



# Immingham Green Energy Terminal

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Planning Act 2008

Regulation 5(2)(c)

Infrastructure Planning (Applications: Prescribed  
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# Immingham Green Energy Terminal

## Development Consent Order 2023

### Explanatory Memorandum

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**Associated British Ports (Immingham Green Energy Terminal) Order  
Explanatory Memorandum**

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## 1 INTRODUCTION

1.1 This Explanatory Memorandum explains the purpose and effect of each article of, and the Schedules to, the draft Associated British Ports (Immingham Green Energy Terminal) Order ("the **Order**"). It forms part of a suite of application documents, prepared by the applicant, Associated British Ports, in compliance with regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 and is submitted in support of its application for the Order.

## 2 PURPOSE OF THE ORDER

### *Project Summary*

2.1 Associated British Ports ("**ABP**") is applying to the Secretary of State for a development consent order (the "**Order**") under section 37 of the Planning Act 2008 (the "**2008 Act**"). ABP is defined in the Order as the "**Company**", so the terms ABP and Company are used interchangeably as applicable in this Explanatory Memorandum. If the Order is made, it will authorise the construction, use, operation, maintenance and decommissioning of a terminal to facilitate the import and export of bulk liquids associated with the energy sector, together with associated development. The terminal consists of a jetty and associated loading/ unloading infrastructure, access ramps, pipelines and metering systems. The project (the "**Project**") will be known as the Immingham Green Energy Terminal or "**IGET**". A more detailed description of the Project and its objectives can be found in Chapter 2 of the environmental statement (document reference TR030008/APP/6.2).

2.2 Initially, the terminal would be used for the import and export of green ammonia to be converted to green hydrogen. To facilitate this, a hydrogen production facility, comprising associated ammonia handling equipment, storage and processing units would be constructed as part of the Project. Air Products ("**AP**") will be the first user of the terminal, as the owner and operator of the hydrogen production facility. Other proposed uses for the green energy terminal will come forward in due course. It is anticipated that future users are likely to include customers in the carbon capture sector. Separate applications for landside infrastructure will be obtained as required.

2.3 The Port of Immingham lies on the south bank of the River Humber. The Project is located partly within and will partly extend the Port but is largely outside of the operational area of the Port (see Plate 2-1 of Chapter 2 of the environmental statement (document reference TR030008/APP/6.2). The area surrounding the Port is industrial in nature, being dominated by chemical manufacturing, oil processing

and power generation facilities. Residential and commercial properties are present to the south of the Port on Queens Road and lie within, and adjacent to, the Order limits. Beyond the industrial facilities, the wider area is largely agricultural. The nearest residential area is the town of Immingham and the nearest residential properties area approximately 460m from the western edge of the West Site (see paragraph 2.4(g) below).

2.4 As more particularly set out in Schedule 1 to the Order, which is to be read alongside the works plans (document reference TR030008/APP/4.2), the Project is split into the following broad areas:

- (a) A multi-user marine terminal for the import and export of bulk liquids (**Work No. 1** on sheets 1, 2 and 3 of the works plans). This will comprise (within the narrower area shown as **Work No. 1a** on the works plans) a jetty with a single berth and topside infrastructure including pipelines and other features to assist with the loading and unloading of vessels and to provide maintenance access and allow for supporting utilities for handling liquid bulk shipments. The jetty will necessitate a dredged pocket to create a berthing pocket with a depth of up to 14.5 metres below chart datum within the area bounded by the grid coordinates specified at paragraph 5(2) of Schedule 3 (deemed marine licence) and shown indicatively within the area labelled 'indicative dredged pocket' on the works plans. Details of the capital dredge and proposals regarding the disposal of dredged arisings are set out in paragraphs 2.5.54 – 2.5.60 of Chapter 2 of the environmental statement (document reference TR030008/APP/6.2). The multi-user marine terminal further includes, within the wider **Work No. 1**, piling and other construction works (including cathodic protection, scour prevention and remediation works) and related landside access infrastructure and local flood defence works to facilitate it.
- (b) A corridor between the jetty and Laporte Road to support a jetty access road and the ammonia import pipeline to the part of the Project referred to as the East site (and a reserved corridor for a future pipeline although this does not form part of the Project for which development consent is being sought). There would also be security gates and buildings, an electrical control building and associated utilities (**Work No. 2** on sheets 3 and 4 of the works plans);
- (c) Part of the East Site (**Work No. 3** on sheets 4 and 5 of the works plans) - An ammonia storage tank with associated plant and infrastructure (**Work No. 3a**) and additional buildings (including welfare building, power distribution centre building, process instrumentation building) and other works, pipelines



and pipe-racks, utilities and other infrastructure. Ammonia storage and hydrogen production will be undertaken on the East Site;

- (d) Construction of an underground culvert under Laporte Road, containing pipelines, cables and other conducting media connecting hydrogen production units and the ammonia storage tank within the East Site (**Work No. 4** on sheet 4 of the works plans);
- (e) Part of the East Site (**Work No. 5** on sheets 3, 4 and 5 of the works plans) – A hydrogen production facility of up to three hydrogen production units and associated buildings and equipment (**Work No. 5a**) with road access for maintenance and operations. There will also be additional buildings (including welfare building, power distribution centre building, process instrumentation building), pipelines, pipes and pipe-racks, utilities and other infrastructure;
- (f) An underground pipeline for the transfer of ammonia, hydrogen, nitrogen and a utilities corridor between the East and West Sites. The pipes will include cathodic protection against saline corrosion (**Work No. 6** on sheets 4, 5 and 6 of the works plans);
- (g) West Site - A hydrogen production, storage and distribution facility (**Work No. 7** on sheets 5, 6 and 7) where hydrogen production, storage and loading will be undertaken. It includes up to three hydrogen production units and up to four hydrogen liquefier units (**Work No. 7a** and **Work No. 7b**). There will also be hydrogen storage tanks and hydrogen trailer filling stations (**Work No. 7c**) and hydrogen vehicle refuelling and trailer filling stations (**Work No. 7d**), together with additional buildings (including control room and workshop building, security and visitor building, contractor building, warehouse, driver administration building, safe haven building, electrical substation and metering station, power distribution buildings, process instrumentation buildings, analyser buildings, temporary vehicle and contractor maintenance buildings). Detailed design may necessitate further unspecified but associated buildings and these cannot exceed 6 metres in height. Work No. 7 further includes process and utility equipment, pipelines, pipes, cables and other conducting media and road access from the public highway at two locations from Kings Road and two locations from the A1173;
- (h) Temporary construction and laydown area including areas adjacent to Queens Road (**Work No. 8** on sheets 5 and 6 of

the works plans) and Laporte Road (**Work No. 9** on sheets 3 and 4 of the works plans);

- (i) Temporary modification of overhead cables and lines and the temporary removal of highway signage, lamp posts and other street furniture to facilitate the movement of oversized loads (**Work No. 10** on sheets 6 and 7 of the works plans).

2.5 Areas shown on the works plans (document reference TR030008/APP/4.2) which do not fall within a specified Work No. area but within the Order limits are where it is proposed:

- (a) to stop up or restrict the use of streets and carry out street works or works to accesses (more particularly described in Schedules 4 to 9 of the Order and shown on the stopping up and restriction of use of streets and public rights of way plan (document reference TR030008/APP/4.7) and street works and accesses plan (document reference TR030008/APP/4.6);
- (b) to carry out utility works (more particularly described in the utilities statement (document reference TR030008/APP/7.7); or
- (c) to exercise temporary possession or compulsory acquisition powers for the purposes of the Project (more particularly described in the book of reference (document reference TR030008/APP/3.1) and shown on the land plans (document reference TR030008/APP/4.5), for which the relevant justification is set out in the statement of reasons (document reference TR030008/APP/3.2).

2.6 Paragraph 11 of Part 1 of Schedule 1 (Authorised project) sets out 'further associated development' and paragraph 12 of Part 2 of that Schedule set out 'ancillary works' which extend across the full extent of the Order limits. In summary, the 'further associated development' is to enable the carrying out on a site wide basis, as required, of works such as site clearance, creation of additional temporary construction compounds, utility works, landscaping works, street works and installation of closed circuit television. Paragraphs 2.4.4 and 2.4.5 of Chapter 2 (The Project) of the environmental statement (document reference TR030008/APP/6.2) set out that all further associated development has been taken to "extend across the full extent of the Site [i.e. the Order limits]" and that has formed one of the bases of assessment of the authorised project. Listing further associated development in paragraphs 11(a) – (k) of Part 1 of Schedule 1 follows the drafting of made DCOs and is a well-precedented means of preventing duplication of each paragraph in each earlier Work No. in the context of a *Rochdale* envelope approach where the further associated development, subject to detailed design, could take place

in any Work Nos. It is therefore not appropriate for any of paragraphs 11(a) – (k) to be provided with their own Work No., forming (as they do) part of a range of Work Nos.

- 2.7 The 'ancillary works' constitute works that would not necessarily constitute development, such as vegetation removal, the installation of fencing and the demobilisation of construction works but in respect of which other provisions of the Order, such as temporary possession etc., should apply in the usual manner. The term is more particularly addressed in paragraphs 2.21 to 2.23 below.
- 2.8 The marine infrastructure, i.e. the terminal, extends into the River Humber. The bed of the River Humber is in the freehold ownership of The Crown Estate but ABP, in its capacity as the Humber Conservancy Commissioners (also known as Humber Estuary Services), enjoys the benefit of a 999 year lease (which commenced in January 1869) from The Crown Estate over it (in respect of which see paragraph 11.34 below).
- 2.9 The IGET project falls partly within the statutory port estate which is owned and operated by ABP but the proposed marine infrastructure would need to extend the existing Port of Immingham harbour limits by 200 metres in every direction from the proposed development.
- 2.10 The landside of the proposed Project falls wholly within the administrative boundary of North East Lincolnshire Council ("**NELC**").
- 2.11 In terms of ownership on the landside, the area required permanently for the Project is largely within the ownership of ABP but also includes some areas of unregistered land for which the Order seeks powers of compulsory acquisition. The Order seeks powers to compulsorily acquire rights to install and retain pipelines and other utilities under third party land including under a railway owned and operated by Network Rail and under public highway. The Order seeks powers of temporary possession of third party land for construction of the Project where the permanent acquisition of land or rights is not necessary or, in the usual manner, where powers of such permanent effect are most appropriately exercised only once land take can be minimised following the completion of works such as pipelines and cables.
- 2.12 ABP and Air Products entered into an agreement on 13 September 2022 relating to matters including the obtaining of necessary consents for the Project, the construction of the jetty by ABP and the grant of a lease and appropriate rights by ABP to Air Products to enable Air Products to construct and operate the green hydrogen production facility. ABP alone has the benefit of powers to compulsorily acquire land and rights and, where it is necessary to exercise these, the land and rights will be demised to Air Products on the terms of the agreement. Both ABP and Air Products have the benefit of powers of

temporary possession, surveys and investigations of land and protective works in respect of land outside of current ABP ownership, as such matters within ABP's ownership are addressed in the agreement.

*Nationally Significant Infrastructure*

- 2.13 The terminal forming part of the Project must be promoted by ABP as a nationally significant infrastructure project ("**NSIP**") under the provisions of the 2008 Act. This is because it comprises the alteration of harbour facilities for the purposes of the 2008 Act (i.e. the Port of Immingham) wholly in England and in waters adjacent to England where the effect of the alteration would be to increase the quantity of material the embarkation or disembarkation of which the facilities are capable of handling by at least the relevant quantity of material per year, which in the case of facilities for cargo ships is 5 million tonnes.
- 2.14 The NSIP would comprise Work No. 1, being the construction of a multi-user marine terminal for the import and export of bulk liquids, more particularly summarised in paragraph 2.4(a) above.
- 2.15 The requirements identified in section 14(1)(j) and under sections 24(2) and section 24(3)(c) of the 2008 Act as therefore met as follows:
- 2.15.1 The NSIP comprises "The alteration of harbour facilities" (i.e. the existing Port of Immingham) – section 24(2);
- 2.15.2 "The harbour facilities are in England" – section 24(2)(a); and
- 2.15.3 "The effect of the alteration is expected to be to increase by at least the relevant quantity per year the quantity of material the embarkation or disembarkation of which the facilities are capable of handling" – section 24(2)(b); where
- 2.15.4 "The relevant quantity is [...] in the case of facilities for cargo ships, 5 million tonnes" – s24(3)(c).

*Associated development*

- 2.16 The Order, if made by the Secretary of State, specifically authorises the construction, operation, maintenance and decommissioning of "associated development", for which the Secretary of State is specifically empowered by section 115 of the 2008 Act, to grant development consent. The pipeline and site areas for the transfer, storage of the ammonia and the hydrogen production, storage and distribution would comprise such "associated development", i.e. Work Nos. 2 – 10. This accords with the principles set out in the document entitled "Planning Act 2008: Guidance on associated development applications for major infrastructure projects" published in April 2013

by the Department for Communities and Local Government (the "**Guidance**").

- 2.17 Principle (i) of the Guidance requires a direct relationship between the associated development and the principal development and advises that the "*Associated development should therefore either support the construction or operation of the principal development*". Ammonia is a hazardous substance and once imported over the jetty it must be stored and treated in a way that limits the toxic risk that arises from it. The pipeline from the jetty to the ammonia storage tank represents the greatest risk of potential damage and/or accidental leakage in that respect and hence needs to be kept as short as practically possible. In addition the further the ammonia is moved in pipes the greater the loss of refrigeration of the liquid and hence the greater the energy use in maintaining the ammonia at the correct refrigeration temperature. As such the associated development in this case clearly supports the principal development (i.e. the jetty including the topside infrastructure). Without this associated development the jetty could not function as there would be no associated facility to receive and process the imported ammonia. Equally, without the jetty the associated development would not be constructed, providing further establishing that the associated development supports the principal development. It is also notable that the associated development is typical of the types of facilities commonly found in ports and that support their operation for example oil processing, bulk cargo and value added processing, biomass import, chemical industries, roll-on roll-off unit holding and parking areas and container handling (import and export).
- 2.18 Guidance principle (ii) requires that the associated development be subordinate to the principal development. By virtue of the fact the associated development in this case supports operation of the principal development, and would not be constructed without the jetty being in place, it is also subordinate to it. It is anticipated that only approximately 12 out of 292 vessel calls will be serving the associated development – approximately 4%.
- 2.19 Compliance is also achieved with principle (iv) of the Guidance that requires that "*Associated development should be proportionate to the nature and scale of the principal development*". The associated development has been sized to process the amount of ammonia that will be imported in any one year. As such and because the jetty has a capacity to embark and disembark significant quantities of other cargoes then it can be seen that the associated development is proportionate to the principal development. The geographical scale of the associated development is not definitive to the subordinate and supporting nature of the associated development further to Guidance principles (i) and (ii) or its proportionality. Rather it is the functional

operational relationship that dictates the nature of that relationship between associated development and the principal development in compliance with the three relevant guidance principles.

- 2.20 Principle (iii) of the Guidance is not relevant as the associated development is not cross-subsidising the principal development.
- 2.21 By way of precedent, other port developments have authorised significant facilities as associated development to the NSIP comprised in those projects. For example **The Port of Tilbury (Expansion) Order 2019** authorised an NSIP comprising a Ro-Ro berth and a construction materials and aggregates berth with extensive associated development in the form of a Ro-Ro terminal and construction materials and aggregates terminal including infilling of land, construction of roads railways including extensive sidings and warehouses, the construction of conveyors, silos and weighbridges and the alteration of watercourses. The associated development at Tilbury was clearly associated with the processing of Ro-Ro units and aggregates that came over the two new berths forming the NSIP in that case in the same way that the Project's associated development will process ammonia coming over the jetty.

*Ancillary works*

- 2.22 The General Model Provisions allowed scope for "ancillary works" to be included in a DCO, so that works which do not count as development within the meaning of section 32 (meaning of development) of the 2008 Act may benefit from the powers of the Order and facilitate delivery of the Project. In the Order the list of such "ancillary works" is provided at Part 2 of Schedule 1 (Authorised project) and further includes any other works authorised by the Order which also do not count as development under the 2008 Act. Listed examples include works within the Order limits comprised in:
- (a) surveying and setting-out;
  - (b) vegetation removal;
  - (c) planting;
  - (d) installation of demarcation fencing, stockproof fencing and heras fencing or similar to enable the establishment of construction areas;
  - (e) survey trenches and pits; and
  - (f) demobilisation of construction works.
- 2.23 Following the approach of the General Model Provisions, the "ancillary works" and the "authorised development" taken together are termed

the “authorised project”, to which the powers of the Order generally apply.

2.24 The definition of “ancillary works” is fundamentally not about authorising a broad category of unspecified new works, which it does not, but ensuring that the works already authorised by the Order do not fail to benefit from the Order powers they are intended to have by falling foul of the complex and often grey area of what works count as “development” under section 32 of the 2008 Act (mirroring longstanding Town and Country Planning categories of what count as development). This well precedented definition therefore replicates exactly the one provided in the Secretary of State’s Model Provisions, following a long line of Transport and Works Act Orders, which appears also in a number of made DCOs including the significant **Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014**, namely “the ancillary works described in Part 2 of Schedule 1 (authorised project) and any other works authorised by the Order and which are not development within the meaning of section 32 (meaning of development) of the 2008 Act”. The powers of the Order, following precedents in the usual manner, are specified either (i) to relate to or (ii) to be for the purposes of the “authorised project”. That definition covers two limbs. Firstly, it covers works authorised by the Order which constitute “development” under section 32 of the 2008 Act (i.e. the defined “authorised development”). Secondly, it covers works which are listed in part 2 of Schedule 1 of the Order (the defined “ancillary works”) which are known not to constitute development under section 32 of the 2008 Act but also, as an intentional catchall, any other works which happen already to be authorised by a power of the Order but where there could be some residual argument as to whether they constitute “development” or not. The definition, as drafted, is clear it relates to works already authorised by the Order, ensuring there is no doubt the powers of the Order apply to all works listed in the Order in one way or another.

2.25 ABP considers, in any event, that all elements of the proposed authorised project are, or form part of, an NSIP or are associated development or ancillary works.

### 3 PHASING

3.1 The application for the Project requires flexibility to construct it in phases. The provisions in Schedule 2 (Requirements) of the Order (the “**Requirements**”) allow for their phased discharge. To assist NELC, Requirement 3 specifies that any discharge application pursuant to a Requirement must include a plan showing the part to which the application relates, the parts previously approved and the parts in respect of which the Requirement remains to be approved.

- 3.2 Phase 1 of the Project necessarily includes the NSIP (the entire jetty structure) and the jetty access road connecting the jetty to the public highway (Laporte Road). Phase 1 also includes the necessary facilities to make the hydrogen production facility operational, including:
- (a) The ammonia storage tank on Work No. 3;
  - (b) Two hydrogen production units and one liquefier at Work No. 7;
  - (c) Connecting pipelines and utilities (including Work No. 4 and Work No. 6);
  - (d) Hydrogen storage and distribution facilities including loading bays at Work No. 7.
- 3.3 The hydrogen production infrastructure is therefore concentrated on Work No. 7 for Phase 1 for the purposes of efficiency and cost of construction. Accordingly, at the end of Phase 1, the terminal and the hydrogen production facility will be operational.
- 3.4 Phases 2 to 6 facilitate the expansion of the hydrogen production facility as market demand is anticipated to grow. Splitting the build-out into phases creates a feasible execution plan and allows site personnel and traffic levels to be managed.
- 3.5 Phase 2 provides a hydrogen production, liquefier and hydrogen refuelling station and compressor on Work No. 7. In Phase 3, permanent works start on Work No. 5, with the construction of the first hydrogen production unit on the East Site, and a liquefier is added on Work No. 7. The final liquefier on Work No. 7 comprises Phase 4 (completing Work No. 7). Phases 5 and 6 both add hydrogen production units on Work No. 5, to complete that Work No. The build out therefore concentrates on the West Site first, with hydrogen production units added on the East Site when demand requires.
- 3.6 The hydrogen will be transported from the facility in either liquid form to vehicle hydrogen refuelling stations or gaseous form to industrial users. Each hydrogen production unit is capable of generating 35 metric tonnes per day (Te/day) of gaseous hydrogen and each liquefier unit is capable of converting 35Te/day of gaseous hydrogen into liquid hydrogen. It is anticipated that more hydrogen will be transported from the facility in gaseous form than liquid form and therefore, once fully constructed, the facility will accommodate six hydrogen production units and four liquefiers.
- 3.7 In Phase 1, the temporary construction sites will be required comprising Work No. 8 (for Air Products' and contractors' car parking and temporary offices) and Work No. 9 (for car parking, material



storage and laydown). The parts of the West Site and East Site not under development will also be used for temporary construction purposes to minimise the use of additional land. After Phase 1, all construction activity will be confined to the West Site and East Site.

