of the model provisions) Public rights of way*

- 7.8 This article allows footpaths to be diverted, so long as any temporary footpath, and eventually the new footpath, is certified as suitable before the old one is stopped up.
- 7.9 The article is based on the model provisions, but instead of referring to a plan, reference is made to Schedule 3, which then refers to points on a plan. The definition of ‘implementation plan’ has been amended to align it with Requirement 10, which is in similar terms.

## **8 Part 4 –Supplemental Powers**

*Article 18 (article 16 of the model provisions) Discharge of water*

- 8.1 This article sets out the circumstances in which the promoter is entitled to discharge water into a sewer or watercourse. Essentially this can be done with the consent of its owner, but consent cannot be withheld unreasonably. The article is identical to the model provision. This article deals with the discharge of water, and should be contrasted with article 4(2), which deals with the obstruction of watercourses. The article is the same as the model provision except that the reference to the Water Resources Act 1991 has been replaced by one to the Environmental Permitting (England and Wales) Regulations 2010, which have replaced that provision of the 1991 Act.

*Article 19 (article 17 of the model provisions) Protective works to buildings*

- 8.2 This article sets out the circumstances in which protective works can be carried out to nearby buildings that it is considered might be damaged by the works. Except in an emergency, the promoter must give 14 days’ notice to the owner of the building, and

the owner can seek arbitration by serving a counter-notice. The power lasts until five years after the relevant part of the project comes into operation. There is an entitlement to compensation for loss or damage. The article is identical to the model provision.

*Article 20 (article 18 of the model provisions) Authority to survey and investigate the land*

- 8.3 This article gives the promoter the power to enter land for the purpose of surveying and testing. There is a similar provision in s53 of the Act, but it is not as extensive as this article, although it can apply before development consent is granted. The Localism Act 2011 is extending the provisions of that section to reflect this article more closely.
- 8.4 The article provides that the promoter must give 14 days' notice before exercising the powers of entry, and that compensation is payable for any loss or damage. The article is based on the model provision, although the words 'upon entering the land' have been added to paragraph (3)(a) to make it clear when the obligation to provide evidence of authority operates.

*Article 21 (article 20 of the model provisions) Right to dredge*

- 8.5 Note that article 19 of the model provisions (removal of human remains) is not included as there are no human remains on the Order land.
- 8.6 This article grants the promoter a power to dredge the River Humber, and to deposit dredged materials below high water pursuant to the marine licence included at Schedule 8. The article is based on the model provision with the following alterations: 'authorised development' is substituted for 'work', since that term is not defined; "the River Humber" is substituted for 'the river', since no river is otherwise defined, the Marine Management Organisation pursuant to the marine licence is substituted for the relevant body in paragraph (2)(b) and the Humber Conservancy Board is substituted for the relevant conservancy authority in paragraph (3).

*Article 22 (article 21 of the model provisions) Tidal works not to be executed without approval of the Secretary of State*

- 8.7 This article requires further permission from the Secretary of State for tidal works (i.e. works of construction below high tide) to be carried out if the works authorised by this Order are not started within five years. The article is based on the model provision except that paragraph (2) (works to be carried out in compliance with protective provisions) has been omitted because there are no relevant protective provisions in a Schedule.

*Article 23 (article 22 of the model provisions) Abatement of works abandoned or decayed*

- 8.8 This article deals with the situation where the promoter has allowed the works below high tide (or in some circumstances above high tide) to fall into disrepair or has abandoned them. The Secretary of State may require the promoter to repair them, failing which he or she may do so and recover the expense of doing so from the promoter. This article is identical to the model provision.

*Article 24 (article 23 of the model provisions) Survey of tidal works*

- 8.9 This article gives the Secretary of State the power to charge the promoter to carry out a survey of the site of the works before, during or after construction. The article is identical to the model provision.

*Article 25 (article 24 of the model provisions) Lights on tidal works during construction*

- 8.10 This article requires the promoter to light the works during their construction between sunset and sunrise for the purposes of navigational safety, to the satisfaction of the Secretary of State and the Humber Conservancy Board (where the Secretary of State takes precedence in the event of disagreement). It is the same as the model provision, with the substitution of the Humber Conservancy Board for the generic text.

*Article 26 (article 25 of the model provisions) Provision against danger to navigation*

- 8.11 This article requires the promoter to lay down buoys etc. to the satisfaction of the Humber Conservancy Board and Trinity House (with the former taking precedence) should the works be damaged, destroyed or decayed. It is the same as the model provision, with the substitution of the Humber Conservancy Board for the generic text.