- 3.8 Requirement 3 in Schedule 2 (Requirements) of the Order requires any application to discharge a requirement to include a plan showing the part to which the application relates, the parts (if any) in respect of which any such application has previously been approved by NELC and the parts (if any) in respect of which the requirement is yet to be discharged. There is flexibility as to how the requirements are discharged (i.e. an application may relate to any part as defined in that application) and Requirement 3 secures transparency for NELC as to overall progress on the discharge of the relevant requirement. The discharge of each requirement may align to the above phasing, or an application could relate to more than one phase or parts of a phase. For example, the hydrogen production units within the East Site (Work No. 5) do not come forward until Phases 3, 5 and 6 and therefore certain requirements relating to Work No. 5 (e.g. approval of a remediation strategy before below ground works) may not be discharged until that point in time.
- 3.9 Requirement 5(1) in Schedule 2 (Requirements) of the Order provides that the ammonia storage tank within Work No. 3a and the hydrogen production units within Work No. 5 and Work No. 7 must not be brought into operational use until the jetty forming part of Work No. 1 is available for use. The hydrogen production facility is to be used to process imported ammonia and the aim of this requirement is to secure demonstrably that the hydrogen production facility will not be constructed and used in isolation from the jetty.
- 3.10 Requirement 5(2) in Schedule 2 (Requirements) of the Order prevents construction of more than two hydrogen production units and one liquefier (i.e. those units and liquefiers contained in Phase 1), until a plan setting out the phase of works relating to the additional hydrogen production unit or liquefier has been approved by NELC. This ensures that NELC are aware of the phasing of the Project as it comes forward and can consider the implications as applications are submitted to discharge requirements. For example, the traffic and transport implications of the Project have been assessed on the basis that the peak traffic will occur in Phase 1 due to the associated construction activity. NELC would have oversight of the construction phases after Phase 1 through Requirement 5(2) and, for example, would be able to reject any proposals for phasing that result in adverse effects arising from phasing that have not been assessed in the Environmental Statement.

3.11 The NSIP (jetty structure) is being constructed during Phase 1 of the Project. So, there is no requirement for provision as to phasing to be captured within the deemed marine licence set out in Schedule 3 of the Order.

#### 4 **PARAMETERS OF THE ORDER**

4.1 The approach to marine and terrestrial parameters and environmental assessment is more particularly described in paragraphs 2.4.12 to 2.4.16 of Chapter 2 of the environmental statement (document reference TR030008/APP/6.2)

4.2 The works to be authorised by the Order are described in Schedule 1 by reference to "Work Nos". The lateral extent of the Work Nos. is set out on the works plans (document reference TR030008/APP/4.2). This provides a degree of flexibility to allow the detailed design of the Project to come forward within the Work Nos. and reflect the latest technology to be used at the time of construction.

4.3 Work No. 1 lies partly within the UK marine area, i.e. below mean high water springs, and partly above it. That part below mean high water springs is subject to the deemed marine licence at Schedule 3 of the Order. The environmental impact assessment of the jetty took account of the jetty's alignment, which is secured through the lateral extent specified for the jetty described in paragraph 1(a) of Part 1 of Schedule 1 (Authorised project) within the area for Work No. 1a set out on the works plans. Work No. 1a has relatively narrow parameters because the design of the jetty has been developed such that it minimises the impacts on the intertidal habitats of the Humber. The remainder of Work No. 1, described in paragraphs 1(b) – 1(d) of Part 1 of Schedule 1 (Authorised project) relate to dredging, construction or landside infrastructure related to the jetty and have a wider lateral extent on the works plans. The works comprised in Work No. 1a are mirrored in the list of licensed activities at paragraph 3(2)(a) of the deemed marine licence and are limited to the co-ordinates specified in paragraph 5(1) of the deemed marine licence at Schedule 3 of the Order, being the extent of Work No. 1a on the works plans (document reference TR030008/APP/4.2). As secured at Article 6(2) (Extent of certain works), the capital dredge described in paragraph 1(b) of Part 1 of Schedule 1 (Authorised project) is limited to the co-ordinates specified in paragraph 5(2) of the deemed marine licence, being the extent of Work No. 1 on the works plans (document reference TR030008/APP/4.2) and is shown indicatively on sheets 1, 2 3 and 4 of the works plans. The deemed marine licence further secures vertical parameters for those parts of Work No.1 within the UK marine area, and matters such as maximum pile number and maximum pile size, by way of the construction environmental management plan which must be submitted and approved pursuant to paragraph 8 of the deemed

marine licence, which must accord with the outline construction environmental management plan (document reference TR030008/APP/6.5) identified at Schedule 15 and certified by the Secretary of State in accordance with Article 64.

- 4.4 In terms of Work No. 2 to Work No. 7, it is assumed for the purposes of the environmental statement (document reference TR030008/APP/6.2) that the works specified in Schedule 1 can come forward anywhere within the relevant Work No., save where the location of specific works are further controlled within that Work No. For example, Work No. 3 includes an ammonia storage tank and associated buildings and infrastructure, but the ammonia storage tank itself can only be constructed within the area shown as Work No. 3a on the works plans (document reference TR030008/APP/4.2). The works to install the pipeline corridor within Work No. 6 will involve horizontal directional drilling and therefore will be underground, although the installation of other utilities within Work No. 6 may include standard methods (trench excavation and backfill).
- 4.5 It is also assumed for the purposes of the environmental statement (document reference TR030008/APP/6.2) that the use of Work Nos. 8, 9 and 10 will be temporary for the purposes of construction and for the activities set out in Work No. 1, but that other parts of Work Nos. 3, and 7 can be used on a temporary basis for construction purposes.
- 4.6 The vertical design parameters of the landside elements of the Project are secured in the Requirements. The maximum height of permanent built elements of Work Nos. 2, 3, 3a, 5, 5a, 7, 7a, 7b, 7c and 7d is secured in the table at Requirement 4(4). Requirement 4(4) also secures the minimum height of the hydrogen production unit stacks in Work Nos. 5a, 7a, 7b and 7c (which is of particular relevance to the air quality assessment).
- 4.7 These parameters form part of the basis on which the assessment set out in the environmental statement (document reference TR030008/APP/6.2) has been undertaken. They capture the important maximum (and where relevant, minimum) parameters that are necessary to ensure that the Project is constructed in such a way that the impacts and effects would not exceed the reasonable worst case scenario assessed in the Environmental Statement. The principle of using a design envelope is recognised as appropriate for a wide range of NSIPs and is described in the Planning Inspectorate's Advice Note 9: Rochdale Envelope (July 2018). This approach does not constrain the Project from being built in a manner that would lead to lower environmental impacts.

## 5 STRUCTURE OF THE DRAFT ORDER

- 5.1 The draft Order is broadly based on the model provisions for harbours (the "**Harbour Model Provisions**") at Schedule 3 of the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 and the general model provisions at Schedule 1 of that Act (the "**General Model Provisions**"). Many of its provisions, however, take precedence from development consent orders ("**DCOs**") for harbour facilities such as **The Port of Tilbury (Expansion) Order 2019** and recently made DCOs such as, for example, the **A47 Wansford to Sutton Development Consent Order 2023**.
- 5.2 The draft Order is divided into five Parts, with a number of Schedules. Together, they comprise the following:
- 5.2.1 Part 1: Preliminary – **Articles 1 – 4** deal with general introductory matters, such as a glossary of terms, whilst also disapplying and incorporating, solely for the purposes of this Order, certain statutory provisions.
- 5.2.2 Part 2: Works Provisions – **Articles 5 – 6** (Principal powers) set the basic parameters for the Order in terms of the description of the development permitted and permitted extents of construction works. **Articles 7 – 17** (Streets) provide the undertaker with a suite of necessary powers in relation to street works. The powers include the ability for the undertaker to be able to carry out works to and place and retain apparatus within, streets; to alter the layout of streets, both permanently and temporarily; to construct and maintain new or altered means of access; to temporarily stop up or divert public rights of way; and to enter into agreements with street authorities. **Articles 18 – 21** (Supplementary) set out four supplemental powers relating to the discharge of water; the authority to survey and investigate land; undertaking protective works; and the removal of human remains;
- 5.2.3 Part 3: Acquisition and possession of land – **Articles 22 – 39** empower the undertaker to exercise powers of compulsory acquisition and temporary possession, should the exercise of such powers be necessary.
- 5.2.4 Part 4: Operational Provisions – **Articles 40 – 45** make provision for powers relevant to operation and use of the Project but in certain cases also to its construction (such as the power to dredge).
- 5.2.5 Part 5: Miscellaneous and general – **Articles 46 – 65** detail a range of general, supplemental powers required by the undertaker both to construct and operate the development. They include giving effect to the deemed marine licence, provision in respect of tidal works during construction and to avoid danger to navigation, trees powers, traffic regulation and providing a defence to proceedings in respect of

statutory nuisance. They govern the interaction with third parties such as those benefitting from protective provisions, Trinity House and the Crown, and for arbitration and the procedure regarding certain approvals. They also make provision for functional matters, such as the benefit of the Order, interaction with Town and Country Planning legislation, landlord and tenant law and the certification of documents and service of notices.

- 5.3 Schedules – There are then 17 Schedules to the Order, which support the provisions in the main body of it. Thus Part 1 of Schedule 1 details the various elements of the authorised development and Part 2 the ancillary works (together the “authorised project”). Schedule 2 sets out the Requirements – i.e. the controls that apply to how the Project is constructed, operated, maintained and decommissioned, similar to planning conditions. Schedule 3 sets out the provisions of the deemed marine licence. Schedules 4 to 10 provide information related to streets powers. Schedule 11 details modifications made to compensation and compulsory purchase enactments. Schedule 12 sets out the details of land in which only new rights may be acquired. Schedule 13 sets out the details of land in which only powers of temporary possession and use may be exercised. Schedule 14 provides protective provisions for various statutory undertakers and bodies with interests which may be affected by the development. Schedule 15 lists the documents and plans which form part of the application and which have to be certified by the Secretary of State. Schedule 16 provides arbitration rules that apply to most arbitrations in connection with the Order. Schedule 17 contains a procedure for discharge of requirements and other consents, agreements or approvals required under the Order discharge.

## 6 **PROVISIONS OF THE ORDER**

- 6.1 The Order consists of 65 operative provisions, each referred to as an Article and 17 Schedules. The Articles are considered below in numerical order (split between the different Parts of the Order), and Schedules are substantially considered alongside the Article which introduces them or to which they relate.
- 6.2 The Order, in common with all statutory instruments, is introduced by a preamble. This includes reference to a Panel of five members, as appointed by the Planning Inspectorate on 31 October 2023.

## 7 **PART 1 (PRELIMINARY)**

### *Article 1 (Citation and commencement)*

- 7.1 This is a preliminary provision specifying the way in which the Order should be cited and when it takes effect. This is a standard provision which is included in all DCOs.

## *Article 2 (Interpretation)*

- 7.2 Article 2(1) defines terms used in the remainder of the Order. Whilst based on the Harbour Model Provisions, a number of amendments have been added which are specific to the Project, such as:
- 7.2.1 "the 1847 Act";
  - 7.2.2 "Air Products" – The definition refers to Air Products (BR) Limited "or such other person as the Secretary of State agrees". Air Products has the direct benefit of certain provisions (see limb (b) of the definition of "undertaker" in Article 2 and Articles 46(3) and (4)) in relation to defined plots. Air Products (BR) Limited intend to construct and operate the Associated Development subject to the Order being granted. However, the definition gives flexibility for any party to apply to the Secretary of State for agreement that another party should benefit from those provisions. It would allow flexibility if, for example, a different Air Products subsidiary company wished to pursue construction and operation of the hydrogen production facility for an unforeseen reason. The requirement for Secretary of State approval ensures that use of those powers is appropriately justified and controlled in the usual manner established in made DCOs;
  - 7.2.3 "area of jurisdiction";
  - 7.2.4 "the Board";
  - 7.2.5 "the Company";
  - 7.2.6 "the dock master";
  - 7.2.7 "existing early works planning permission";
  - 7.2.8 "the harbour master";
  - 7.2.9 "the level of high water";
  - 7.2.10 "new early works planning permission";
  - 7.2.11 "the Port of Immingham";
  - 7.2.12 "the River Humber";
  - 7.2.13 "tidal works";
  - 7.2.14 "statutory harbour authority"; and
  - 7.2.15 "the undertaking".
- 7.3 The development site, on the landside, falls entirely within the administrative boundary of NELC. It is that Council that is defined as

“the relevant planning authority”. “The MMO”, being the Marine Management Organisation, is defined because it will be the body responsible for discharging conditions imposed on the deemed marine licence which applies in respect of those parts of the Project which fall within the UK marine area and must be so licensed;

7.4 Other definitions in the Harbour Model Provisions have been amended or supplemented to reflect the particular circumstances of the Project and the practice of recent comparable made DCOs, and of note are the following:

7.4.1 The definition of “apparatus” has the same meaning as in Part 3 of the 1991 Act. However, for the purposes of the Order this has been clarified to include pipelines, aerial markers, cathodic protection test posts, field boundary markers, transformer rectifier kiosks, electricity cables, telecommunications equipment (including masts and cables), electricity cabinets and any pipe sleeves, ducts and culverts in which any apparatus is lodged. This definition follows how the starting point for the definition of “apparatus” in made DCOs, and in the Transport and Works Act orders which preceded them, is that established in Section 105, Part 3 of the New Roads and Street Works Act 1991 (“**1991 Act**”), i.e. “‘apparatus’ includes any structure for the lodging therein of apparatus or for gaining access to apparatus”. The wording after “includes” is additional information, the core definition simply being the plain English understanding of the term “apparatus” which will be intentionally broad. It is established in made DCOs, such as for example the **Riverside Energy Park Order 2020**, that projects will wish, in the context of that broad starting definition, to ensure that apparatus key to their specific works is specified, as beyond doubt, as being included in that plain English definition. It is considered entirely appropriate for the definition of “apparatus” in the Order to be as broad as the starting statutory position envisages, including the specified list of items for the avoidance of doubt as it does, given the wide range of equipment and apparatus that may be found in a complex engineering structure such as a hydrogen production facility. No purpose is served in this case by acting contrary to the existing legislative framework and precedent by constraining what constitutes “apparatus” and it would, indeed, conflict with the imperative of delivering this nationally significant infrastructure project. None of the items can reasonably be described as falling outside of the ambit of a plain English definition of “apparatus”. Each element of the clarifying list added to the 1991 Act definition for the purposes of the authorised project is addressed below:

(a) Pipelines – the Project includes multiple pipelines including those comprised in Work No. 1, Work No. 2, Work No. 4 and Work No. 6, as well as pipelines within individual Work Nos.

These carry ammonia and other substances between storage and processing facilities.

- (b) Aerial markers – these are likely to be necessary to mark the route of the underground pipelines, for example at Work No. 6.
- (c) Cathodic protection test posts – cathodic protection is required against saline corrosion for the underground pipeline in Work No. 6. The test posts allow for above-ground monitoring.
- (d) Field boundary markers – these would be used to demarcate the boundary between ownerships during construction to ensure that fence lines can be re-erected after completion of works. This is particularly relevant to Work No. 9, which will be returned to two different owners.
- (e) Transformer rectifier kiosks, electricity cables and electricity cabinets – electricity cables will be installed to connect the various sites. The kiosks and cabinets are required to connect to Northern PowerGrid infrastructure.
- (f) Telecommunications equipment (including masts and cables) – telecommunications apparatus will be installed to connect the various sites to telecommunications networks.
- (g) Pipe sleeves, ducts and culverts – this ensures that the structures for lodging apparatus referred to in the 1991 Act includes these specific items. For example, Work No. 4 comprises a culvert under Laporte Road and may include a pipe sleeve, and pipe sleeves will be required as part of Work No. 6. Ducts will be provided to hold the electricity cables including in Work No. 4 and Work No. 6.

7.4.2 The definition of “authorised development” means the development and associated development described in Part 1 of Schedule 1 (authorised project) of the Order and includes development as defined in section 32 of the 2008 Act. Ancillary works are described in Part 2 of Schedule 1 (authorised project) of the Order and include any other works authorised by the Order and which are not development as defined in section 32 of the 2008 Act.

7.4.3 “Construct” is defined to include execution, placing, altering, replacing, relaying and removal. Section 31 (Requirement for Development Consent) of the 2008 Act provides that “**development consent is required for development** to the extent that the development is or forms part of a nationally significant infrastructure project” (emphasis added). Article 5 (Development consent, etc., granted by the Order) of the Order, following the precedent of made DCOs, such at Article 2



of the **Port of Tilbury (Expansion) Order 2019**, therefore simply grants development consent for the authorised development. Neither the Act nor the Order are required to specifically authorise all of the exact construction activities necessary to carry out the development. It is understood that all the activities necessary will be carried out. How the activities are carried out will be constrained, as necessary, by the Requirements (Schedule 2 of the Order) or conditions imposed on the deemed marine licence (Schedule 3 of the Order) for reasons of mitigation, and Article 5 (Development consent, etc., granted by the Order) specifically states that the development consent granted is subject to the provisions of the Order including the Requirements. The term construct is, in general terms, used across the Order (a) where construction is being governed by restrictions as to how it is carried out, in which case it should be broad; or (b) where a power is only to be exercised for the purpose of construction of the authorised project, in which case, again, it would not be appropriate to constrain the definition of “construct”, especially in circumstances where each power already contains appropriate safeguards as to its use in the usual manner. Context aside, the term “construct” is in itself broad, interpreted by way of its plain English meaning, and the additional wording is therefore only to clarify what that broad term includes for the avoidance of doubt both to ensure that the appropriate safeguards in the Order which apply to construction do indeed apply to its various elements but also that there can be no doubt that those activities are also purposes for which powers can be exercised. In each case the term construct appears with the “authorised development”, and so no additional works are being authorised. The need for the clarificatory wording arises as follows:

- (a) Execution – this comprises the execution of the works which would have been approved pursuant to the DCO;
- (b) Placing – this clarifies that “placing” something in a particular position is included within the works of construction;
- (c) Altering, relaying, replacing and removal – not every work of construction is completed correctly in the first instance – there is scope for error. Accordingly, having executed some works or placed some components, it may be necessary to alter or relay or remove and replace that work of construction, in order for it to comply with the requisite design details. It also provides scope to put in temporary works then alter or relay or remove and replace some works to allow permanent works to be constructed (for example, if a temporary road access is installed but later upgraded in whole or part to a permanent road access).

7.4.4 The definition of “maintain” includes “inspect, repair, adjust, alter, remove, reconstruct or replace”. Article 41(2) (maintenance of authorised project) restricts such maintenance in the usual manner to the scope of the works assessed in the environmental statement. This reflects the powers that ABP considers will be required in order to carry out the range of activities reasonably needed to maintain the Project over its lifetime to ensure its ongoing safe and efficient operation. It reflects the operational period and likely framework of maintenance that will be required while enabling technological and practice advancement and improvements within identified environmental performance standards. Some flexibility must be built in to what maintenance of the authorised project will involve, particularly to keep up with changing standards and controls and advances in technology. The Order is intended to authorise all development that is required to construct, operate and maintain the Project throughout its lifespan, provided that it does not give rise to materially new or materially different environmental effects. Many of the activities likely to be required to maintain the authorised development over that time will constitute development, and a key purpose of the system of development control introduced by the 2008 Act is to enable all such activities to be authorised in a single Order. In that context it would clearly be inappropriate to draft the Order so that any future maintenance activity that constituted ‘development’ could only be carried out if the undertaker first obtains a grant of planning permission from NELC, or alternatively obtains a further Order or an amendment to the existing Order.

7.4.5 The wording for the definition of “maintain” is therefore derived from the equivalent definition in the **Port of Tilbury (Expansion) Order 2019**. In terms of the Port of Immingham the power has precedent in a series of local and nationally applicable Acts used by ABP and its predecessors on the Humber. These include the **Humber Commercial Railway and Dock Act 1904** which effectively authorised the original construction of the Port of Immingham and which, for example, at section 5 authorises Associated British Ports (as the successor port undertaker) to “*provide and maintain in connection with the dock and other works authorised by this Act all necessary and convenient lock gates opening and other bridges graving and other docks ...*” and to “*dredge scour and deepen the bed shore and soil of the River Humber at and near the entrance to the said dock and other works*”. For the purposes of the authorised project, examples of the activities anticipated to be covered are listed:

- (a) Maintenance and inspection: Throughout the life of the authorised project there will be a planned maintenance regime and, on occasion, the need for unplanned maintenance where unexpected works are required.

- (b) Repair / Replaced: Through the planned maintenance regime and indeed through any unplanned maintenance required, it is likely that some plant and equipment will need to be repaired or refurbished or indeed replaced;
- (c) Adjust and alter: Through the planned maintenance regime, and indeed outside the planned maintenance regime, there may be a need to adjust or alter elements comprising the authorised project to respond to changing conditions;
- (d) Remove: Repair, refurbish, replacement and adjustment activities will require plant, equipment and material to be removed;
- (e) Reconstruct: If, for example, a part has to be dismantled in order to be repaired or refurbished, then that part will need to be reconstructed.

7.4.6 The Order, if made, will be a piece of delegated legislation, and therefore falls to be understood and interpreted having regard to the principles of statutory construction. The meaning given to defined terms within the Order will have regard not only to the words used, but also the statutory context in which they are used. That is of importance when considering the inclusive list of activities identified as falling within the definition of "maintain". The statutory context here is that the purpose of the Order is to grant the powers and development consent necessary to construct, operate and maintain a multi-user marine terminal for the import and export of bulk liquids and hydrogen production facility. The definition of "maintain" is inherently constrained to the context of a consent for that terminal and facility.

7.4.7 The activities authorised by Article 41 (maintenance of authorised project), read together with the definition of "maintain", are further inherently constrained by the fact that the underlying concept is one of "maintenance" of the authorised project. In that context, the contents of the inclusive list of what might constitute maintenance are not the main determinative factor in controlling the scope of Article 41. Indeed, it is a principle of statutory interpretation that the ordinary meaning of a defined term itself, such as "maintain", is part of the material which can be used to construe the wording of its definition. In this way, the defined term comprising "inspect, repair, adjust, alter, remove or reconstruct" is likely to exert influence over the way that the definition "maintain" is understood and applied. The purpose of Article 41 is to authorise the activities required to maintain the authorised development so that it can continue to operate and perform the functions for which it was originally constructed, throughout its operational lifespan.

- 7.4.8 Inclusion of “electronic transmission” mirrors wording in the **National Grid (Hinkley Point C Connection Project) Order 2016**, the **Southampton to London Pipeline Development Consent Order 2020** and various other recently made DCOs, and provides for means of communication for the purpose of service of notices or written consents in accordance with provisions under the Order.
- 7.4.9 The definition of “Order land” means the land described in the Book of Reference (document reference TR030008/APP/3.1) and shown on the land plans (document reference TR030008/APP/4.5) coloured pink (land to be permanently acquired), coloured blue (land in which the undertaker can create and acquire new rights and impose restrictive covenants), coloured and hatched blue (land in which the undertaker can create and acquire new subsurface rights), coloured green (land over which temporary possession may be taken only, noting that temporary possession may also be taken over land coloured pink and blue on the terms of Article 31(a)(ii)) and coloured purple (land in respect of which private easements or rights over land may be extinguished, suspended or interfered with only). The land shaded orange on the land plans is land owned by the Crown subject to the leasehold ownership of ABP within the Order limits. The land shaded brown on the land plans forms part of the public highway within the Order limits. The land shaded yellow on the land plans is land in the ownership of ABP in the Order limits. No powers of compulsory acquisition of land or rights or temporary possession or use of land are sought over the land shaded orange, brown and yellow and it does not form part of the Order land (as defined in the DCO). It is not proposed that any interests of ABP are to be subject to powers of compulsory acquisition of land or rights, of temporary possession or use of land or extinguishment, suspension or interference, which is made clear in the Book of Reference. Land that is excluded from the Order itself is defined by the extent of the red line showing the Order limits.
- 7.4.10 The definition of “Order limits” means the limits shown on the works plans, i.e. within which the authorised project may be carried out;
- 7.4.11 The definition of “street works” has been amended to refer to the works listed in the Order’s street works provision (i.e. Article 7(1)) so as to ensure consistency between the powers in the Article and the definition itself; and
- 7.4.12 “The undertaker” is defined as:
- (a) ABP;
  - (b) Air Products in respect of articles 19 (Authority to survey and investigate the land), 20 (Protective works), 31 (Temporary use of land for constructing the authorised project) and 32

(Temporary use of land for maintaining the authorised project) in relation to plots 3/2, 4/5, 4/7, 4/8, 4/9, 4/16, 4/17, 4/18, 4/19, 4/20, 4/21, 4/22, 4/23, 4/26, 4/28, 4/29, 4/30, 4/32, 5/3, 5/4, 5/7, 5/8, 5/10, 5/11, 5/12, 5/13, 5/14, 5/15, 5/18, 5/20, 5/22, 5/23, 5/24, 5/25, 5/27, 5/28, 5/29, 5/30, 5/32, 5/33, 5/36, 5/37, 5/38, 5/39, 5/45, 6/6, 6/14, 6/15, 6/16, 6/18, 6/19, 7/1, 7/2, 7/3, 7/4, 7/5, 7/6, 7/7, 7/7, 7/8, 7/9, 7/10, 7/11, 7/12, 7/15, 7/16, 7/17, 7/18, 7/20, 7/21, 7/22 and 7/23 on the land plans (being land not currently owned by ABP, except as one of a number of potential subsoil owners of highway, as Air Products is otherwise to have relevant rights demised to it by ABP by way of private treaty – see paragraph 2.12 above) and in respect of land outside the Order limits where applicable on the terms of the relevant Article;

- (c) any person who has the benefit of the Order in accordance with section 156 (benefit of order granting development consent) of the 2008 Act, subject to Article 46 (Benefit of the Order).

See paragraph 11.1 below for further explanation in respect of the benefit of provisions of the Order. The undertaker so defined will have the benefit of most powers of the Order, though only ABP (as the “Company”) will have the benefit of compulsory acquisition powers etc. and certain harbour jurisdiction powers will only be relevant to it.

7.5 In written questions the Examining Authority asked for a table of specifically named authorities and undertakers to which the Order refers. It is considered helpful to set it out below as well, following the order set out by the Examining Authority:

<b>Defined term in Order</b>	<b>Body/person</b>
Highway authority	North East Lincolnshire Council
Lead local flood authority	North East Lincolnshire Council
Relevant planning authority	North East Lincolnshire Council
Street authority	For streets which are publicly maintainable highway: the highway authority, i.e. North East Lincolnshire Council.  For streets not publicly maintainable highway, the “street managers”, i.e. within the Order limits so far as there

	are such streets, being only Associated British Ports except in respect of the unnamed private access road within plots 5/18 and 6/18 shown on sheets 5 and 6 of the land plans [APP-015] where it is Elba Securities Limited which is the freeholder responsible for maintenance.
Traffic authority	North East Lincolnshire Council
Local authority	North East Lincolnshire Council
Public authority	This term is used only once in the Order, at Article 29(3), which amends how the Compulsory Purchase (Vesting Declarations) Act 1981 (relating to compulsory purchase procedure) is to be read so that it applies to the Order as if it were a compulsory purchase order. It does so by substituting one of the Act's sections, in the usual manner in made DCOs, to state the Act applies to any Minister, any local or other public authority or any other body or person authorised to acquire land by means of a compulsory purchase order. The entity of relevance being captured here is Associated British Ports, as "any other body or person authorised to acquire land by means of a compulsory purchase order", i.e. the Order. So no "public authority" is relevant to the Order.
Acquiring authority	This term is used in reference to incorporation and/or application of the Compulsory Purchase Act 1965 and Land Compensation Act 1961, in the usual manner, which relate to compulsory purchase procedure and

	compensation. The Order provisions in respect of these Acts mean that Associated British Ports will be treated as the acquiring authority for their purposes where it exercises its powers for compulsory purchase under the Order.
Internal drainage board	North East Lindsey Drainage Board
Sewerage undertaker	Anglian Water
Statutory undertaker	<p>This term in the Order is, in the usual manner of made DCOs, intentionally defined broadly and non-exclusively by reference to section 127(8) (statutory undertakers' land) of the Planning Act 2008 so as to ensure any bodies falling with that definition benefit from the protection conferred.</p> <p>However, ABP has identified the following bodies as most likely being relevant statutory undertakers to which the Order relates: Anglian Water Services Limited Cadent Gas Limited; BT Limited; Network Rail Infrastructure Limited;</p> <p>Northern Powergrid Limited; and Virgin Media Limited.</p>
Crown authority	The term is not used in the Order. Instead it is referred to as the "Crown Estate".

7.6 The discharging authority for the Requirements (Schedule 2 of the Order) is North East Lincolnshire Council. The discharging authority for the deemed marine licence conditions (Schedule 3 of the Order) is the Marine Management Organisation.

7.7 Paragraph (2) of Article 2 has been included to reflect that "rights over land" include references to do or restrain or to place and maintain

anything in, on or under land or in the airspace above its surface and to any trusts and incidents, including restrictive covenants. It also makes it clear that references to the imposition of restrictive covenants are references to the creation of rights over land which interfere with the interests or rights of another.

- 7.8 Paragraphs (3) to (7) of Article 2 have been added to provide clarity (respectively) as follows:
- 7.8.1 That all distances, directions, lengths and volumes are approximate. The purpose of this is to ensure that if, upon construction of the works, it transpires that the distances are marginally different to those listed in the Order there is no issue over whether the works are permitted by the Order. This provision allows for a small tolerance with respect to any distances and points, although all works will take place within the Order limits. It is commonplace to include such a provision in an Act or instrument, and similar wording is included in Article 1(3) of the General Model Provisions and, for example, Article 2(3) of the **Port of Tilbury (Expansion) Order 2019** and Article 2(3) of the **A47 Wansford to Sutton Development Consent Order 2023**.
- 7.9 How references in the Order to works designated by numbers or by a combination of letters and numbers, are to be construed.
- 7.10 That all areas described in square metres in the book of reference are approximate.
- 7.11 That references to points identified by letters are references to points or letters on the relevant plans.
- 7.12 How references to "includes" and to statutory bodies is to be understood.

*Article 3 (Disapplication of legislative provisions)*

- 7.13 Section 120(5) of the 2008 Act provides that a DCO may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the Order and make such amendments, repeals or revocations of statutory provisions or local legislation. Pursuant to this, Article 3 of the Order provides for the disapplication of certain requirements which would otherwise apply under public general legislation, as well as local legislation.
- 7.14 Articles 3(1)(a) to 3(1)(c) disapply the need for consents from the North East Lindsey Drainage Board ("**NELDB**") which would otherwise be required in respect of the Land Drainage Act 1991 and byelaws made under the Water Resources Act 1991 and the Land Drainage Act 1991. However, these disapplication provisions have been included so that they will be superseded by protective provisions in favour of



NELDB which include equivalent approvals. The form of those protective provisions included on the face of the Order at Part 9 of Schedule 14 has been agreed with NELDB, which is also therefore content with the disapplication of its aforementioned consents (see rows 4 and 7 of its statement of common ground [TR030008/EXAM/9.18]).

- 7.15 Article 3(1)(d) provides for the disapplication of the consent required in relation to the carrying out of a relevant flood risk activity under the Environmental Permitting (England and Wales) Regulations 2016 (the “**Environmental Permitting Regulations**”) and will be replaced by the protective provisions for the protection of the Environment Agency and NELC as the lead local flood authority in Part 2 and Part 6 of Schedule 14 of the Order respectively, which will require certain works which could affect the interests protected by these consents to be approved by the relevant body before they are carried out. The form of protective provisions on the face of the Order with NELC as the lead local flood authority is agreed (see row dDCO03 of the statement of common ground [REP4-021]). ABP and the Environment Agency and are working constructively towards agreeing the form of protective provisions in its favour and the form currently on the face of the Order will be updated once any updates are agreed.
- 7.16 This is part of the consolidated approach to consenting which goes to the heart of the regime for nationally significant infrastructure under the Planning Act 2008. Articles 3(1)(a) – (d) have precedent in the **Port of Tilbury (Expansion) Order 2019** and the **Great Yarmouth Third River Crossing Development Consent Order 2020**.
- 7.17 Article 3(1)(e) disapplies provisions of the Neighbourhood Planning Act 2017 (the “**2017 Act**”) in the same manner as Article 3 of the **A47 Wansford to Sutton Development Consent Order 2023**. This disapplication makes it clear that the temporary possession provisions in that enactment would not take effect at the expense of the temporary possession provisions contained in the Order. The provisions relating to temporary possession in the 2017 Act have not yet come into force and regulations required to provide more detail on the operation of the regime have not yet been made. Due to the uncertainty in relation to the detail around that regime, the undertaker proposes relying on the long-standing process available under the 2008 Act. Had Parliament wished to apply the 2017 Act temporary possession regime to DCO projects, it could have done so by effecting amendments to PART VII of the 2008 Act. It has not done so, and in the absence of the clarity this would provide, the undertaker proposes to proceed under the existing 2008 Act procedure.

7.18 Article 3(2) refers to three local Acts, known as 'local legislation' in that they do not have general application but only apply specifically, in this case, to marine works in the River Humber and the Humber Estuary. These three Acts, if not modified for the purposes of the authorised project, would either require ABP to secure separate consents for works that are in fact already consented by the Order if it is made or lead to the imposition of penalties which should not be included in the Order. In brief, sections 25 and 26 of **The River Humber Conservancy Act 1852** relate to the imposition of penalties for the improper deposit of hard materials in the River and no mud to be cast into the River except as the Admiralty may direct. Sections 5 and 9 of the **Humber Conservancy Act 1899** deal with ability of the Commissioners to remove obstructions or grant licences for the execution of works which is no longer required while section 6(2) and section 8 of the **Humber Conservancy Act 1905** are disapplied in that the former provides for no erections in Humber below river lines or without licence above river lines without a formal consent from the Commissioners whilst the latter provides that sand etc. is not to be removed from bed or foreshore of River Humber without licence of Commissioners – points that are now encompassed within the draft Order, notably in the protective provisions in favour of the Statutory Conservancy and Navigation Authority at Part 1 of Schedule 14 (the form of which is agreed, as set out in the statement of common ground with it, further confirming that has no issue with Article 3 as a whole [REP4-025]).

*Article 4 (Incorporation of the 1847 Act)*

7.19 Article 4 makes provision to enable the "dock master" efficiently and safely to manage the "area of jurisdiction" (each term being defined at Article 2 (Interpretation) the Order.

7.20 Article 4 does so, following Article 2 of the Harbour Model Provisions, by incorporating specified provisions of the 1847 Act to apply to the "area of jurisdiction" on a similar basis to precedent, amongst others, in Article 3 of each of the **Associated British Ports (Immingham Outer Harbour) Harbour Revision Order 2004**, the **Associated British Ports (Immingham Gas Jetty) Harbour Revision Order 2007**, the **Associated British Ports (Grimsby Riverside Ro-Ro Terminal) Harbour Revision Order 2011** and the **Able Marine Energy Park Development Consent Order 2014**.

7.21 The 1847 Act provides a series of provisions that can be incorporated, where relevant, in later enactments authorising a given project such as the Order. Those provisions act very much akin to the Harbour Model Provisions, except that instead of repeating those provisions wholesale in the Order as necessary they can merely be incorporated by reference to the 1847 Act. As more particularly described in

paragraph 7.24 below, certain provisions of the 1847 Act have not been incorporated because either they are not relevant, would duplicate existing standard form provisions in the Order deriving from the Harbour Model Provisions or more recent DCOs or have been repealed.

- 7.22 Articles 4(2)(a) – (i) provide for certain provisions and definitions contained in the 1847 Act as they are to be incorporated into the Order to have effect in a particular way, the practical effect of which is to ensure that those definitions from the 1847 Act are appropriately applicable to the Order and the powers and rights conferred under it.
- 7.23 The sections of the 1847 Act incorporated are summarised below have been as being required for the efficient and safe management of the proposed development. Subsections (3) and (8) of section 120 (What may be included in order granting development consent) authorise provision to be made in an order granting development consent for creating offences or conferring power to create offences where it is for a matter listed in paragraph 32B of Schedule 5 of the 2008 Act. Such matters include the creation of offences in connection with the enforcement of byelaws or the construction, improvement, maintenance or management of a harbour where the offence is triable only summarily, a person guilty of the offence is not liable to imprisonment and any fine to which a person guilty of the offence may be liable cannot be higher than level 3 on the standard scale. Any offences created below, by incorporation of provisions of the 1847 Act designed for such incorporation in circumstances such as those anticipated by the Order, fall within these statutory parameters:
- (a) Section 1 provides for the 1847 Act extending only to the harbours, docks, or piers where incorporated by statute (such as the Order), as may be modified.
  - (b) Sections 2, 3 and 3A set out definitions for the 1847 Act, as incorporated, which are varied in paragraph (2) of Article 4 of the Order so that these function properly with the Order. Section 4 sets out that it is sufficient to refer to the 1847 Act by its short title "The Harbours, Docks, and Piers Clauses Act 1847", which the Order does at its Article 2 (Interpretation).
  - (c) The following sections of the 1847 Act which relate to accommodation for custom house officers:
    - (i) Section 14 provides that before ABP is entitled to take any rates in respect of the harbour, dock or pier, it must if required to do so by the Commissioners for His

Majesty's Revenue and Customs, or at any time thereafter when so required, erect and thereafter maintain on a suitable spot (to be approved by the Commissioners) within or near the harbour, dock, or pier a watch-house and boat-house for the use of the officers of Revenue and Customs and their crew, to be constructed of such size and materials and in such manner as approved by the Commissioners and provide from time to time to the satisfaction of the Commissioners a sufficient number of huts for use of officers of Revenue and Customs with all fit and necessary weighing materials. At all times ABP must keep the watch-house, boat-house, huts and weighing materials in good and sufficient repair.

- (ii) Section 15 which imposes a penalty on ABP neglecting to repair the watch-house, boat-house, huts or weighing materials, such that if they are out of repair or not provided as the Commissioners for His Majesty's Revenue and Customs may require, and notice is given to ABP, ABP shall repair or provide the same to the Commissioner's satisfaction within 3 months after such notice, or in default thereof shall forfeit a sum of 100 pounds for every month during which the watch-house, boat-house, huts or weighing materials remain out of repair or not provided, with the penalty to be recovered in any of the superior courts against ABP as a debt due to the Crown and sued for by any officer of Customs by the direction of the Commissioners.