*Article 27 (article 26 of the model provisions) Permanent lights on tidal works*

- 8.12 This article is the equivalent to article 25 once the works have been completed, although it is the Humber Conservancy Board and Trinity House who agree the lighting scheme (the former taking precedence). It is the same as the model provision, with the substitution of the Humber Conservancy Board for the generic text.

*Article 28 Power to appropriate*

- 8.13 Note that article 27 of the model provisions is not included as it is thought that the powers under article 12 will suffice (with the removal of the word ‘statutory’).
- 8.14 This article is not in the model provisions, as it is a replacement for s33 of the 1847 Clauses Act. It allows berths at the harbour to be allocated for the use of particular companies. The proposed use of the harbour whereby berths will be made available to particular companies is the same system as is used the Harwich Parkeston Quay Harbour Revision Order 2010 (SI 201/626), and so the precedent is taken from article 14 of that Order, and is the same except that references to officers of the Company have been altered to references to the harbour master.

## **9 Part 5 – Powers of Acquisition**

*Article 29 (article 28 of the model provisions) Compulsory acquisition of land*

- 9.1 This article authorises the acquisition of land by compulsory purchase. The land that is subject to this power is coloured pink on the land plan. It simply grants the power to acquire such of that land as is required for the project.
- 9.2 The article is based on the model provision with the following amendments: the reference to the land on the plans has been added for clarity; text about acquisition for

incidental purposes and for replacement land has been removed as they are unnecessary; the reference to a subsoil acquisition article in paragraph (4) has been removed as there is no article in this Order.

*Article 30 Power to override easements and other rights*

9.3 This article is not in the model provisions, and is based on an article in the draft Development Consent Order for an application previously made to the Infrastructure Planning Commission, which in turn is based on section 237 of the Town and Country Planning Act 1990. The article is similar to the Rookery South DCO article (article 16), save for the following changes:

- (a) the removal of ‘by its statutory successor’ and ‘or by any of their servants or agents’ from paragraph (1);
- (b) the addition of paragraph (4), taken from section 237(3) of the Town and Country Planning Act 1990;
- (c) the addition of ‘in respect of injurious affection’ to paragraph (6), which is as in section 237(4);
- (d) the addition of paragraph (8), which makes it clear that there is no impact on the availability of compensation for compulsory purchase; and
- (e) the addition of paragraph (9) which maintains the residual liability of the undertaker to pay compensation and is the same as section 237(5).

9.4 The purpose of the article is to ensure that when land is acquired, whether by compulsory purchase or by agreement, it is free from restrictions such as restrictive covenants, as the provisions of article 29(2) may not go far enough. The loss of any right or benefit over the land would be compensatable, rather than being able to be the subject of an injunction that might halt the project.

*Article 31 (article 29 of the model provisions) Compulsory acquisition – incorporation of the mineral code*

9.5 By incorporating the two parts of the named Schedule, this article exempts existing rights in minerals from the scope of compulsory acquisition, and deals with the situation where the owner of mines or minerals wishes to work them. The article is identical to the model provision (taking the option of incorporating Parts 2 and 3 of Schedule 2 rather than just Part 2, Part 3 providing the procedure for the owner wishing to work the mines or minerals).

*Article 32 (article 30 of the model provisions) Time limit for exercise of authority to acquire land compulsorily*

9.6 This article gives the promoter five years to issue ‘notices to treat’ or a ‘general vesting declaration’ to acquire the land that is subject to the power of compulsory purchase. These are the two main procedural methods by which the process of acquiring land is undertaken should this Order be made. The article is the same as the model provision, except that ‘save that’ has been replaced with ‘but’ as a more modern usage.

*Article 33 (article 31 of the model provisions) Compulsory acquisition of rights*

9.7 This article allows for rights in land to be acquired as well as the land itself, and also for new rights to be created over land. The article is identical to the model provision.

*Article 34 (article 32 of the model provisions) Private rights of way*

9.8 This article extinguishes any private rights of way across land being acquired compulsorily at the point that it is taken possession of, or, if is being occupied temporarily, suspends such rights for the duration of the temporary occupation. Compensation is payable to anyone who suffers loss from such an extinguishment. The general provision may also be varied in individual cases. The article is identical to the model provision.

*Article 35 (article 33 of the model provisions) Application of the Compulsory Purchase (Vesting Declarations) Act 1981*

9.9 This article applies the provisions of this 1981 Act to compulsory acquisition under the Order. 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 title in the land to pass to the acquirer more quickly than using the notice to treat method, and also allow several parcels to be acquired at once. The method is often used for large projects (e.g. Crossrail). The article is identical to the model provision.