- (d) The following sections of the 1847 Act which relate to the collection of rates:

- (i) Section 26 provides that a certificate under the hand of the chairman of the quarter sessions in England shall be conclusive evidence that the harbour, dock or pier is completed and fit for the reception of vessels, or other purpose intended;
- (ii) Section 27 provides that for the purpose of ascertaining the tonnage rates payable upon vessels the tonnage of British vessels duly registered shall be ascertained according to the certified tonnage in the register of such vessels and for the tonnage of all other vessels, this shall be ascertained according to the rules of admeasurement established regulating the admeasurement of the tonnage and burthen of the merchant shipping of the United Kingdom;

- (iii) Section 28 exempts vessels belonging to or employed in the service of his Majesty, or any member of the royal family, or in the service of the Customs and Excise, or of the corporation of Trinity House of Deptford Strond, or the commissioners of Northern Lights from any charge or duties arising pursuant to the 1847 Act. It is an offence liable to a penalty to falsely claim and take the benefit of any such exemption;
- (iv) Section 29 provides that any vessel which has paid rates that is obliged to return with the same cargo after leaving the harbour, dock or pier due to stress of weather or other sufficient cause will not be able liable to pay the rates again;
- (v) Section 31 governs the rates chargeable on foreign vessels where treaties of reciprocity exist;
- (vi) Section 32 provides an undertaker with the power to charge a fixed sum, payable in advance, as a composition for rates payable in respect of passenger or pleasure vessels;
- (vii) Section 33 embodies the "open port" duty effectively providing a general right to all persons, subject to the "payment of rates" to use the harbour. This section is caveated in the usual manner (see the relevant paragraphs of this Explanatory Memorandum) by:
  - (A) Article 44 (Power to appropriate) of the Order which enables ABP "from time to time to set apart and appropriate any part of the area of jurisdiction [defined in Article 2 (Interpretation)] for the exclusive or preferential use and accommodation of any trade, person, vessel or goods ..."; and
  - (B) Article 4(2)(g), which provides that this section "must not be construed as derogating from the power of the dock master [defined in Article 2 (Interpretation)] to discontinue any part of its undertaking";
- (viii) Section 34 gives the collector of rates the power to enter into any vessel within the limits of the harbour, dock, or pier, in order to ascertain the rates payable in respect of such vessel or goods on such vessel;

- (ix) Section 35 makes it an offence for masters to fail to report arrival of any vessel within 24 hours after arrival within the limits of the harbour, dock or pier of any vessel liable to a penalty not exceeding level 1 on the standard scale (currently £200);
- (x) Section 36 requires masters of every registered vessel to produce on demand the certificate of the registry of the vessel to the collector of rates, and makes it an offence for masters to refuse or neglect to produce that certificate on demand liable to a penalty not exceeding level 2 on the standard scale (currently £500);
- (xi) Section 37 requires masters to provide the name of the consignee of goods to be unshipped, a copy of the bill of lading, or if only part of the cargo is intended to be unshipped, an account in the writing of the goods to be unshipped, within 12 hours of arrival of the vessel.
- (xii) Section 38 makes it an offence for master of a vessel to give no account, or a false account, of goods to be unshipped (liable to a penalty not exceeding level 3 on the standard scale).
- (xiii) Section 39 makes it an offence for shippers to give no account, or a false account, of goods intended to be shipped (liable to a penalty not exceeding level 3 on the standard scale).
- (xiv) Section 40 provides that in case of dispute between a collector and master as to the weight or quantities of goods in which rates are payable, the collector may cause all such goods to be weighed or measured and may detain the vessel until such goods have been weighed or measured, if necessary;
- (xv) Section 41 sets out the respective obligations to pay the expenses of the weighing and measuring of goods;
- (xvi) Section 42 provides that rates must be paid before shipment where goods are to be shipped or, for goods to be unshipped, before the removal of goods from the premises of ABP and before the expiration of two months next after they were unshipped;
- (xvii) Section 43 provides that if the master of any vessel or the owner of any goods evades the payment of rates payable to ABP in respect of such vessel or goods they shall pay ABP three times the amount of rates of which

they have so have evaded, and the payment shall be recovered from the master or owner in the same manner as penalties imposed by the 1847 Act are to be recovered, or by action in any court of competent jurisdiction.

- (xviii) Section 44 gives the collector of rates, in the event of non-payment of rates by the master of a vessel, the power to board such vessel and take, distrain or arrest the vessel (including the tackle, apparel and furniture) and provides the power to sell such matters and satisfy the unpaid rates. Section 45 provides the same but in relation to the recovery of rates on goods; and
  - (xix) Section 46 provides that any disputes concerning rates or charges occasioned by distressed or arrested good is to be settled by a justice in England;
- (e) The following sections of the 1847 Act grant powers for the appointment of harbour masters, dock masters and pier masters and make provisions governing their duties:
- (i) Section 51 gives ABP the power to appoint, and from time to time remove, such harbour master as they think necessary;
  - (ii) Section 52 details the purposes for which the harbour master may give directions;
  - (iii) Section 53 requires the master of every vessel within the harbour or dock, or at or near the pier, or within the prescribed limits, to regulate their vessel according to the harbour master's directions that are made in conformity with the 1847 Act (or any act authorising the construction or improvement of an harbour, dock or pier and incorporating the 1847 Act), and makes any such master liable, where notice of any such direction by the harbour master is served upon him and he shall not forthwith regulate his vessel according to the direction, to a penalty not exceeding level 2 on the standard scale.
  - (iv) Section 54 makes it an offence for the harbour master or his assistants to exercise their powers or authorities without reasonable cause or in an unreasonable or unfair manner, liable to a penalty not exceeding level 1 on the standard scale;
  - (v) Section 55 makes it an offence for a person to give or offer any sum of money or anything, by way or reward

or bribe to any harbour master or officer employed in or about the harbour, dock, or pier, liable to a penalty of level 2 on the standard scale

- (vi) Section 56 gives the harbour master the power to remove any wreck or other obstruction to the harbour, dock or pier or the approaches to them, including floating timber that impedes navigation, and reclaim the expense of doing so from the owner. It gives the harbour master the power to detain, and sell as necessary, such wreck or timber to secure such expenses in the event of non-payment;
- (vii) Section 57 gives the harbour master the power to remove any unserviceable vessel altogether from the harbour and summarily recover the expenses of doing so from the owner of such vessel;
- (viii) Section 58 gives the harbour master the power to remove vessels from the harbour, dock or pier as he sees fit and recover the expenses of doing so from the master of such vessel;
- (ix) Section 59 requires the master of any vessel entering the harbour or dock or approaching the pier to cause the vessel to be dismantled as directed by the harbour master, and if such vessel should fail to be dismantled as required after notice has been given to the master to dismantle it, the master shall be liable to a penalty not exceeding level 1 on the standard scale;
- (x) Section 60 requires that the master of any vessel must cause the vessel's sails to be lowered or furled before entry into the dock, and if the master of any vessel navigates the same under sail into or in the dock, he shall be liable to a penalty not exceeding level 1 on the standard scale;
- (xi) Section 61 makes it an offence for vessels to be improperly moored, liable to a penalty not exceeding level 1 on the standard scale;
- (xii) Section 62 makes it an offence for a person to wilfully unmoor any vessel within the harbour, liable to a penalty not exceeding level 3 on the standard scale;
- (xiii) Section 63 makes it an offence for vessels to lie or be moored within prescribed limits without the permission of the harbour master, liable to a penalty not exceeding



level 3 on the standard scale and a further sum of £1 for every hour that such vessel remains within the limits after a reasonable time for removing the vessel has expired;

- (xiv) Section 64 gives the harbour master the power to remove any vessel for the purposes of repairing, scouring or cleansing the harbour, dock or pier. It makes it an offence for the master of a vessel not to remove the vessel within three days after notice in writing from the harbour master, liable to a penalty not exceeding level 1 on the standard scale;
  - (xv) Section 65 gives the harbour master the power to remove a vessel if the master of such vessel neglects or refuses to do so in accordance with notice given under section 64, and recover the expenses of doing so from the owner or master of such vessel, provided that three days' notice of the need for removal has been given;
- (f) The following sections make provisions relating to the discharge of cargoes and removal of goods:
- (i) Section 66 requires the harbour master to set aside an area of the harbour or dock for light vessels and requires the masters of every vessel which enters into the harbour or dock for the purposes of discharging cargo to cause the cargo to be discharged as soon as it conveniently may be after entering the harbour or dock, and after the discharge, remove the vessel without loss of time into the part of the harbour or dock that the harbour master has set apart for light vessels. If such vessel is not removed to that area within twenty-four hours after receiving a written notice signed by the harbour master, the master of the vessel may be liable to a fine not exceeding level 1 on the standard scale and the harbour master is permitted to cause such vessel to be removed at the expense of the master of the vessel;
  - (ii) Section 67 makes it an offence for any servant of ABP or any lessees or servant thereof to give undue preference or show any partiality in loading or unloading any goods on any of the quays, wharfs or other works belonging to ABP, liable to a penalty not exceeding level 1 on the standard scale;
  - (iii) Section 68 provides that goods cannot remain upon any piers or quays for a longer time than allowed by the

byelaws of ABP and allows for the removal of such goods where goods remain without ABP's consent;

- (iv) Section 69 gives the harbour master the power to require any person who has control of combustible things within the harbour to remove them, and if they do not within two hours they may be liable on summary conviction to a fine not exceeding level 3 on the standard scale (as amended by sub-paragraph 2(g) of Article 4 of the Order);
- (v) Section 70 provides that if the combustible things remain after sunset, then they must be guarded by a sufficient number of persons from half an hour before sunset to half an hour after sunrise;
- (vi) Section 71 makes it an offence liable to a penalty not exceeding level 1 on the standard scale to heat flammable objects or other combustible materials, or to light a fire, candle or lamp within a vessel without the harbour master's permission or to light any fire, candle or lamp within any of the docks or works belonging to the docks except as permitted by ABP's byelaws, or carry a loaded gun within the harbour without the consent of ABP;
- (vii) Section 72 gives the harbour master the power to enter into any vessel within the harbour or dock, or at or near the pier, to search for any fire or light in or suspected to be in such vessel, and may extinguish the same, and any person who obstructs the harbour master in the execution of such duty shall for every such offence be liable to a penalty not exceeding level 1 on the standard scale;
- (viii) Section 73 makes it an offence for a person to throw or put any ballast, earth, ashes, stones or other thing into the harbour or dock, liable to a penalty not exceeding level 1 on the standard scale;
- (ix) Section 74 makes the owner of a vessel or float of timber answerable to ABP for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock or pier, or quays where any works connected;
- (x) Section 75 allows the amount claimed for damages in respect of section 74 to be recovered before two justices in England if it does not exceed fifty pounds and gives

power to the justices to distrain, keep or sell any part of the property if the amount of damages and costs are not paid within seven days after the distress or keeping;

- (xi) Section 76 provides that where the owner of a vessel or float of timber has made payment for damage actually caused by the wilful or negligent act of another person, that other person shall repay the owner or it is recoverable before two justices in England if the sum does not exceed fifty pounds;
  - (xii) Section 78 prohibits the erection of any lighthouse or beacon or exhibition of any light, beacon, or sea-mark, without the sanction of Trinity House.
- (g) The following sections make provision relating to meters and weighers:
- (i) Section 81 gives ABP the power to appoint and remove a sufficient number of persons to be meters and weighers within the limits of the harbour, dock and pier and make regulation for their government and fix reasonable rates of remuneration;
  - (ii) Section 82 makes it an offence liable to a penalty not exceeding level 1 on the standard scale where a sufficient number of meters and weighers have been appointed by ABP for the master of any vessel or owner of any goods shipped, unshipped or delivered within the harbour, dock or pier to employ someone other than a meter or weigher appointed by ABP or the Commissioners of his Majesty's Customs and Excise to weigh or measure those goods.
- (h) Section 83 and 84 give ABP the power to make, repeal and alter byelaws and impose reasonable penalties not exceeding level 3 on the standard scale for breaches.
- (i) Section 103 provides that nothing in the 1847 Act (or any act authorising the construction or improvement of an harbour, dock or pier and incorporating the 1847 Act) exempts ABP from the provisions, regulations and conditions of any general Act relating to harbours, docks.

7.24 Sections 5 to 13, 16 to 25, 47 to 50, 77, 79, 80 and 85 to 102 and of the 1847 Act have not been incorporated:

- (a) Sections 5, 24, 30, 47, 89, 91, 93 to 96 and 104 have been repealed.

- (b) Sections 6 to 13 relate to powers to construct a harbour, dock, or pier and are not necessary in the context of the powers for those purposes already set out in the Order
- (c) Sections 16 to 23 and 25 relate to the provision of life boats, tide gauges and barometers and the carrying out of works before the collection of rates not relevant to the Project. They also relate to certain construction, leasing and compulsory purchase powers not necessary in the context of existing Order powers.
- (d) Sections 48 to 50 relate to the enforcement and accounting of rates and are not considered necessary;
- (e) Sections 77 which grants and governs powers to erect lighthouses and lay down buoys with the consent of Trinity House is not required as this, to the extent necessary, is provided for in Article 49 (Provision against danger to navigation), 50 (Lights on tidal works during construction) and 51 (Permanent light on tidal works) of the Order;
- (f) Sections 79 and 80 provide for the appointment and dismissal of special constables within the limits of the harbour, dock or pier – the appointment of such special constables is not considered to be necessary for the Project;
- (g) Sections 85 to 88 and section 90 relate to historical procedures for the creation of byelaws not considered necessary;
- (h) Section 92 incorporates the clauses of the Railways Clauses Consolidation Act 1845 with respect to the recovery of damages not specially provided for, and penalties, and to the determination of any other matter referred to justices. It is not considered necessary;
- (i) Section 98 would make it an offence for ABP not to keep a copy of the Order but has not been included as the Order is made publicly available by the Planning Inspectorate in any event;
- (j) Sections 99 and 100 relate to protection of Crown interests are not included as these powers are already provided for under article 60 (Crown rights) of the Order.
- (k) Section 102 provides that nothing in the 1847 Act (or any act authorising the construction or improvement of an harbour, dock or pier and incorporating the 1847 Act) prejudices or derogates from nay of the rights, privileges, jurisdiction or authority of the Corporation of the Trinity House of Deptford

Strond but this is provided for already in Article 48 (Saving for Trinity House) of the Order.

## 8 **PART 2 – WORKS PROVISIONS**

### *Principal powers*

#### *Article 5 (Development consent etc. granted by the Order)*

8.1 This Article grants development consent for the authorised development and consent for the ancillary development within the Order Limits. The various elements of the authorised development (NSIP and associated development) are set out in Part 1 of Schedule 1 of the Order, split into 'work numbers', each of which represents different sections or parts of the authorised development as shown on the works plans (TR030008/APP/4.2). This split of the authorised development between different work numbers enables the Order to refer to different parts of the authorised development by citing the relevant work number. The content of the works contained within each work number is described in greater detail in Part 1 of Schedule 1 (authorised project). The ancillary works are listed in Part 2 of Schedule 1 (authorised project).

8.2 The consent granted by this Article is subject to the Requirements which are detailed in Schedule 2 to the Order. These correspond in general terms to the planning conditions that would be imposed on a planning permission granted under the Town and Country Planning Act 1990 (the "**1990 Act**").

#### *Article 6 (Extent of certain works)*

8.3 The overarching approach to parameters, of which this Article is a part, is described in Section 4 (Parameters) above. This Article provides the undertaker with a necessary, but proportionate, degree of flexibility when constructing the authorised project, reducing the risk that the authorised project as approved cannot later be implemented for reasons which, at the time the application was made and the development consent was granted, could not reasonably have been foreseen (e.g. variances in ground conditions and choice of appropriate equipment and technology). It also gives a proportionate amount of flexibility for the detailed design of the Project, within the set limits. The environmental statement accompanying the application for development consent has assessed the authorised project within the full envelope provided by the limits of deviation, and so development within this envelope will not create effects that exceed the reasonable worst-case scenario assessed in the environmental statement.

8.4 Accordingly, Paragraph (1) of the Article requires that, subject to Paragraph (2), works numbered in Part 1 (authorised development) of

Schedule 1 (authorised project) to be undertaken within the lateral extent of the area shown for them on the works plan (document reference TR030008/APP/4.2). Paragraph (2) provides further details on the dredged pocket that is referred to in paragraph 1(b) of Part 1 (authorised development) of Schedule 1 (authorised project), and indicates that the lateral extent of the area for the dredged pocket is not to be taken as the area set out on the works plans, that area being shown for indicative purposes only, but rather that the dredged pocket is to be carried out only within the area bounded by the grid coordinates specified in paragraph 5(2) of Schedule 3 of the Order (or other such area as is specified in a marine licence granted to varied under the Marine and Coastal Access Act 2009 ("**MCAA 2009**").

### *Streets*

#### *Article 7 (Street works)*

- 8.5 This Article allows the undertaker to carry out certain works to streets within the Order limits for the purposes of the authorised project. It is necessary because implementation of the authorised project will require works to be undertaken to streets, and the list at paragraphs (a) to (i) reflect those which the undertaker considers necessary for the Project.
- 8.6 Schedule 4 sets out the streets that are anticipated to be subject to street works, and the nature of those works, thereby clarifying the extent of the powers where no further consent from the street authority is required but street works can be carried out on any other street with that consent under paragraph (3) of the Article. NELC requested, and the undertaker was content to include, clarity that it must comply with reasonable conditions attached to that consent. The powers conferred by this Article are a statutory right, rather than a licence under section 50 of the New Roads and Street Works Act 1991.
- 8.7 The Article is from Article 8 of the General Model Provisions and amended to reflect Article 8 of **The Port of Tilbury (Expansion) Order 2019**, Article 9 of **The Immingham Open Cycle Gas Turbine Order 2020** and Article 15 of **The A47 Wansford to Sutton Development Consent Order 2023**.

#### *Article 8 (Application of the 1991 Act)*

- 8.8 This article provides for the application of the 1991 Act. Although not included in the General Model Provisions, there is precedent for these provisions in respect of a range of made DCOs, and this wording is derived from Article 9 of **The Port of Tilbury (Expansion) Order 2019** and Article 11 of **The A47 Wansford to Sutton Development Consent Order 2023**.

- 8.9 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 work authorised by the Order, irrespective of who carries them out.
- 8.10 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 specific authorisation given for those works by the Order and the specific provisions in the Order which regulate their carrying out.
- 8.11 Paragraphs (4) to (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to streets which are to be temporarily restricted for use, altered or diverted under the Order. This is for two reasons: first, it prevents any confusion as to whether works in respect of a temporarily affected street are 'street works' for the purposes of the 1991 Act; and secondly, it simplifies the implementation of the works by providing for a single process in respect of streets which are stopped up and those which are not.
- 8.12 Paragraph (7)(a) provides that nothing in Article 10 of the Order (which provides that the streets constructed, altered or diverted under the Order are to be maintained by the highway authority) affects the ability of the local highway authority (under section 87 of the 1991 Act) to apply Part 3 of the 1991 Act to such streets in advance of those streets becoming publicly maintainable. Paragraph (7)(b) restricts the operation of article 10 to off-street works.

*Article 9 (Power to alter layout, etc. of streets)*

- 8.13 Article 9 allows the undertaker to alter the layout of or carry out any works in a street. Schedule 5 then sets out the alterations to streets (split into two parts showing temporary and permanent works respectively).
- 8.14 This Article is necessary because, in order to construct, operate, maintain and decommission the authorised project, the undertaker will need to alter street layouts and establish suitable accesses to ensure that the authorised project can be accessed effectively while ensuring there is minimal disruption to the local highway network. The powers conferred by paragraph (2) (which is a general power enabling the undertaker to alter the layout of any street) require the consent of the street authority before they can be exercised. The Article has precedent in many made DCOs and appears, for example, in Article 14

of the **A47 Wansford to Sutton Development Consent Order 2023**.

*Article 10 (Construction and maintenance of new, altered or diverted streets)*

- 8.15 For any streets constructed or permanently altered or diverted, paragraphs (1) and (2) of this Article specify the body that will be liable for maintenance, namely the undertaker for the first 12 months following completion of the street and, following that, the street authority (this would be the local highway authority in the case of a public highway). These paragraphs allow the undertaker to make contrary agreements with the local highway (or street) authority concerned. Paragraph (3) requires the undertaker to remain liable for maintenance of any temporarily altered or diverted part of a street.
- 8.16 Paragraph (4) provides that any new public highway as a result of the construction, diversion or alteration of streets under the Order will be deemed to be dedicated as public highway after 12 months from completion of the constructed, diverted or altered street. The undertaker may make a contrary agreement with the local highway (or street) authority concerned.
- 8.17 Paragraph (5) applies in the case of a bridge or other structure carrying a street, whereby the street authority is liable from the bridge's completion and provides that such bridge or other structure is to be maintained by and at the expense of the undertaker for a period of 24 months from its completion and thereafter by the street authority.
- 8.18 The effect of paragraphs (6) and (7) is that in any action for damages against the undertaker alleging failure to maintain a street, the undertaker 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.
- 8.19 The Article has precedent and appears at Article 10 of **The Port of Tilbury (Expansion) Order 2019**.

*Article 11 (Permanent stopping up of streets)*

- 8.20 This Article allows those parts of the streets identified in Schedule 6 to be stopped up (i.e. the legal right of way along it to be extinguished). Since the definition of a "street" in section 48 of the New Roads and Street Works Act 1991 includes highways and footways these can also be stopped up under this article. No substitute street is to be provided. The street may not be stopped up unless the conditions referred to in paragraph (4) are met. 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. Paragraph (7) provides for the highway authority being informed of streets being stopped up.

- 8.21 This Article mirrors Article 9 of the General Model Provisions and has precedence in a number of made DCOs, including Article 17 of the **A47 Wansford to Sutton Development Consent Order 2023**, albeit in each case references to highway or private means of access being stopped up for which a substitute is being provided has been omitted as this is not relevant to the Project.

*Article 12 (Permanent stopping up of public rights of way)*

- 8.22 This Article is based on Article 15 of the **model provisions** and Article 11 of **The Rookery South (Resource Recovery Facility) Order 2011** and provides that, with effect from the date upon which the authorised development is first begun the public rights of way specified in Schedule 7 and shown on the stopping up and restriction of use of streets and public rights of way plan are extinguished to the extent specified in that Schedule. There is understood to have been occasional access and use of an area of sea wall between the existing jetty to the west (where secure fencing prevents access further west) and the point at which Bridleway 36 meets the sea wall. If any public rights of way were to have accrued over this area, those rights are to be permanently stopped up to enable the construction and operation of the jetty.

*Article 13 (Temporary stopping up and prohibition or restriction of use of streets and public rights of way)*

- 8.23 This Article provides for the temporary stopping up, prohibition of the use, authorisation of use, alteration or diversion, of public rights of way for the purposes of carrying out the authorised project. It is required because the undertaker will need to temporarily close certain streets and public rights of way in order to construct the authorised project, including the temporary diversion of the part of Bridleway 36 running from Laporte Road to the sea wall and along a stretch of the sea wall for reasons of safety (it is immediately adjacent to the proposed temporary construction area) and temporary prohibition of the use of the southern strip of Long Strip woodland south of Laporte Road (where there has been informal access) for reasons of safety. The authorisation of use of motor vehicles over public rights of way where there is no public right to use motor vehicles, for the purpose of crossing only, is necessary to enable the undertaker to access parts of the authorised project with construction and maintenance plant, equipment and personnel which would otherwise be severed by public rights of way without having to also temporarily stop up those public rights of way. The Article broadly follows the approach of Article 11 of the General Model Provisions in that it contains provisions of general application and then also in relation to the specific public rights of way

that are set out in Schedule 8 to the Order and as shown on the street works and accesses plan (document reference TR030008/APP/4.6). The Article also mirrors Article 11 of the General Model Provisions in providing that where the street is specified in a Schedule to the Order that there is a requirement to consult the street authority, but there would be no need to obtain its consent. In respect of streets not specified in a Schedule to the Order there would be a requirement to obtain the consent of the street authority.

- 8.24 Paragraph (7) provides that compensation is payable in respect of the loss or suspension of any private rights of way. This provision is required so that persons who temporarily lose private rights of way because of the closure of public rights of way can be appropriately compensated. Paragraph (2) provides an additional power to the undertaker which allows it to use any street temporarily stopped up as a temporary working site (which is not in the model provision).
- 8.25 Similar wording has been used in other made Orders, including Article 11 of the **Wrexham Gas Fired Generating Station Order 2017**, Article 12 of the **Meaford Gas Fired Generating Station Order 2016**, Article 13 of the **Riverside Energy Park Order 2020** and Article 16 of **The A47 Wansford to Sutton Development Consent Order 2023**.

*Article 14 (Use of private roads for construction)*

- 8.26 This article authorises the temporary passage of persons or vehicles along private roads situated within Order limits for the purpose of, or in connection with, the construction of the authorised project without the necessity for the undertaker to acquire an easement over that land. Provision is made for compensation. The Article has precedent and appears at Article 16 of **The Port of Tilbury (Expansion) Order 2019**.

*Article 15 (Access to works)*

- 8.27 This Article mirrors Article 12 of the General Model Provisions, which gives the undertaker powers to form new or to improve existing means of access for the purposes of the authorised project, as set out in Schedule 8 to the Order. This article is necessary because the undertaker will need to create or improve existing means of access for the purposes of the authorised project. For clarity, Schedule 9 is split into Part 1 (permanent means of access) and Part 2 (temporary means of access). The Article also provides that other means of access or works can also be provided in other locations reasonably required for the authorised project with the approval of the relevant planning authority, in consultation with the highway authority. Requirement 8 (Highway works) provides for the approval by NELC in consultation with the highway authority of the layout of the permanent accesses.

*Article 16 (Agreements with street authorities)*

- 8.28 This Article is based on Article 13 of the General Model Provisions, which authorises street authorities and the undertaker to enter into agreements relating to the construction of new streets, the strengthening, improvement, repair or reconstruction of streets, the maintenance of streets or structures carrying a street over or under the authorised project, the stopping up, prohibition, restriction, alteration or diversion of a street, the construction in the street of any of the authorised project, the undertaking in the street of any of the works referred to in article 7 (street works), article 9 (power to alter layout, etc., of streets) and article 10(1) (construction and maintenance of new or altered means of access) or the adoption of works. This provision also has precedent in Article 15 of the **Port of Tilbury (Expansion) Order 2019** and Article 16 of the **Riverside Energy Park Order 2020** and is required so that the undertaker may enter into agreements with the relevant street authorities.

*Article 17 (Apparatus and rights of statutory undertakers in stopped up streets)*

- 8.29 This Article governs what happens to statutory utilities' apparatus (pipes, cables, etc.) under streets that are temporarily stopped up by the Order. This Article is required because, without it, the statutory undertaker would not have access to the apparatus, since there would no longer be a right of way along the street. The Article is a model provision but has been amended in that paragraphs (2) onwards have been deleted from Article 32 of the General Model Provisions to avoid duplication with the protective provisions contained in Schedule 14.

*Supplementary*

*Article 18 (Discharge of water)*

- 8.30 This Article details the circumstances in which the undertaker is permitted to discharge water into a watercourse or public sewer or drain as a result of the carrying out, maintenance or use of the authorised project. The article establishes a statutory authority for such discharges, but they must only be carried out with the consent of the person to whom the watercourse or drain in question belongs. Such consent must not be unreasonably withheld.
- 8.31 Article 18(5) requires the undertaker to take all necessary steps to ensure that any water discharged is as free as may be practicable from gravel, soil, or other solid substance, oil or matter in suspension.
- 8.32 Article 18(6) makes clear that it does not remove the requirement for an environmental permit under regulation 12(1)(b) of the

Environmental Permitting Regulations where one would otherwise be necessary.

8.33 Article 18(8) provides that a person who owns a watercourse or public sewer or drain may not refuse the undertaker consent or approval to discharge water into it, or of the proposed plans as to how to do so, or impose a condition on that consent or approval, where the ground for refusal or the condition to be imposed is inconsistent with a relevant drainage strategy approved by the relevant planning authority pursuant to paragraph 12 (Surface water drainage) of Schedule 2 (Requirements). The drainage strategies will, as required by that paragraph, be approved by NELC in consultation with the Environment Agency and North-East Lindsey Drainage Board and must accord with the outline drainage strategy. The outline drainage strategy is contained in appendix 18.B of the environmental statement, which is available for consideration during the Examination and will thus become a certified document under Schedule 15 (documents and plans to be certified) of the Order. ABP is not aware of precedent for this exact provision. Its intent, however, is well precedented across a range of provisions in made DCOs in reaching an appropriate balance between enabling nationally significant infrastructure projects to proceed expeditiously, without reaching an impasse and unnecessarily requiring use of the dispute resolution mechanism at Article 18(2), whilst adequately protecting the interests of persons affected in the context of prior strategic consideration of the matter by the relevant planning authority. It would conflict with the imperative of delivery of a nationally significant infrastructure project to allow individual owners to refuse to consent or approve the discharge of water on grounds that would be inconsistent with the drainage strategies agreed or approved by all the relevant bodies responsible for drainage matters, which in turn are in line with an outline drainage strategy examined pursuant to the 2008 Act. This is because it would cause the Project unnecessary uncertainty and delay.

8.34 The Article (except for its paragraph 8, as noted) has precedent in Article 18 of the **Port of Tilbury (Expansion) Order 2019** and Article 21 of the **47 Wansford to Sutton Development Consent Order 2023**.

*Article 19 (Authority to survey and investigate the land)*

8.35 This Article is based on Article 16 of the General Model Provisions that enables the undertaker, should it be necessary, to enter land both within and land adjacent to but outside the Order limits for the purpose of testing and surveying etc.

8.36 The power is subject to a number of conditions, including a requirement for the service of 14 days' notice on every owner and occupier of the land, the requirement to remove equipment following

completion of any survey and the payment of compensation in the event that any loss or damage arises. The 14 day period is well-established and has been included in the Model Provisions and numerous other granted DCOs including **The A428 Black Cat to Caxton Gibbet Development Consent Order 2022** and is considered reasonable. ABP needs to ensure that the Project can be carried out efficiently and speedily following the making of the Order. It is anticipated that ammonia will be available in Europe in 2027 and, given the urgent imperative of delivering this nationally significant infrastructure project in that context, Air Products must consider all appropriate ways of maintaining an expeditious construction programme to ensure that the hydrogen production facility could be operational as soon as possible in 2027. Extending the notice period set out in Article 19(3) is not a matter to be considered in isolation. It would cause delay to the construction programme on its own and in the context of the cumulative impact taken together with other notices, consents and discharges required under the Order, which could be significant. In any event, a longer notice period is not considered to be necessary given the limited nature of the works and that compensation is payable for any loss or damage caused in the usual manner.

- 8.37 ABP has included within the Order limits all land that it considers is necessary to deliver the Project. However, ABP considers that it would be imprudent in the context of the urgent imperative of nationally significant infrastructure projects not to provide for circumstances where it would be necessary to carry out surveys outside the Order limits to facilitate the delivery of the Project. Such surveys or investigations could for example include surveys of ecological receptors in land adjacent to the Order limits where construction activities are taking place within the Order limits. Similarly, it may reasonably be necessary to survey groundwater levels at locations outside of the Order limits or to monitor noise at appropriate receptors.
- 8.38 ABP is not at this time able to identify exhaustively the land adjacent to, but outside the Order limits where surveys or investigations under this article may be required. The power to enter any land beyond the Order Limits limited (a) to land which is adjacent to land within the Order Limits and (b) to circumstances in which it is "reasonably necessary". In order for something to be "reasonably necessary" it must be connected to the authorised project and it must also fall within one of the activities listed in Article 19(1). Compensation is payable under the CPO Compensation Code in the usual manner.
- 8.39 This ability to survey, monitor or investigate within but also beyond the Order limits, restricted on its terms, has always been key to delivering nationally significant infrastructure schemes. It is considered more measured than taking permanent rights. That is why the Article

has precedent dating back to the Model Provisions (in turn derived from Transport and Works Act orders) but also in many made DCOs including Article 20 of the **Port of Tilbury (Expansion) Order 2019** and Article 23 of the **Wansford to Sutton Development Consent Order 2023**.

- 8.40 Nor is the provision peculiar to DCOs. There is similar provision in the Housing and Planning Act 2016 to Article 19 in respect of surveys of land beyond that which it is proposed to compulsorily acquire. Section 172 (Right to enter and survey land) of that Act empowers a person authorised in writing by an acquiring authority (which means a person who could be authorised to acquire compulsorily the land to which the proposal relates (regardless of whether the proposal is to acquire an interest in or a right over the land or to take temporary possession of it)) to enter and survey or value land in connection with a proposal to acquire an interest in or a right over land. The power under Section 172 may relate to the land which is the subject of the proposal or to other land (i.e. to land outside of the proposal). Examining Authorities and the Secretary of State have therefore historically not considered this power to be broad or undefined but accepted it in the context of its necessity, its inbuilt safeguards and limitations and the payment of compensation.
- 8.41 The model provision has been modified so that no trial holes are to be made in land located within the highway boundary without the consent of the highway authority or in a private street without the consent of the street authority.
- 8.42 Where consent is required from a highway or street authority, if relevant, the provisions of Article 63 (procedure in relation to certain approvals etc.) apply, being consent not to be unreasonably withheld or delayed and the application of Schedule 17 (procedure for discharge).
- 8.43 Paragraph (6) requires the undertaker, after completion of activities for the purpose of surveys or investigations, to remove any apparatus used in connection with such activities and restore the land to the reasonable satisfaction of the owners of the land on which the activities were carried out. This mirrors Article 26(6) of The HyNet Carbon Dioxide Pipeline Order 2024, with clarification that the owners cannot require the undertaker to do anything breaching the terms of the Order.
- 8.44 Paragraph (7) applies section 13 of the Compulsory Purchase Act 1965 (refusal to give possession to acquiring authority) thereby providing an enforcement mechanism (by way of a warrant) where entry onto land under the Article is refused. This is considered necessary so that there is no delay in the implementation of the authorised project.

*Article 20 (Protective works)*

8.45 This Article is based on Article 15 of the General Model Provisions, which is included in most made DCOs to date. Its purpose is to provide powers to the undertaker to enter any building and land within its curtilage to survey to determine whether protective works are needed and to carry out protective works to buildings within the Order limits, or which may be affected by the construction or operation of the authorised project outside of the Order limits (including works to secure the safe operation of the authorised project). This Article is required because there is land and there are buildings within, and in close proximity to, the Order limits in respect of which it would be imprudent to exclude any possibility that protective works might be required as a result of the authorised project. It is not possible for ABP to define in exactly what circumstances protective works would be required. The provision is intentionally broad as the purpose, which should be borne in mind throughout consideration of justification for the power, is to permit the undertaker to prevent or remedy damage or other harm for the benefit of third parties or other land. However, the power is not unlimited and subject to the standard safeguards for such provisions in made DCOs. First, the period is limited – protective works can only be carried out until five years after the part of the authorised project in the vicinity was first brought into operational use (the phrase ‘open for use’ which is used in the model provision is not appropriate to the type of development in question). This a reasonable and appropriate period for unforeseeable issues arising from the construction but which only come to light following the start of operation of the Project. A 5-year provision is standard and was included in the Model Provisions and numerous other granted DCOs including **The A428 Black Cat to Caxton Gibbet Development Consent Order 2022**. Second, any desired works must be “necessary or expedient”, which is preferable to setting an arbitrary geographical limit. Third, not only must the undertaker serve notice on the owners and occupiers, but where protective works are proposed, those owners and occupiers have the right to serve a counter-notice which would trigger arbitration. In those circumstances, an arbitrator would determine whether the undertaker’s assessment of “necessary or expedient” is appropriate. Fourth, compensation is payable for any loss or damage caused. The undertaker would thus not embark on such a process lightly.

8.46 The period of 14 days for notices in Article 20(5) is considered appropriate because the undertaker needs to ensure that the Project can be carried out efficiently and speedily following the making of the Order. It is anticipated that ammonia will be available in Europe in 2027 and, given the urgent imperative of delivering this nationally significant infrastructure project in that context, the undertaker must consider all appropriate ways of maintaining an expeditious

construction programme to ensure that the hydrogen production facility could be operational as soon as possible in 2027. Extending the notice period is not a matter to be considered in isolation. It would cause delay to the construction programme on its own and in the context of the cumulative impact taken together with other notices, consents and discharges required under the dDCO, which could be significant. The 14-day period is well-established and has been included in the Model Provisions and numerous other granted development consent orders including **The A428 Black Cat to Caxton Gibbet Development Consent Order 2022** and is considered reasonable, particularly given that the process also provides for service of a counter-notice and a potential arbitration procedure.

- 8.47 Paragraph (7) includes compensation provisions in relation to any loss or damage arising by reason of the exercise of the powers. Paragraph (7) applies section 13 of the Compulsory Purchase Act 1965 (refusal to give possession to acquiring authority) thereby providing an enforcement mechanism (by way of a warrant) where entry onto land under the Article is refused. This is considered necessary so that there is no delay in the implementation of the authorised project.
- 8.48 Paragraph (14) was included further to discussions with NELC, clarifying that protective works cannot be carried out within its highway without its consent.
- 8.49 The Article has precedent in many made DCOs including Article 19 of the **Port of Tilbury (Expansion) Order 2019** and Article 22 of the **47 Wansford to Sutton Development Consent Order 2023**. Such provision is anticipated by the 2008 Act. Section 120(4) (What may be included in order granting development consent) and Paragraph 10, Schedule 5 (Provision relating to, or to matters ancillary to, development) provide that a DCO may make particular provision for or relating to the protection of the property or interests of any person.

*Article 21 (Removal of human remains)*

- 8.50 The purpose and effect of Article 21 is to replace the existing and disparate regimes for regulating the removal of human remains and consolidate the applicable provisions in a single article in the Order. It is required to ensure that human remains are recovered appropriately without causing unacceptable delay to the implementation of this nationally significant infrastructure project. The Article is based on Article 17 of the General Model Provisions and found in Article 51 of the **A47 Wansford to Sutton Development Consent Order 2023**.



- 8.51 The Article disapplies section 25 of the Burial Act 1857 and replaces it with an alternative procedure for managing the removal of any human remains disturbed during the course of carrying out the authorised project.
- 8.52 The Article departs from the model provision in that paragraph (12) excludes the requirement to give notice before the removal of remains which the undertaker is satisfied were interred more than 100 years ago and that no relative or personal representative of the deceased is likely to object to their removal. This approach has precedent in the **Crossrail Act 2008** and the **A47 Wansford to Sutton Development Consent Order 2023**. Paragraph (13) requires that the undertaker seeks and complies with direction from the Secretary of State under paragraph (14) regarding the treatment of such remains following their removal.
- 8.53 Paragraph (19) applies section 238 and 239 of the 1990 Act to land, and rights over land, acquired under the Order and permits the use of such land notwithstanding any obligation or restriction imposed under ecclesiastical law or law relating to burial grounds, save as provided for in the remainder of the Article. Paragraph (18) excludes the application of Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950. The drafting in paragraphs (17) and (18) has precedent in Article 20 of the **River Humber Gas Pipeline Replacement Order 2016** and Article 51 of the **A47 Wansford to Sutton Development Consent Order 2023**.

## 9 **PART 3 – ACQUISITION OR POSSESSION OF LAND**

### *Powers of acquisition*

#### *Article 22 (Compulsory acquisition of land)*

- 9.1 This Article authorises the acquisition by compulsory purchase of the land shaded pink on the land plans (document reference TR030008/APP/4.5) and described in the book of reference (document reference TR030008/APP/3.1), and then to use it for the purposes authorised by the Order or for any other purposes in connection with or ancillary to the construction, operation, or maintenance of the authorised project. It grants the power to acquire land required for the Project not already in the ownership of ABP. This is subject to Articles 23 (time limit for exercise of authority to acquire land compulsorily), 24 (compulsory acquisition of rights), 28 (rights over or under streets), 31 (temporary use of land for constructing the authorised project) and 60 (crown rights), which are explained below. This Article is based on Article 18 of the General Model Provisions but appears recently in this form at Article 28 of the **Sizewell C (Nuclear Generating Station) Order 2022**.

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

- 9.2 This Article mirrors Article 20 of the General Model Provisions which, subject to one exception, imposes a time limit of 5 years for the exercise of powers of compulsory acquisition from the date on which the Order is made, via issuing notices to treat or executing general vesting declarations. The undertaker considers that 5 years is an appropriate time limit as it is consistent with the time limit for commencing the authorised project set out in requirement 2 of Schedule 2 to the Order and has precedent in most made DCOs to date.
- 9.3 However, a time limit of 10 years is proposed for the temporary possession powers relating to Kings Road (plots 7/1, 7/2, 7/3, 7/4, 7/5, 7/6, 7/7, 7/8, 7/9, 7/10 and 7/11 shown on sheet 7 of the land plans (document reference TR030008/APP/4.5)). It is anticipated that modular construction methods will result in oversized loads being brought from the Port down Kings Road to the construction site. This will require temporary works including removal of street furniture and access to certain properties along Kings Road for the purposes of adjusting (removing, raising or lowering) cables above the street (understood to be telecommunications lines). As the construction period is anticipated to extend beyond five years, it is necessary for such powers to extend beyond five years. However, it is not proposed that temporary possession is taken for a prolonged period. Possession will only be necessary to achieve the modification to overhead lines as and when an abnormal load passes down Kings Road. The works may for example require raising or lowering of the lines temporarily overnight whilst the load passes and access to the land will be required temporarily to facilitate those works.
- 9.4 Article 23(2)(b) clarifies that even though the deadline for starting to exercise powers under Article 31 (Temporary use of land for constructing the authorised project) expires within the periods specified, the undertaker can remain in possession of land where temporary possession was taken before the relevant periods specified in Article 23(2) expire. However, the restrictions on how long such possession, once taken, may endure in Article 31(4) remain applicable.