*Article 36 (article 34 of the model provisions) Acquisition of subsoil only*

9.10 This article allows the promoter to acquire land below a certain depth under the ground rather than having to acquire all of the land. The provisions of the next article of having to acquire more land in the case of ‘severance’ (where only part of some land is acquired) do not apply unless the subsoil that is being acquired includes any part of a ‘house, building or manufactory’. The article is identical to the model provision.

*Article 37 (article 36 of the model provisions) Acquisition of part of certain properties*

9.11 Note that article 35 of the model provisions is not included because no land is proposed to be acquired from 9 metres below the surface.

9.12 This article caters for the situation where part of a landowner’s landholding is proposed to be acquired such that part of a building or other structure is included and part is not, or part of a park or garden. The landowner can require the promoter either to acquire all of the building, park or garden, or none of it, or to refer the dispute to the Lands Chamber of the Upper Tribunal, which decides how much land should be taken.

9.13 The article is identical to the model provision.

*Article 38 (article 37 of the model provisions) Rights under or over streets*

9.14 This article allows the promoter to occupy land above or below streets within the Order limits without having to acquire the land. If there are any structures below the street then compensation is payable for any loss or damage.

9.15 The article is identical to the model provision.

*Article 39 (article 38 of the model provisions) Temporary use of land for carrying out the authorised development*

9.16 This article allows the land coloured blue on the plans to be occupied temporarily while the works are carried out, and also any of the land for permanent acquisition (i.e. coloured pink) that has not yet been taken possession of.

9.17 The article is based on the model provision, with two changes: first, the ability to occupy land temporarily that is subject to powers of permanent acquisition (paragraph (1)(a)(i)) has been added. This has also been used in recent orders made under the Transport and Works Act 1992, such as the Nottingham Express Transit System Order 2009 (SI 2009/1300) (article 36(1)(a)(ii)). It allows the promoter to occupy land without having to acquire it if this later becomes possible, which has a lesser impact on the landowner. There is a consequent amendment to paragraph (3) to cater for the two types of land.

9.18 There is also a minor amendment to paragraph (5) where ‘the provisions of’ has been substituted by ‘any power conferred by’ in last line, since powers, rather than provisions, are exercised.

*Article 40 (article 39 of the model provisions) Temporary use of land for maintaining authorised development*

9.19 This article allows land within the Order limits (that has not been acquired) to be entered onto after the works are complete for maintenance purposes. Houses or occupied buildings cannot be entered into under this provision, 28 days’ notice must be given, and compensation must be paid for any loss or damage.

9.20 The article is identical to the model provisions.

*Article 41 (article 41 of the model provisions) Statutory undertakers*

9.21 Note that article 40 of the model provisions (Special category land) has not been included, because there is no land for which a replacement is to be provided.

9.22 This article allows the promoter to acquire land shown on the plans and described in the book of reference that belongs to statutory undertakers, and to extinguish rights in apparatus or remove or reposition apparatus as so described.

9.23 The article is identical to the model provision.

*Article 42 (article 43 of the model provisions) Recovery of costs of new connections*

- 9.24 Note that article 42 of the model provisions (acquisition and rights of statutory undertakers in stopped up streets) has not been included, since the promoter is not stopping up any streets.
- 9.25 This article provides that if any statutory undertaker's apparatus is removed and this interrupts the service to anyone, then the cost of obtaining a new service can be claimed from the promoter.
- 9.26 The article is identical to the model provision.

**10 Part 6 – Miscellaneous and general**

*Article 43 (articles 44 and 45 of the model provisions) Deemed marine licence*

- 10.1 This article deems the granting of a marine licence, which is a licence to deposit or build on the sea bed below high water mark. Under the Marine and Coastal Access Act 2009, since 1 April 2011 the two previous permissions of a consent under section 34 of the Coast Protection Act 1949 and a licence under Part 3 of the Environment Protection Act 1990 have been combined into a single 'marine licence'.
- 10.2 The drafting of the article reflects the combining of the model provisions for the two previous permissions into the single new permission. Schedule 8 contains the terms of the licence and the conditions attached to it.

*Article 44 (article 46 of the model provisions) Felling and lopping of trees*

- 10.3 This article allows any tree or shrub that is near the project to be felled or lopped, or have its roots cut back, if it is considered to obstruct the construction, operation or maintenance of the project or endanger anyone using it. Compensation is payable for any loss or damage caused.
- 10.4 The article is based on the model provision – the words 'passengers or other' have been removed from paragraph (1)(b) because no passengers are expected to use this harbour facility.