*Article 24 (Compulsory acquisition of rights)*

- 9.5 Paragraph 1 of this Article enables the Company to acquire rights or impose restrictive covenants over the land shaded pink on the land plans (document reference TR030008/APP/4.5) as may be required for any purpose for which that land may be acquired under article 22 (Compulsory acquisition of land). The ability to acquire new rights is required in order that the Company can construct the authorised project, and it ensures that the Company is able to seek a lesser

interference with land where this is appropriate (whether in the context of new or existing rights) during the implementation of the authorised project (as will the micro siting referred to in paragraph 9.18 below).

- 9.6 Paragraph 2 provides that, in respect of the land shaded blue or shaded and hatched blue on the land plans set out in Schedule 12 (land in which only new rights and restrictive covenants etc. may be acquired), the undertaker's powers of acquisition of new rights and imposition of restrictive covenants are limited to the purposes set out in that Schedule.
- 9.7 Providing the undertaker with powers to acquire rights only and impose restrictive covenants only over the Order land shaded blue or shaded and hatched blue and set out in Schedule 12 allows the undertaker to reduce the area of land that is required to be compulsorily acquired for the purposes of the authorised project, and therefore allows for a more proportionate exercise of compulsory acquisition powers.
- 9.8 The form of this Article is a departure from the model provisions, but it has precedent in many made DCOs including Article 18 of the **Cleve Hill Solar Park Order 2020** and Article 24 of the **Riverside Energy Park Order 2020**.

*Article 25 (Acquisition of subsoil or airspace only)*

- 9.9 This Article allows the Company to acquire, or acquire or create rights in, land below the surface or above the surface, rather than having to acquire all of the land. It gives the Company the flexibility to minimise so far as is possible the extent of interests to be acquired, with consequently less impact on affected landowners. Any subsoil or airspace acquired under this provision can only be used for the same purposes for which the Company could have acquired the land. The Article is based on Article 24 of the model provisions, which related to subsoil only, and has precedent in a number of recent made DCOs such as Article 29 of the **M20 Junction 10a Development Consent Order 2017**, article 25 of the **M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016** and Article 32 of the **47 Wansford to Sutton Development Consent Order 2023**.

*Article 26 (Private rights)*

- 9.10 This Article, based on Article 22 of the General Model Provisions, is required because it enables the undertaker to take land with a clear, unencumbered title, thereby minimising impediments to the delivery of the authorised project. It expands on the model provisions so as to apply to private rights generally and not just to rights of way. Paragraph (2) provides for the cessation of effect of private rights and restrictive covenants on land within the Order limits already owned by

the undertaker in circumstances where an activity authorised by the Order interferes with or breaches them as per Article 29(3) of the **A47 Wansford to Sutton Development Consent Order 2023**. In other words, the Company will be able to “cleanse the title” on land it already owns if required to deliver the Project. Paragraphs (1), (3) and (4) respectively (i) extinguish or suspend private rights and restrictions over land so far as their continuance would be inconsistent with the exercise of the compulsory acquisition powers contained in the Order; (ii) cease the effect of private rights and restrictions over land so far as their continuance would be inconsistent with the exercise of compulsory acquisition of rights or the imposition of restrictive covenants under the Order and (iii) suspend and render unenforceable private rights and restrictions over land so far as their continuance would be inconsistent with the exercise of temporary possession powers under the Order. These provisions are subject to paragraph (8) which allows the undertaker to serve notice or enter into agreements preserving the existence of rights over land.

9.11 Paragraph 5 makes bespoke provision for all restrictive covenants contained in a transfer dated 19 April 1979 and made between (1) the right Honourable John Edward Pelham Earl of Yarborough and (2) Samuel James Parker and Maud Parker relating to land shown as plot 5/4 on sheet 5 of the land plans (document reference TR030008/APP/4.5) and described in the book of reference (document reference TR030008/APP/3.1) are extinguished on the date on which the authorised project is begun. This is a restrictive covenant preventing use of the property otherwise than for residential purposes, which is incompatible with Requirement 14 (Queens Road residential properties) at Schedule 2 (Requirements) of the Order which prohibits residential use of that property. Section 120 and Schedule 5 of the 2008 Act provide for the extinguishment of such interests in land in an order for development consent and, without this provision, any active use of the property would otherwise be sterilised.

9.12 Paragraph (6) provides that compensation is payable to any person who suffers loss as a result of the exercise of the powers in this Article and that such compensation would be payable under section 152 of the 2008 Act rather than the Compulsory Purchase Act 1965. Paragraph (10) sets out a list of matters deemed to be private rights to ensure that any right which could potentially interfere with the implementation of the authorised project (including trusts or incidents) is capable of being extinguished on the terms of this article and mirrors the lists in Article 25 of the **A14 Cambridge to Huntingdon Improvement Order 2016**, article 24 of the **A19/A1058 Coast Road (Junction Improvement) Order 2016**, article 24 of the **A19/A184 Testo’s Junction Alteration Order 2018** and article 29 of the **A47 Wansford to Sutton Development Consent Order 2023**.

*Article 27 (Power to override easements and other rights)*

- 9.13 This Article provides the undertaker with the power to override easements and other rights and reflects the terms of section 120(3) and (4) and paragraphs 2 and 3, Part 1 of Schedule 5 of the 2008 Act. This Article has precedent in, for example, Article 24 of the **Silvertown Tunnel Order 2018**, Article 28 of the **Port of Tilbury (Expansion) Order 2019** and Article 27 of the **Riverside Energy Park Order 2020**. The Article is supplementary to Article 22 (Compulsory acquisition of land) and Article 24 (Compulsory acquisition of rights) and is considered necessary and expedient to give full effect to development consent under Article 5. The Article makes it clear that any “authorised activity”, as defined in paragraph (2), is authorised notwithstanding that it may interfere with any easement, liberty, privilege, right or advantage annexed to land (including any natural right to support and restrictions as to the user of land arising by the virtue of a contract). These provisions are all subject to paragraph (7), which allows the undertaker to serve notice or enter into agreements preventing the overriding of easements and other rights.

*Article 28 (Rights over or under streets)*

- 9.14 This Article mirrors Article 27 of the General Model Provisions which has been included in the majority of made DCOs to date. It enables the undertaker to enter on and appropriate and use land above or below streets within the Order limits where required for the purpose of the authorised project without having to acquire that land. It therefore reduces the amount of land that needs to be compulsorily acquired for the purposes of the authorised project. The exercise of the power conferred by this Article is prohibited in the circumstances set out in paragraph (3). Paragraphs (4) and (5) provide for the payment of compensation in relevant circumstances. The construction of the Project will include works under and over streets. Examples include:

- (a) The construction of a culvert under Laporte Road which will involve construction works affecting land below Laporte Road;
- (b) Modification to apparatus over Kings Road during construction works, using the airspace above Kings Road;
- (c) Works to create permanent and temporary accesses to Work Nos. 3, 5 and 7, which will involve use of the airspace above the adjacent streets.

- 9.15 Save for the strips of highway land along Laporte Road to be stopped up, all of the above and other construction works affecting streets are

consistent with the permanent retention of the affected streets. It would be unfair and disproportionate to the owners of the subsoil below or airspace over those streets to be permanently deprived of their ownership when the requirements of the Project extend only to the temporary use of subsoil and airspace.

*Article 29 (Application of the 1981 Act)*

- 9.16 This Article applies (with minor modifications to make the provisions appropriate to the context of acquisition under powers in a development consent order) the provisions of the Compulsory Purchase (Vesting Declarations) Act 1981 (the "**1981 Act**") to compulsory acquisition under the Order so that the Company has the option to acquire land via the vesting declarations procedure set out in the 1981 Act. Vesting declarations allow title in the land concerned to pass to the acquiring authority more quickly than using the notice to treat method. They also enable several parcels of land to be acquired under the same legal instrument and therefore more efficiently than under the notice to treat procedure. This Article has been amended from Article 23 of the General Model Provisions to reflect the changes brought about by the Housing and Planning Act 2016, which has is precedent in numerous made DCOs including Article 31 of the **Port of Tilbury (Expansion) Order 2019** and Article 31 of the **Wansford to Sutton Development Consent Order 2023**.

*Article 30 (Modification of Part 1 of the 1965 Act)*

- 9.17 The purpose of this article is to ensure consistency and inter-operability between the terms of the Order and the Compulsory Purchase Act 1965 (as amended by the Housing and Planning Act 2016) as applied by section 125 of the 2008 Act. It has precedent in numerous made DCOs including Article 31 of the **Port of Tilbury (Expansion) Order 2019** and Article 30 of the **Wansford to Sutton Development Consent Order 2023**.

*Article 31 (Temporary use of land for constructing the authorised project)*

- 9.18 This Article is a model provision which enables the undertaker to enter onto and take temporary possession of specified Order land or any of the remainder of the Order land, where no notice of entry or general vesting declaration has been served. Temporary use of land is required for purposes associated with the construction of the authorised project and also as it will enable the Company to carry out micro siting, which will then inform the precise permanent easements and restrictive covenants that the Company requires, thereby reducing compulsory acquisition powers.

- 9.19 Paragraph (1)(a) is a land power that sets out that the Company may temporarily possess (i) the land shown coloured green on the land plans for the purpose specified in Schedule 13 or (ii) any other Order land shown coloured blue, pink or coloured and hatched blue on prior to the exercise of the power to compulsory acquire, or acquire rights over, that land. Paragraphs (1)(b) to (e) are land powers that set out various activities that can be undertaken on the Order land through temporary possession. The list has been modified from the model provisions to stipulate activities which the undertaker considers are relevant to the Project, such as use of the land for temporary working sites and accesses, and to carry out any mitigation works required pursuant to the Requirements in Schedule 2 of the Order.
- 9.20 The Article sets out limitations on this general power to temporarily use the Order land for carrying out the authorised project. Under paragraph (2) the Company cannot take temporary possession of any house, garden or other occupied building save that access to gardens and external works to houses may be required during construction to allow statutory undertaker apparatus connected to houses to be removed or repositioned to allow oversized loads to move along the adjacent highway (Kings Road) as permitted under Article 33 (statutory undertakers).
- 9.21 In addition, the Company must:
- 9.21.1 serve notice of intended entry not less than 14 days before intended entry onto the land (paragraph (3));
- 9.21.2 not remain in temporary possession of the land for any longer than required and not for more than one year after the date of beginning with the date of completion of the part of the authorised project for which the land was temporarily possessed unless the undertaker has already served a notice to treat or general vesting declaration (paragraph (4));
- 9.21.3 before giving up occupation of land, remove the temporary works and restore the land to the reasonable satisfaction of the owner. The model provision has been modified to specify certain operations necessitated by the authorised project that are not required to be removed (paragraph (5)). Sub-paragraph (h) provides that the undertaker is not required to breach or fail to comply with a term of the Order.
- 9.22 Dispute and compensation provisions are included at paragraphs (6) to (10) to compensate owners and occupiers that suffer loss or damage as a result of their land being temporarily used for carrying out the authorised project.

9.23 Paragraph (12) applies section 13 of the Compulsory Purchase Act 1965 (refusal to give possession to acquiring authority) thereby providing an enforcement mechanism (by way of a warrant) where entry onto land under the Article is refused. This is considered necessary so that there is no delay in the implementation of the authorised project.

9.24 The Article has precedent in Article 32 of the **Port of Tilbury (Expansion) Order 2019** and Article 39 to the **A47 Wansford to Sutton Development Consent Order 2023**.

*Article 32 (Temporary use of land for maintaining the authorised project)*

9.25 This Article is similar to Article 31 (Temporary use of land for constructing the authorised project) and provides for the temporary use of land within the Order limits for maintenance of the authorised project during the “maintenance period” (defined in paragraph (12) as five years beginning with the date on which the part of the authorised project for which temporary possession is required is brought into operational use). The Article is based on Article 29 of the General Model Provisions and it is required so that the undertaker can take temporary possession of land within the Order limits if it is reasonably required to maintain the authorised project. The power conferred by the Article is considered appropriate as it would impose a lesser burden than acquiring rights to achieve the same purpose.

9.26 The Article also allows temporary works (including means of access) and buildings to be constructed if reasonably necessary (paragraph 1(c)). It is appropriately limited and cannot be exercised in respect of a house, garden or any other building where it is occupied (paragraph 2). Paragraph (2) has been supplemented to clarify for the benefit of NELC that the power cannot be used in relation to its public highway.

9.27 Several provisions similar to Article 31 apply:

(a) The undertaker must provide at least 28 days’ notice to the relevant owner/occupiers before taking temporary possession (paragraph (3)) save where the circumstances in paragraph (11) apply (risk to safety);

(b) The undertaker may only retain possession for as long as is reasonably necessary to carry out the maintenance (paragraph (4));

(c) When returning the land after the temporary possession the undertaker must remove temporary works and restore the land to the reasonable



satisfaction of  
the owners (paragraph (5));

- (d) Compensation provisions are included to compensate owners and occupiers that suffer loss as a result of their land being temporarily used for the maintenance of the authorised project (paragraphs (6) to (8));
- (e) Section 13 of the Compulsory Purchase Act 1965 (refusal to give possession to acquiring authority) is applied, thereby providing an enforcement mechanism (by way of a warrant) where entry onto land under the Article is refused (paragraph (10)).

9.28 This Article is substantially based on the wording of Article 29 of the model provisions and a number of previous DCOs, including Article 33 of the **Port of Tilbury (Expansion) Order 2019** and Article 35 of the **A47 Wansford to Sutton Development Consent Order 2023**.

*Article 33 (Statutory undertakers)*

9.29 Article 33 is derived from article 31 of the model provisions and allows the Company:

9.29.1 to acquire compulsorily any Order land belonging to statutory undertakers;

9.29.2 extinguish rights of statutory undertakers and remove and reposition their apparatus within the Order land;

9.29.3 cross underneath or over apparatus belonging to statutory undertakers within the Order land.

9.30 It is impractical for any statutory undertaker to show and describe all such apparatus, laid down over decades, which is why a general power is standard. Paragraph (2) restricts the Company's power to extinguish rights or remove or reposition apparatus where it is in streets. If the streets in question are to be stopped up as part of the authorised project then the provisions of Article 17 (Apparatus and rights of statutory undertakers in stopped up streets) will apply. The entire power conferred is limited by the terms of the protective provisions in Schedule 14. This article has broad precedent in numerous made DCOs including Article 34 of the **A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016**, Article 34 of the **Port of Tilbury (Expansion) Order 2019** and Article 36 of the **A47 Wansford to Sutton Development Consent Order 2023**.

*Article 34 (Recovery of costs of new connections)*

- 9.31 This Article is based on Article 33 of the General Model Provisions which provides that persons who have to create a new connection following the exercise of powers under Article 33 (Statutory undertakers), for example in a situation where there is an interruption to the service provided by a statutory undertaker to owners or occupiers of premises (such as the provision of gas, water or electricity), their costs incurred in obtaining a new service can be recovered from the undertaker. The Article is recently precedent in Article 38 of the **A47 Wansford to Sutton Development Consent Order 2023**.

*Article 35 (Acquisition of part of certain properties)*

- 9.32 This Article, which follows Article 26 of the General Model Provisions, enables acquisition of a part, rather than the whole of, properties subject to compulsory acquisition. It contains a procedure enabling the relevant owner in certain circumstances to require the whole of the land to be taken, with disputes being determined by the Land Chamber of the Upper Tribunal. The article applies as a substitute for section 8(1) and Schedule 2A of the Compulsory Purchase Act 1965.

*Article 36 (Compulsory acquisition of land – incorporation of the mineral code)*

- 9.33 This Article incorporates Parts 2 and 3 of Schedule 2 to the Acquisition of Land Act 1981, exempting existing rights in minerals from the scope of compulsory acquisition unless they are expressly named and conveyed. It also makes provision for a situation where the owner of mines or minerals wishes to work such mines and minerals. This means that where the Company acquires land under the powers of the Order, it will not acquire any mineral deposits present in the land (other than those necessarily extracted or used in constructing the authorised project) unless they are expressly included in the conveyance. The article is based on Article 19 of the General Model Provisions and has broad precedent in a number of made DCOs, including Article 25 of the **A47 Wansford to Sutton Development Consent Order 2023**.

*Article 37 (Disregard of certain interests and improvements)*

- 9.34 This Article provides that the Tribunal is to disregard certain interests in and enhancement to the value of land if required to assess a claim for compensation with regard to its compulsory acquisition in circumstances where the creation of the interest or the making of the enhancement in value was designed with a view to obtaining compensation or increased compensation. The Article does not have the effect of modifying or excluding the application of an existing provision relating to compulsory acquisition and is, therefore, in compliance with section 126 of the 2008 Act.

9.35 The wording of the Article mirrors section 4 (Assessment of compensation) of the Acquisition of Land Act 1981 (the "**1981 Act**"). It is necessary to apply the effect of section 4 of the 1981 Act in the Order because the 2008 Act only applies to a compulsory purchase to which any other statutory instrument has applied its provisions and the 2008 Act provisions do not apply these. Sections 120(3) and 120(5)(a) and Schedule 5 (by virtue of section 120(3) of the 2008 Act) allow the application in a DCO of statutory provisions which relate to the payment of compensation. The Article has precedent in Article 38 of the **Port of Tilbury (Expansion) Order 2019** and Article 44 of the **A47 Wansford to Sutton Development Consent Order 2023**.

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

9.36 This Article makes provision for a situation where the Tribunal, in assessing the compensation payable to a person, can be asked to set off against the value of the land any increase in value of any contiguous or adjacent land belonging to that person arising out of construction of the authorised project.

9.37 The Article is in compliance with section 126(2) of the 2008 Act as it does not have the effect of modifying the application of an existing provision relating to compulsory purchase compensation. The principle of this article was established in section 7 of the Land Compensation Act 1961 (effect of certain actual or prospective development of adjacent land in same ownership). That section has now been repealed and replaced by section 68 of the same Act – which needs to be applied by the Order. Sections 120(3) and 120(5)(a) of and Schedule 5 (by virtue of section 120(3) to the 2008 Act allow the application in a DCO of statutory provisions which relate to the payment of compensation. This article is common in made DCOs and preceded in Article 38 of the **Port of Tilbury (Expansion) Order 2019** and Article 45 of the **A47 Wansford to Sutton Development Consent Order 2023**.

*Article 39 (No double recovery)*

9.38 This Article has been included in the Order so as to ensure that compensation cannot be payable both under the terms of the Order and in addition under other compensation regimes for the same loss or damage. Similarly, the Article provides that there is not to be double recovery under two or more different provisions of the Order.

9.39 It is an acknowledged principle of equivalence that a claimant the subject of compulsory acquisition of land who has an interest in or a right across land should be compensated for no more than and no less than the loss suffered. This provision therefore does not conflict with the compensation code. This article is common in made DCOs and preceded in Article 40 of the **Port of Tilbury (Expansion) Order 2019** and Article 43 of the **The Riverside Energy Park Order 2020**.

## 10 **PART 4 – OPERATIONAL PROVISIONS**

### *Article 40 (Authorisation of operation and use)*

- 10.1 This Article authorises the operation and use of the authorised project. Schedule 5 of the Planning Act 2008, which is a non-exclusive list, provides that a DCO can make provision for the operation of certain development, such as for example a generating station (paragraph 5). Made DCOs involving development which will be operated or used therefore contain provision such as Article 40 so it is clear that the undertaker may operate and use the authorised project for which development consent is granted. A recent example is Article 7(1) of the **Sizewell C (Nuclear Generating Station) Order 2022**. Article 40 clarifies that any persons authorised by the undertaker may also operate and use the authorised project to reflect that whilst ABP and AP will retain control of the use and operation of the authorised development they may, in the usual manner, engage contractors in doing so, who themselves are not an “undertaker” for the purposes of the Order. Any person, including any contractor, commits an offence if without reasonable excuse they fail to comply with the terms of a DCO, as set out in Section 161 of the Planning Act 2008, and all relevant other regulatory regimes will apply in the usual manner. The equivalent provision in **The West Midlands Rail Freight Interchange Order 2020**, Article 5 (Authorisation of use), also makes reference to “the undertaker and any persons authorised by the undertaker”.

### *Article 41 (Maintenance of authorised project)*

- 10.2 This Article reflects Article 3 of the General Model Provisions and sets out the scope within which the undertaker may maintain the authorised project. The definition of “maintain” is contained in article 2(1) (see paragraphs 7.4.4 to 7.4.7 above). As with many made DCOs, including for example Article 41(3) of the **Port of Tilbury (Expansion) Order 2019**, the power conferred does not authorise the carrying out of any works which are likely to give rise to any materially new or materially different effects that have not been assessed in the environmental statement.

### *Article 42 (Limits of dock master’s jurisdiction)*

- 10.3 Section 2 of the Harbours, Docks and Piers Clauses Act 1847 anticipates the “special Act”, i.e. in this case the Order, specifying the limits within which the powers of the dock master may be exercised by reference to the distance measured from the “harbour, dock, or pier”, i.e. in this case the authorised project. Section 47 of the **Humber Commercial Railway and Dock Act 1904**, first authorising the construction of a dock near the village of Immingham, did this by reference to a distance of 200 yards riverwards from every part of the

works. The approach was followed in subsequent enactments for extensions to the docks, most recently in the **Associated British Ports Act 1983** (section 11), the **Associated British Ports Act 1990** (section 10), the **Associated British Ports (Immingham Outer Harbour) Harbour Revision Order 2004** (article 15) and the **ABP (Immingham Gas Jetty) Harbour Revision Order 2007** (article 9), all further extending the limits “to a distance of 200 metres in every direction” from the works authorised by each of those enactments. Article 42 of the Order simply replicates this approach in respect of the authorised project, clarifying (as its precedents back to the original 1904 Act did) that, so far as relevant to vessels, such powers are limited to vessels going to, moored at or departing from the relevant work. Article 42 therefore fulfils the same function as Article 5 (Limits of harbour) of the model provisions and is equivalent to Articles 4(1) - (3) of the **Port of Tilbury (Expansion) Order 2019**, i.e. to extend the area of the Dock Master Immingham’s jurisdiction to encompass 186 metres around the new built marine infrastructure comprised in the authorised project. The drafting and approach mirror that taken in Orders related to the Port of Immingham since its creation (186 metres reflecting the frontage of the Immingham Oil Terminal which corresponds sensibly with the 200 yards set in previous enactments iteratively extending the jurisdiction of the Port as it expanded).

*Article 43 (Area of jurisdiction to form part of the undertaking and application of byelaws)*

- 10.4 Paragraph (1) of Article 43 clarifies that the limits within which the powers of the dock master may be exercised under article 42 (limits of dock master’s jurisdiction) for all purposes form part of the harbour, dock or pier undertaking of the Company as authorised from time to time. It is equivalent to Article 41(1)(b) of the **Port of Tilbury (Expansion) Order 2019**.
- 10.5 The byelaws regulating activities within the Port of Immingham were made by the London and North Eastern Railway Company on 1 January 1929 and confirmed by the Minister of Transport on 4 January 1929 (the “**Immingham Dock Byelaws**”) were made in 1929. Paragraphs (2) and (30)(a) of the Article specify that those byelaws will also regulate the authorised project and may be enforced by the Company. Byelaw 52 of the Immingham Dock Byelaws prohibits any person at the Dock knowingly or negligently damaging or injuring any part of the Dock, or any kind of property whatsoever of the Company, under any circumstance. So it is necessary for Paragraph (30)(b) of the Article to clarify that any activity carried out pursuant to the Order is not a breach of the Byelaw 52 if it is with the written approval of the Company.

*Article 44 (Power to appropriate)*

- 10.6 This Article gives the Company the power to set apart and appropriate any part of the authorised project and the area within 186 metres of it for the exclusive or preferential use and accommodation of any trade, person or goods – subject to such charges and the imposition of terms and conditions as the Company may consider fit. Without this provision, Section 33 of the Harbours, Docks and Piers Clauses Act 1847 could be interpreted to mean that the Company would need to make the authorised project fully open to public access and use, which could have detrimental operational consequences. The Article has precedence in Article 42 of the **Port of Tilbury (Expansion) Order 2019**, Article 29 of the **Able Marine Energy Park Development Consent Order 2014** and numerous orders made under the Harbours Act 1964.

*Article 45 (Powers to dredge)*

- 10.7 This Article provides the Company with a general power to dredge, deepen, scour, cleanse, alter and improve so much of river bed and foreshore of the River Humber as is within the Order limits. This is separate to the capital dredge to create a berthing pocket with a depth of up to 14.5 metres below chart datum described in paragraph (b) of Work No. 1 set out in Part 1 (Authorised development) of Schedule 1 (Authorised project) of the Order and paragraph 4(1) of Schedule 3 (Deemed marine licence).
- 10.8 The Article also includes a power for the Company to use, deposit or otherwise dispose of the dredged materials as they think fit, provided that no materials are disposed of in the UK marine area other than in accordance with approval from the Marine Management Organisation (the “**MMO**”) under the deemed marine licence or under any other marine licence granted. The Order is deemed to be legislation falling within section 75(3) of the MCAA 2009 for the purpose of dredging activities falling within paragraph (1) of the Article. This means that the exemption from the need to obtain a licence for dredging is applied to the Order and as a result maintenance dredging does not need to be listed as a licensable activity in the deemed marine licence.
- 10.9 The Company already has consent to undertake regular maintenance dredging under the terms of its extant marine licence.
- 10.10 Article 20 of the Harbour Model Provisions makes provision for a right to dredge but this Article is based on Article 42 of the **Port of Tilbury (Expansion) Order 2019**.

11 **PART 5 – MISCELLANEOUS AND GENERAL**

*Article 46 (Benefit of Order)*

- 11.1 The Order defines the “undertaker” as described in paragraph 7.4.12 above, i.e. (i) the “Company” (being ABP), (ii) any person who for the time being is interested in the land in accordance with the approach prescribed in section 156(1) (benefit of order granting development consent) of the 2008 Act and (iii) Air Products in respect of certain land and certain powers not available to it by virtue of its agreement with ABP combined with the operation of (ii). Sub-paragraph 1(b) of this Article provides that the undertaker (as so defined) has the benefit of the Order. This is subject to a number of exceptions:
- (a) Sub-paragraph (1)(a) specifies that the provisions conferring a power only on (i) the Company, (ii) the dock master or (iii) the statutory harbour authority, have effect solely for the benefit of these parties specified (to clarify for the avoidance of doubt that not all parties comprised in the definition of “undertaker” have those powers, largely relating to harbour management).
  - (b) Paragraph 2 specifies that only ABP has the benefit of the powers in Articles 22, 24, 25, 33(1)(a) and (b) and 35 which relate to compulsory acquisition.
  - (c) Paragraphs 3 and 4 specify that only ABP and Air Products have the benefit of Articles 19, 20, 31 and 32 which relate to powers to temporarily possess, survey and investigate and carry out protective works to land. ABP in respect of the full ambit of each power; Air Products in relation to plots 3/2, 4/5, 4/7, 4/8, 4/9, 4/16, 4/17, 4/18, 4/19, 4/20, 4/21, 4/22, 4/23, 4/26, 4/28, 4/29, 4/30, 4/32, 5/3, 5/4, 5/7, 5/8, 5/10, 5/11, 5/12, 5/13, 5/14, 5/15, 5/18, 5/20, 5/22, 5/23, 5/24, 5/25, 5/27, 5/28, 5/29, 5/30, 5/32, 5/33, 5/36, 5/37, 5/38, 5/39, 5/45, 6/6, 6/14, 6/15, 6/16, 6/18, 6/19, 7/1, 7/2, 7/3, 7/4, 7/5, 7/6, 7/7, 7/7, 7/8, 7/9, 7/10, 7/11, 7/12, 7/15, 7/16, 7/17, 7/18, 7/20, 7/21, 7/22 and 7/23 on the land plans (being land not currently owned by ABP, except as one of a number of potential subsoil owners of highway, as Air Products is otherwise to have relevant rights demised to it by ABP by way of private treaty – see paragraph 2.12 above) and land outside the Order limits where applicable to the relevant article.
  - (d) Paragraph 5 specifies that only ABP has the benefit of the powers in Article 26(8) (private rights) and Article 27(7) (power to override easements and other rights) to give the notices or make the agreements to which those Articles refer and prevent operation of the suspension or cessation of effect of easements and other rights. This power enables ABP to limit the effect of these provisions, where appropriate.

- (e) Paragraph 6 specifies that only ABP has the benefit of the powers in Article 55(2) (planning legislation) to serve a notice on NELC that conditions attached to a planning permission prior to the making of the Order which relate to the Order limits cease to have effect to the extent that they are inconsistent with the authorised project.
- (f) Paragraphs 7, 8 and 9 specify that an undertaker can transfer or temporarily grant the benefit of a provision of the Order to a statutory undertaker where it is required for it to install apparatus comprised in the authorised project or to divert, replace or protect apparatus. This is necessary because such statutory undertakers may not constitute an “undertaker” because they are not for the time being interested in the land in question. Secretary of State approval is only needed for the transfer or grant of the land-related powers listed in paragraph 11, except where it is to the list of licence-holding statutory undertakers in paragraph 9.
- (g) Paragraph 10 specifies that the benefit of a provision of the Order (except the land-related powers listed in paragraph 11) may be transferred or temporarily granted to any person, without the approval of the Secretary of State. Again, this is necessary because flexibility and expedition of delivery may necessitate Air Products carrying out the authorised project on land compulsorily acquired by ABP but still in the process of being demised to Air Products, who would otherwise not constitute an “undertaker” with the benefit of the development consent in the Order because it is not yet for the time being interested in the land in question.
- (h) It is considered appropriate for the remaining provisions of Part 3 (Acquisition and possession of land) not to be limited to the Company because these relate to the consequences of the exercise of powers rather than the exercise of principal land acquisition/possession powers. For example, the extinguishment of rights etc. under Article 26 or the suspension of such rights under Article 27 will need to apply more broadly for the Project to be constructed, used and operated in the longer term.
- (i) It is not considered necessary to make provision pursuant to section 156(2) of the 2008 Act which goes contrary to the principle in section 156(1) of the 2008 Act that a DCO has effect for the benefit of the land and all persons for the time being interested in the land, except in relation to the land powers listed in paragraph 11 of Article 46. The Order does not therefore limit the benefit of provisions of the Order, beyond



what is in section 156(1) of the 2008 Act, or require the approval of the Secretary of State for the transfer or temporary grant of the Order's provisions save in respect of those powers listed in paragraph 11 of Article 46. There is precedent for this approach in article 7 of **the West Midlands Rail Freight Interchange Order 2020** and its definition of undertaker. There is no reason in land use planning terms to proceed otherwise.

- (j) Paragraphs 2 – 11 are therefore bespoke to the requirements of the Order but reflect wording and established principles from a number of made DCOs, including Article 7 of the **West Midlands Rail Freight Interchange Order 2020** and Articles 9(1), 32(5) and (6) of the **Sizewell C (Nuclear Generating Station) Order 2022**.
- (k) Paragraphs 12 to 15 have been inserted in response to comments from the MMO. Paragraph 12 provides for Secretary of State approval of transfers of the benefit of the deemed marine licence, following consultation with the MMO, and mirrors wording from articles 6(3) and (5) (Benefit of the Order) of the **Norfolk Vanguard Offshore Wind Farm Order 2020**. Paragraph 13 provides for advance notice to the MMO with sufficient information for it to be aware of the details of the transfer, and the transfer cannot take effect until such notice has been given. Paragraph 14, mirroring article 6(16) (Benefit of the Order) of the **Norfolk Vanguard Offshore Wind Farm Order 2020**, necessarily clarifies that sections 72(7) and (8) of the 2009 Act do not apply to transfers of the deemed marine licence under paragraph 12. This is because those sections provide that a marine licence may not be transferred except in accordance with the 2009 Act, which would preclude transfer as part of the Order. Paragraph 15 includes clarification that the deemed marine licence may also, as an alternative, be transferred pursuant to a variation notice issued by the MMO under section 72(7) of the 2009 Act, i.e. the Order anticipates an undertaker being able to avail themselves either of the procedure under paragraph 12 or that under section 72(7) of the 2009 Act. The aforementioned provisions are those in favour of which the undertaker has made representations. If the Secretary of State prefers the MMO's representation that transfer only via sections 72(7) and (8) of the 2009 Act is permissible, then paragraph 16 should be inserted for the avoidance of doubt but deleted if the Applicant's representations are preferred.
- (l) Paragraphs 17 – 20 are standard DCO provisions as to the terms of the transfer or grant of provisions of the Order.

- (m) Paragraph 21 of the Article provides that where more than one undertaker has the benefit of articles 19 (authority to survey and investigate the land), 20 (protective works), 31 (temporary use of land for constructing the authorised project) and 32 (temporary use of land for maintaining the authorised project) in relation to the same land all are entitled to exercise it on its terms as they may agree. This provision is particular to the Order and anticipates that certain works will be carried out by Air Products rather than the Company but both might need access to the same land using temporary possession, protective works and survey or investigation powers. For example both might use the temporary construction and laydown area comprised in Work No. 9 at the same time.
- (n) The definition of undertaker is subject to clarification in paragraph 22 that no person is liable for breach of a term of the Order except where they are the person who (as applicable) has carried out, or caused to be carried out, that part of the authorised project to which the breach relates or has exercised, or caused to be exercised, the provision of the Order to which the breach relates. This clarification reflects the wording and principle in section 161 of the 2008 Act that it is only the actual person who has failed to comply with the terms of a DCO who can be held liable for committing an offence. That provision was enacted by Parliament in the context that under section 156 of that Act the standard position is that an order granting development consent, if made, would have effect for the benefit of the land and all persons for the time being interested in it. So Parliament wished to be clear that criminal liability was not to be joint and several between all those persons, or this would impede delivery of the infrastructure in question. Article 46(21) is therefore included because the Order is intended to be for the benefit of the Company, Air Products and any person for the time being interested in land within the Order limits. So the scope of liability (in the event of arbitration pursuant to article 63 and not just in the event of criminal proceedings pursuant to section 161 of the 2008 Act) must be absolutely clear for the benefit of the Company, Air Products, landowners and authorities (including the beneficiaries of any protective provisions) seeking to enforce relevant provisions in the event of any breach. It has similar effect to paragraph (b) of the definition of the undertaker in the **West Midlands Rail Freight Interchange Order 2020**, which grappled with broadly similar, albeit more limited, issues.

*Article 47 (Deemed marine licence)*

11.2 This Article constitutes deemed consent (as provided for under 149A of the 2008 Act) under section 65 of the 2009 Act, the successor provision to section 34 of the Coast Protection Act 1949. Schedule 3 sets out the terms on which the licence would be granted. The form of deemed marine licence is substantially based on that recently settled between the Company and the MMO on the ongoing neighbouring IERRT DCO application being pursued by the Company, with scheme specific details such as the relevant licensed activities, co-ordinates and licence conditions reflecting the environmental impact assessment of the Project inserted. Productive dialogue between the Company and MMO will continue with a view to settling the terms of deemed marine licence at the earliest opportunity.

11.3 Whilst not a model provision, Article 47 has precedent in Transport and Works Orders, as well as the Lake Lothing (Lowestoft) Third Crossing Order 2020, and the Sizewell C (Nuclear Generating Station) Order 2022.

*Article 48 (Saving for Trinity House)*

11.4 This Article mirrors Article 53 of the Harbour Model Provisions and protects the interests of Trinity House, the general lighthouse authority for England.

*Article 49 (Provision against danger to navigation)*

11.5 This Article derives from Article 25 of the Harbour Model Provisions and is intended to ensure that in the case of any instance of damage, destruction or decay arising in relation to tidal works, as defined in the Order, Trinity House and the ABP Statutory Harbour Authority must be informed as soon as is reasonably practicable and the necessary steps taken to prevent any danger to navigation arising as a result.

*Article 50 (Lights on tidal works during construction)*

11.6 This Article derives from Article 24 of the Harbour Model Provisions and requires the undertaker to ensure that for the whole time during construction, alteration, replacement or extension of the authorised project the relevant works are lit between sunset to sunrise and to take such additional steps as may be required by Trinity House and the ABP Statutory Harbour Authority.

*Article 51 (Permanent light on tidal works)*

11.7 This Article looks to the position following completion of the authorised project and requires the undertaker to display lighting at the outer extremity of tidal works and take such other steps as may be required by Trinity House and the appropriate Statutory Harbour Authority to prevent any danger to navigation.

*Article 52 (Application of landlord and tenant law)*

- 11.8 This Article governs the leasing of land by the undertaker to any other person. In brief, it allows the terms of the lease to override any statutory provisions relating to landlord and tenant law. It can be found in the General Model Provisions at Article 35 and has been reproduced in many made DCOs including Article 41 of the **A47 Wansford to Sutton Development Consent Order 2023**.

*Article 53 (Felling or lopping of trees and removal of hedgerows)*

- 11.9 This Article allows any tree or shrub within or overhanging the Order limits to be felled or lopped, or have its roots cut back, if it is considered to obstruct the construction, operation, maintenance or decommissioning of the Project or endanger anyone using it. Compensation is payable for any loss or damage caused.
- 11.10 Section 9(1)(4)(d) of the Forestry Act 1967 provides that a felling licence granted by the appropriate forestry authority is not required for the felling of growing trees where the felling is immediately required for the purpose of carrying out development authorised by planning permission granted or deemed to be granted under the 1990 Act. There is no reference to DCOs, which naturally post-date the Act. Article 53 follows the precedent of article 54(3)(c) of the **Great Yarmouth Third River Crossing Development Consent Order 2020** in extending the effect of that section to activities under the Article.
- 11.11 The Article also authorises the removal of any hedgerow as defined in the Hedgerow Regulations 1997 within the area edged and shaded purple and labelled "area of hedgerows to be removed" on the plan of potentially affected hedgerows and trees subject to preservation orders (document reference TR030008/APP/4.9). The Article is based on Article 39 of the General Model Provisions and has recent precedent in Article 39 of the **A47 Wansford to Sutton Development Consent Order 2023**.

*Article 54 (Trees subject to tree preservation orders)*

- 11.12 Paragraph 1(a) of this Article allows any trees subject to a tree preservation order to be felled or lopped, or have its roots cut back, within the area edged and shaded green and labelled "area of TPO trees to be removed (including tree canopy)" on the plan of potentially affected hedgerows and trees subject to preservation orders (document reference TR030008/APP/4.9). The clearance of these trees within Long Strip is to facilitate delivery of a key part of the Project, comprised in Work Nos. 1 and 2. Paragraph 1(b) creates scope for obtaining prior NELC approval to fell, lop or cut back the roots of any other trees subject to a tree preservation order within the Order

limits, if it transpires that they too are considered to obstruct the construction, maintenance, operation or decommissioning of the authorised project or endanger anyone using it. Compensation is payable for any loss or damage caused.

11.13 This Article is based on Article 40 of the General Model Provisions and has recent precedent in Article 40 of the **A47 Wansford to Sutton Development Consent Order 2023**, save for the wording in respect of Long Strip which is bespoke to the Project and follows the approach in made DCOs where interference with certain trees subject to a tree preservation order is known as the application stage and approved on the face of the DCO in question.

11.14 Similar provision is made in respect of no need for felling licences under the Forestry Act 1967 for activities under this Article as described in paragraph 11.10 above.

*Article 55 (Planning legislation)*

11.15 Paragraph (1) of the Article mirrors Article 36 of the General Model Provisions and is included in numerous made DCOs. It has the effect of ensuring that the land on which the authorised project is constructed will be “operational land” under section 264(3)(a) of the 1990 Act. The effect is to ensure that planning rights attaching to the undertaker in relation to operational land have effect as they would do if planning permission had been granted for the authorised project. Paragraph (2) is more usefully addressed at paragraph 11.20 below.

11.16 As set out more particularly at paragraph 8.36 above, and in the Early Works Note [REP4-043], the undertaker will need to maintain an expeditious construction programme to ensure that the hydrogen production facility could be operational as soon as possible in 2027. To that end, the undertaker may need to commence parts of Works Nos. 2, 3, 5 and 7 under one or more planning permissions to be granted by NELC pursuant to the 1990 Act in advance of continuing them under the Order once made. The provisions in paragraphs (3) – (9) are intended to manage seamlessly the relationship and transition between those planning permissions and the Order.