*Article 45 (article 47 of the model provisions) Trees subject to tree preservation orders*

- 10.5 This article is in the same terms as the previous one but applies to trees subject to tree preservation orders, as set out in Schedule 7 and shown on the ecology plan. The permission granted by the article is deemed to be a consent under the tree preservation order. The model clauses refer to trees subject to tree preservation orders being shown on the land plan, but given that this is an ecological protection rather than a right in land, it is shown on the ecology plan for this project.
- 10.6 The article is based on the model provision with the same amendment as to the previous article.

*Article 46 (article 48 of the model provisions) Railway and navigation undertakings*

- 10.7 This article requires the consent of a railway or navigation undertaking to break up any street in their control or to interfere with any level crossing, except in an emergency.
- 10.8 The article is identical to the model provision.

*Article 47 Railway network*

- 10.9 This article is not in the model provisions. Part of the project involves taking a rarely used freight-only railway out of the national network and turning it into a private siding. Note that this does not involve any physical work to the line, it is a regulatory matter. Doing this is expedient because it will allow the undertaker to have greater control over the Order land which will in turn improve the operation of AMEP.
- 10.10 For the sake of clarity, paragraph (1) declares that doing this is to be considered a ‘minor modification’ to the railway network which avoids much of the detailed procedure that would have to be undergone for a ‘network change’.
- 10.11 Paragraph (2) restricts the railway to the carriage of goods to be used by the promoter or anyone permitted by the promoter.
- 10.12 Paragraph (3) allows the promoter to enter into agreements with Network Rail and the Office of Rail Regulation about the operation and use of the railway. This is included because Network Rail and the Office of Rail Regulation are established by statute and their powers need to be expressed explicitly.
- 10.13 Able is in discussion with Network Rail as to the specification of any protective provisions for the latter, which will be included at Part 4 of Schedule 9.

*Article 48 Arrangements with Her Majesty’s Revenue and Customs*

- 10.14 This article is not in the model provisions, although it is identical to article 49 of the London Gateway Port Harbour Empowerment Order 2008 (SI 2008/1261).
- 10.15 In anticipation of the import and export of goods overseas via the quay, it allows the promoter to enter into agreements with HMRC about their operations at the port.

*Article 49 (article 49 of the model provisions) Application of landlord and tenant law*

- 10.16 This article governs the leasing of land by the promoter to any other person. Essentially it allows the terms of the lease to override any statutory provisions relating to landlord and tenant law.
- 10.17 The article is identical to the model provision.



*Article 50 (article 50 of the model provisions) Operational land for the purposes of the 1990 Act*

10.18 This article declares that the land within the Order limits shall be treated as the operational land of a statutory undertaker for the purposes of the Town and Country Planning Act 1990.

10.19 The article is identical to the model provision.

*Article 51 (article 51 of the model provisions) Defence to proceedings in statutory nuisance*

10.20 Section 158 of the Act confers statutory authority for the purposes of a defence in statutory nuisance generally. This article amends the terms of the defence in the case of noise nuisance (other types of nuisance continue to have the general defence afforded by s158).

10.21 The defence is available if the noise relates to the construction or maintenance of the project and is in accordance with any controls imposed by the local authority under the Control of Pollution Act 1974 or cannot reasonably be avoided, or the use of the project and is in accordance with a scheme developed under requirement 20 (see Schedule 11) or cannot reasonably be avoided.

10.22 The article is based on the model provision with the following amendments. The text 'which is being used' has been removed from paragraph (b)(i) as the words are redundant given the word 'use' earlier in the paragraph, and the reference to the Commission has been substituted with the relevant planning authority in the same paragraph, as the planning authority will be responsible for the requirements rather than the IPC.

*Article 52 (article 52 of the model provisions) Protection of interests*

10.23 This article simply applies Schedule 9, which contains provisions protecting the interests of various parties as negotiated with them. The article is identical to the model provision; the model Schedule is blank.

*Article 53 (article 53 of the model provisions) Saving for Trinity House*

10.24 This article protects the interests of Trinity House, the general lighthouse authority for England. It is identical to the model provision.

*Article 54 (article 54 of the model provisions) Disapplication of regulation 73 of the Conservation of Habitats and Species Regulations 2010*

10.25 This article exempts the project from requiring approval under the Habitats Regulations 2010 from the local planning authority for any planning approvals subsequently required for the project to the extent that they have already been subject to 'appropriate assessment' under the regulations.

10.26 The article is based on the model provision, except it refers to the Conservation of Habitats and Species Regulations 2010 (SI 2010/416) instead of the Conservation of

Habitats, &c. Regulations 1994, as the 2010 regulations superseded the 1994 regulations since the model provisions were drafted.

*Article 55 (article 55 of the model provisions) Planning etc. jurisdiction*

10.27 This article extends the planning jurisdiction of North Lincolnshire Council and East Riding of Yorkshire Council to the area of the project when it is under construction, since normally planning jurisdiction extends to the mean low water mark. Once the project is complete then it will be above the low water mark in any event.

10.28 The article is based on the model provision with the amendment that ‘beginning with the accretion date’ is changed to ‘ending with the accretion date’ – this is believed to be an error with the model provision (otherwise the period concerned has two beginnings and no ending), the insertion of the relevant planning authority where required, and the substitution of the 1990 Act for the name of the Act in full, since it is a defined term.

*Article 56 (article 56 of the model provisions) Certification of plans etc.*

10.29 This article requires the promoter to submit the final versions of the plans for certification to the decision-maker.

10.30 The article is based on the model provision, amended to refer to the names of the plans that are part of the application.

*Article 57 Service of notices*

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

10.32 Although the article is not in the model provisions it is common to have such an article in an order authorising development such as this. The article is identical to article 35 of the Network Rail (Nuneaton North Chord) Order 2010 (SI 2010/1721), for example.

*Article 58 (article 57 of the model provisions) Arbitration*

10.33 This article governs what happens when two parties disagree in the implementation of any provision of the order. The matter is to be settled by arbitration, and if the parties cannot (even) agree on who the arbitrator should be, this is decided by the President of the Institute of Civil Engineers.

10.34 The article is based on the model provision with the insertion of the President of the Institute of Civil Engineers where an appropriate body is required.

*Article 59 Requirements - appeals*

10.35 This article applies the ability to appeal against the imposition or terms of conditions applied to planning permissions, to the requirements contained in Schedule 11.

- 10.36 The article is not in the model provisions, but is contemplated by paragraph 71 of the CLG guidance to local authorities on the Planning Act 2008 regime (although the appeal is to be to the Secretary of State rather than the IPC, given its expected demise):

*“As is the case under the previous regime, scheme promoters should normally be able to appeal local authority decisions on a subsequent approval – though not by appealing under the TCPA. Instead the IPC can include provision in each Development Consent Order that allows it to determine any subsequent approval in default of agreement or approval by the LPA. We will be amending the Infrastructure Planning (Model Provisions) Order 2009 to reflect this in due course.”*

## **11 Requirements**

- 11.1 The requirements in Schedule 11, similar to planning conditions, are based on the model provisions, with the following exceptions.
- 11.2 All approvals are sought from the local planning authority rather than the Commission. Again, paragraph 71 of the CLG guidance for local authorities contemplates that approval will be sought from the former rather than the latter. Where the model requirement provides for approval of the Commission after consultation with the planning authority, the latter step has been omitted since the planning authority is now the approving body.
- 11.3 Requirement 2 requires the development to commence within 7 years of approval (the model provisions do not provide a figure).
- 11.4 In requirement 5, ‘until commence’ has been corrected to ‘commence until’. The landscaping of services below ground and manholes has been omitted.
- 11.5 In requirement 7, the provision to replace trees that have been damaged or have died within two years is omitted.
- 11.6 Requirement 8 is amended to apply to access to public highways rather than any highway.
- 11.7 Model requirement 12 (fencing of special roads) is omitted as irrelevant.
- 11.8 In requirement 10, the fencing of the construction site has been omitted, since fencing must be approved by the local authority.
- 11.9 In requirement 12, the contaminated land expert does not have to be approved by the local planning authority, nor does the person carrying out any archaeological works in requirement 13.
- 11.10 In requirement 15, the code of construction practice does not need to be agreed in advance of the grant of permission.
- 11.11 In requirement 18, the agreement of routes for construction traffic only applies to public highways.

- 11.12 Model requirement 20 (hours of operation) has been omitted – this will be a matter for the Code of Construction Practice.
- 11.13 Model requirements 25-31, which deal with the control of various types of nuisance, have been combined into a single requirement.
- 11.14 Model requirement 32 (accumulations and deposits) has been omitted.
- 11.15 Paragraph (1) of model requirement 34 (European protected species) has been removed since (a) it has been established that such species are present and (b) case law indicates that such surveys should not be undertaken subsequent to receiving permission for the project.
- 11.16 Model requirement 35 (restoration of land used temporarily for construction) has been removed since the restoration of such land is governed by article 39(4).