11.17 The planning permissions in question are divided into “existing early works planning permissions” and “new early works planning permissions”. “Existing early works planning permission” is defined at Article 2 (Interpretation) as planning permissions for early works described in the Early Works Note [REP4-043] which may be already granted before the Order is made, and the undertaker will provide the Examining Authority and Secretary of State with necessary updates to the list from time to time in advance of the making of the Order. “New early works planning permission” is defined at Article 2 (Interpretation) as any planning permission granted after the making of the Order prior

to service of notice under Article 55(3) for early works (i.e. works also comprised in Work Nos. 2, 3, 5 or 7 or further associated development). This would give the Order the flexibility to refer to the relevant early works planning permissions whether granted or not on the date of the Order, as NELC's timeline for determining planning applications is separate from the timeline for the making of the Order. For the purposes of this Explanatory Memorandum there is no difference between "existing early works planning permissions" or "new early works planning permissions", so the following paragraphs will refer to them together as "early works planning permissions".

- 11.18 Paragraph (3) requires the undertaker to serve notice on NELC before beginning Work Nos. 2, 3, 5 and 7 under the Order as to whether those works have been begun under any early works planning permissions and, if so, whether those works have been completed. Paragraph (5) provides that the undertaker may not begin Work Nos. 2, 3, 5 or 7 (as applicable) until that notice is served. Paragraph (4) specifies that from the service of that notice the relevant works can only be continued under the Order and no longer under the relevant early works planning permission. The conditions to which the relevant early works planning permission are subject would cease to be enforceable (except for any past breaches or where they relate to statutory biodiversity net gain under the 1990 Act). In other words, any relevant biodiversity net gain conditions attaching to early works planning permissions would continue to be enforceable by NELC pursuant to the permission in question, rather than the condition being 'imported' into the Order. This approach is consistent with biodiversity net gain not being required for NSIPs and a requirement in the Order which obliged the undertaker to provide biodiversity net gain would therefore fail the tests of necessity and reasonableness. Paragraphs (3) and (4) have similar effect to Articles 5(1) and (2) of the **Sizewell C (Nuclear Generating Station) Order 2022**. Paragraph (6) clarifies that the prohibition on the undertaker carrying out works under the Order until it has served the relevant notice does not prevent it from using other powers under the Order, such as for example in relation to land assembly. Similarly, paragraph (7) clarifies that the undertaker can seek to discharge the Order's Requirements at Schedule 2 at any time. Paragraph (8) enables the undertaker and NELC to prevent administrative duplication by agreeing what Requirements can be taken to be discharged if NELC has already confirmed discharge of the same matter pursuant to a condition attached an early works planning permission. This is similar to the approach in Articles 5(6), (7) and (8) of the **Sizewell C (Nuclear Generating Station) Order 2022**.
- 11.19 There are multiple precedents of made DCOs where a promoter has also obtained one or more separate planning permissions under the 1990 Act for associated early works, including the **Sizewell C (Nuclear Generating Station) Order 2022** (see Article 5 of that

Order for the relevant provisions governing the relationship between permissions under the 1990 Act and that DCO), the **A428 Black Cat to Caxton Gibbet Development Consent Order 2022** (see Article 55 for the relevant provisions governing the relationship between the early works planning permissions and that DCO) and the **Hinkley Point C (Nuclear Generating Station) Order 2013** (see Article 4 for the relevant provisions governing the relationship between permissions under the 1990 Act and that DCO).

- 11.20 Paragraph (10) clarifies interaction between the Order and subsequent planning permissions under the 1990 Act. If the undertaker carries out additional development within the Order limits pursuant to planning permission granted under the 1990 Act, which includes a deemed permission under the provisions of the Town and Country Planning (General Permitted Development) Order (England and Wales) Order 2015, it will not be in breach of the Order. This provision is aligned with those above in relation to early works planning permissions because it applies to where the undertaker is not looking to transition from a planning permission to the Order but is instead content to proceed under the planning permission in question (and must therefore comply with the terms of that planning permission). It is the equivalent of Article 7 of the **A47 Wansford to Sutton Development Consent Order 2023**, Article 47(2) of the **Port of Tilbury (Expansion) Order 2019** and Article 44(3) of the **West Midlands Rail Freight Interchange Order 2020**. Paragraph (2) is effectively the reverse, whereby the undertaker will not be subject to enforcement for the breach of any conditions attached to planning permissions granted prior to the making of the Order where they are inconsistent with the authorised project. This power is exercisable at the option of the Company by notice to NELC and aimed at preventing historical permissions (if any) impeding delivery of the authorised development, albeit it is clarified this does not apply to early works planning permissions (on the basis that those have their own mechanism in paragraphs (3) – (9), their works and conditions will be aligned with the Order and any conditions relating to statutory biodiversity net gain should be left intact).
- 11.21 Paragraph (11) confirms that the Community Infrastructure Levy Regulations 2010 do not apply to the authorised project, so that the community infrastructure levy (known as “CIL”) is not chargeable on it, which has the same effect as the wording included at Article 9 of the **National Grid (Hinkley Point C Connection Project) Order 2016**, Article 9 of the **National Grid (Richborough Connection Project) Development Consent Order 2017** and Article 44(5) of the **West Midlands Rail Freight Interchange Order 2020**.
- 11.22 Paragraph (12) clarifies that the authorised project may be delivered in severable phases, subject to the sequential phasing limitations set

out in Requirement 5 (Phasing) in Schedule 2 (Requirements) (see Section 3 above). Paragraph (10) has also been supplemented to clarify that nothing done pursuant to a later planning permission prevents the undertaker from constructing, operating, using, maintaining or decommissioning any part of the authorised project pursuant to the Order which has not yet been carried out pursuant to that planning permission. These clarifications both ensure that a later planning permission for any associated development comprised in the Order, for example, will not compromise what remains to be built out under the Order for the purposes of the Supreme Court's judgment in *Hillside Parks Limited v Snowdonia National Park Authority*. They are aligned with the mechanism for early works planning permissions, which also should not be taken to compromise the later carrying out of works under the Order. The recent nature of the *Hillside Parks* case means that there is no precedent in made DCOs for such clarification on phasing but it is key to retain the flexibility anticipated in Section 115 of the 2008 Act for a promoter being able either to obtain development consent pursuant to that Act for "associated development" or, in the usual manner, planning permission, without concern that a subsequent planning permission could render any part of the Order incapable of further implementation.

*Article 56 (Traffic regulation measures)*

- 11.23 The purpose of this Article is to provide the undertaker with powers to make deemed traffic regulation orders, so that it can implement traffic management measures (e.g. restrictions on the use of roads) in connection with the construction or operation of the authorised project. It includes a number of specific traffic regulation measures set out in Schedule 10 (which is brought into effect by paragraph (1)), as well as more general powers by virtue of paragraph (4).
- 11.24 The specific powers include the following, as set out in Schedule 10:
- (a) The imposition of a permanent 30 miles per hour speed limit on a defined part of Laporte Road and an extension to the permanent 40 miles per hour speed limit on a further defined part of Laporte Road to the point where the existing limit reduces from the national speed limit to 40 miles per hour. The reduction in speed limits was proposed to facilitate the introduction of new entrances to the Project (where the speed limit is currently 40mph) and then remove the short section of the 60mph limit to provide consistency of limit (40mph) on the remainder of Laporte Road. This measure was expressly consulted upon and has the support of NELC in its capacity as local highway authority.



- (b) The power to temporarily prohibit parking on defined parts of Laporte Road, Queens Road and Kings Road. These powers are required to facilitate the movement of abnormal loads from the Port to the Order limits along those roads in association with the temporary closure power below.
- (c) The power to temporarily close roads between 11pm and 6am to all traffic save as directed by the undertaker on defined parts of Laporte Road, Queens Road and Kings Road. This power is required to facilitate the movement of abnormal loads as identified above. It is restricted to limited nighttime hours to minimise disruption of traffic around the Port.
- (d) The power to regulate the priority of vehicular traffic by temporary traffic lights at the direction of the undertaker on a defined part of Laporte Road. This power is required to facilitate the movement of construction traffic between the two parts of East Site across Laporte Road.
- (e) The power is also included to revoke, amend or suspend in whole or in part any order made, or having effect under the 1984 Act in so far as it is inconsistent with the above. This ensures that any incompatibility with existing traffic regulation orders in place (for example securing current speed limits) can be addressed.
- (f) Implementation in certain circumstances is subject to the prior approval of the traffic authority in whose area the roads are situated and consultation with the relevant chief officer of police.
- (g) Article 56(3) permits the temporary placing of traffic signs and signals in connection with the authorised works, but only as permitted by the traffic authority to ensure that authority has appropriate oversight.
- (h) The broader powers in Article 56(4) only apply with the consent of the traffic authority. These allow the undertaker to, so far as expedient or necessary, (a) revoke, amend or suspend any orders made under the 1984 Act; (b) permit, prohibit or restrict the stopping, parking, waiting, loading or unloading of vehicles on any road; (c) authorise the use as a parking place of any road; (d) make provision as to the maximum speed, routes, direction or priority of vehicular traffic on any road; and (e) permit, prohibit or restrict vehicular access or use to or on any road. It is possible that such temporary restrictions on road use may be required in connection with the construction of the

Project, but their use will only be as permitted by the traffic authority to ensure that authority has appropriate oversight.

- (i) In addition to traffic authority consent to the use of powers where specified above (i.e. save those powers specified in Schedule 10), Article 56(5) contains requirements to give notice in writing of the use of all of the above powers to the chief officer of police and the traffic authority. The undertaker may be required by the traffic authority to advertise the proposed measures – this ensures that users of the Port are adequately notified. Article 56(8) also requires the undertaker to consult such persons as it considers necessary and appropriate and have regard to their representations.
- (j) There are standard measures in Article 56(2) (preventing any speed limit from applying to defined special forces) and Articles 56(6), (7) and (9) (clarifying the relationship of the resulting measures to the 1984 Act and other legislation and ensuring that any such measures may be suspended, varied or revoked in certain circumstances).

11.25 The Article is based on Article 42 of the **Port of Tilbury (Expansion) Order 2019**.

*Article 57 (Defence to proceedings in respect of statutory nuisance)*

11.26 Section 158 of the 2008 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 the nuisances which the statement of statutory nuisance (document reference TR030008/APP/7.5) explores as potentially being engaged but, with the proposed mitigation in place, are not anticipated to give rise to a statutory nuisance for the purposes of section 79(1) of the Environmental Protection Act 1990, being:

- (a) smoke emitted from premises so as to be prejudicial to health or a nuisance;
- (b) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance;
- (c) any accumulation or deposit which is prejudicial to health or a nuisance;
- (d) artificial light emitted from premises so as to be prejudicial to health or a nuisance;

- (e) noise emitted from premises so as to be prejudicial to health or a nuisance;
- (f) noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street;
- (g) any pond, pool, ditch, gutter or watercourse which is so foul or in such a state as to be prejudicial to health or a nuisance; and
- (h) any part of a watercourse, not being a part ordinarily navigated by vessels employed in the carriage of goods by water, which is so choked or silted up as to obstruct or impede the proper flow of water and thereby to cause a nuisance, or give rise to conditions prejudicial to health.

11.27 Other types of nuisance continue to have the general defence afforded by section 158.

11.28 The defence is available if the nuisance relates to the construction, maintenance, operation or decommissioning of the authorised project and:

- (a) is in accordance with any controls imposed by the local authority under the Control of Pollution Act 1974;
- (b) is in accordance with the applicable controls and measures relating to smoke, dust, accumulations, deposits, light, noise, lighting or ponds, pools, ditches, gutters or watercourses described in the relevant construction environmental management plan, construction traffic management plan, drainage strategy, lighting strategy noise or management scheme approved by NELC pursuant to the relevant provision of Schedule 2 (Requirements) or in accordance with noise and lighting levels set out in an environmental permit relating to the construction, maintenance, operation or decommissioning of the authorised project;
- (c) is a consequence of the use of the authorised project and cannot reasonably be avoided.

11.28.2 The Article is a provision relating to, or to matters ancillary to, the authorised development within section 120(3) of the 2008 Act and is a matter specifically identified in paragraph 11 of Schedule 5 to the 2008 Act, which states that a DCO can provide for the exclusion of liability in respect of acts or omissions.

- 11.29 The Article is largely based on Article 7 of the General Model Provisions, with the remaining elements having recent precedence in many made DCOs including Article 12 of the **Sizewell C (Nuclear Generating Station) Order 2022** and Article 43 of the **A47 Wansford to Sutton Development Consent Order 2023**, and paragraph (3) having precedence in Article 32(3) of the **Network Rail (Cambridge South Infrastructure Enhancements) Order 2022**.

*Article 58 (Procedure in relation to appeals under Control of Pollution Act 1974)*

- 11.30 This Article amends the appeals provision in relation to approvals under section 60 (control of noise on construction sites) and 61 (prior consent for work on construction sites) of the Control of Pollution Act 1974 so that appeals are to the Secretary of State rather than the magistrates' court. This reflects the fact that this is a project of national rather than local significance. The procedure for appeals is set out in paragraph 4 of Schedule 16 to the Order.

- 11.31 Paragraph (2) provides that in making determinations under section 60 concerning controls on construction sites the local authority is to have regard, in addition to the other material set out in subsection (4) of that section, the relevant mitigation control documents to be approved by NELC pursuant to Schedule 2 (Requirements) and the noise levels reported in the environmental statement for the authorised project.

- 11.32 This provision, which is preceded in Article 7 of the **Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014**, is intended to ensure that the local authority has regard to the levels of impact and controls considered and regarded as acceptable by the Secretary of State in making a determination on the Order.

*Article 59 (Protection of interests)*

- 11.33 This Article gives effect to Schedule 14, which contains provisions protecting the interests of third parties. It is a standard article in development consent orders that include protective provisions. ABP and Air Products have been engaging with the statutory undertakers who have interests affected by the authorised project, have provided drafts of the relevant Parts of Schedule 14 to them and continue to negotiate with them to ensure any concerns are dealt with appropriately. The undertaker will provide a full update of the status of the negotiations throughout the Examination.

*Article 60 (Crown rights)*

- 11.34 A lease ("**Lease**") was entered into between The Queen's Most Excellent Majesty, the Board of Trade and the Humber Conservancy

Commissioners on 1 January 1869 whereby the Board of Trade on behalf of Queen Victoria granted the Humber Conservancy Commissioners a 999 year lease of that part of the foreshore and bed of the Humber and its estuary shown on plans submitted to the Examination (Appendix 2 and Appendix 3 of **[AS-023]**). The Crown Estate is the successor to The Queen's Most Excellent Majesty and the Board of Trade. ABP is successor to the Humber Conservancy Commissioners:

- (a) The River Humber Conservancy Act 1852 created a body known as the 'River Humber Conservancy Commissioners' and provided powers to those Commissioners to maintain and improve the channel and navigation of the River Humber.
- (b) The Humber Conservancy Act 1868 provided for the Commissioners to be incorporated, under the name of the 'Humber Conservancy Commissioners'. That is the body granted the Lease.
- (c) The Humber Conservancy Act 1907, amongst other things, dissolved the existing Humber Conservancy Commissioners and the pilotage commissioners and replaced both bodies with a 'Humber Conservancy Board'. That Act incorporated the Humber Conservancy Board and transferred all powers, liabilities and property from the preceding bodies to it.
- (d) The Humber Harbour Reorganisation Scheme 1966 Confirmation Order 1967 (SI 1968/237) confirmed a reorganisation scheme which dissolved the Humber Conservancy Board and ordered the transfer of all powers, duties, liabilities, property, staff, pension rights, etc. from the Humber Conservancy Board to the 'British Transport Docks Board'.
- (e) The Transport Act 1981 reconstituted the British Transport Docks Board as 'Associated British Ports'. Associated British Ports is therefore the statutory successor to the River Humber Conservancy Commissioners and has the benefit of the Lease and its residual term of 844 years.

11.35 The land plans [APP-015] show Crown land as plots 1/1, 2/1, 3/3 and 4/31 within the Order limits shaded orange and label them "Crown land with leasehold ownership of Associated British Ports not part of the Order land". The Lease demise includes this land shaded orange. The Order, accordingly, does not seek to acquire any interests in this orange land. Only land shown shaded pink and blue or hatched blue on the land plans is subject to Articles 22 (Compulsory acquisition of land) and 24 (Compulsory acquisition of rights).

- 11.36 The Lease is typical of a long lease granted for a term of 999 years and is, effectively, tantamount to a freehold interest, with very few limitations or restrictions on what ABP is able to do within the Lease demise. For example, there are no restrictions on what the demise may be used for. There are, however, a few limited matters which require the consent of the Crown Estate in order to be lawful, such as the need to obtain consent for the carrying out of certain works. This consent has, however, already been obtained in respect of the authorised project, as evidenced by the letter of the Crown Estate Commissioners dated 20 February 2024 (the "**Crown Letter**").
- 11.37 Section 135(1) of the Planning Act 2008 provides that an order granting development consent may include provision authorising the compulsory acquisition of an interest in Crown land only if the appropriate Crown authority consents to the acquisition. Section 135(1) is not relevant to the Order or the Project. This is because ABP has the benefit of the Lease and the Order does not need to seek to acquire any interests in Crown land. Section 135(2) of that Act, however, provides that an order granting development consent may include any other provision (i.e. except seeking to acquire interests over Crown land) in relation to Crown land only if the appropriate Crown authority consents to the inclusion of the provision. The existence of the Lease itself cannot be taken as consent from the Crown Estate that it is content with all provisions of the Order applying in respect of its land for the purposes of section 135. The Crown Letter is a consent granted pursuant to the Lease, satisfying the relevant land assembly requirements for the Project, so to speak, so far as the Crown Estate is concerned. It probably cannot be taken as consent from the Crown Estate that it is content with all provisions of the Order applying in respect of its land for the purposes of section 135. ABP is informed by the Crown Estate's agent that the Crown Estate deals with such consents pursuant to section 135 separately to consents under its leases. ABP will continue liaising with the Crown Estate in respect of a section 135 consent but does not envisage any particular impediment in obtaining this, particularly in circumstances where the Crown Estate has provided consent for the Project pursuant to the Lease with the Crown Letter and a section 135 consent must be, in that context, largely a formality.
- 11.38 Article 60 of the Order is the Crown's preferred formulation on the face of the Order akin to section 135 and safeguards the rights of The Crown Estate in respect of provisions of the Order and follows the form of Article 56 of the **Port of Tilbury (Expansion) Order 2019**. Carter Jonas, acting on behalf of the Crown Estate, has confirmed that it is satisfied with the wording of this Article. Any consent under this Article will be bound together with that required under section 135.

*Article 61 (Application of sections 91(3A) and (3B) of the 1990 Act)*

- 11.39 Under the 1990 Act, sections 91(3A) and (3B) only apply to planning permissions for the development of land in England. This article applies these provisions to the Order as though it were a planning permission for the development of land in England. The effect of this is that if there is a legal challenge to the Order, the time limit in article 23 (time limit for exercise of authority to acquire land compulsorily) and the time within which the authorised project must be commenced (Requirement 2) are extended by one year to account for the delay resulting from the legal challenge.

*Article 62 (Arbitration)*

- 11.40 This Article is an arbitration provision.
- 11.41 Paragraph 1 departs from the General Model Provisions in a form which has precedent in Article 41 of the **Millbrook Gas Fired Generating Station Order 2019** and Article 35 of the **Cleve Hill Solar Park Order 2020**, amongst others. It is considered that this approach provides greater certainty to all parties involved in the process. Paragraph 2 mirrors Article 84(2) and (4) (Arbitration) of the **Sizewell C (Nuclear Generating Station) Order 2022** in clarifying that it is not appropriate that arbitration should apply to the provisions of the 1847 Act incorporated in the Order by article 4 (Incorporation of the 1847 Act), Trinity House or any matter for which the consent or approval of the Secretary of State or the MMO is required under the Order. The Statutory Conservancy and Navigation Authority has been added to the list of exemptions at its request.

*Article 63 (Procedure regarding certain approvals etc.)*

- 11.42 This Article provides that Schedule 17 is to have effect in relation to all consents, agreements or approvals contemplated by any provision of the Order except for the provisions in Schedule 14 (Protective provisions) or disputes under article 20(7) (Protective work to buildings), which are to be resolved under Article 62 (Arbitration) as per recently made DCOs. Paragraph (5) of this Article also provides that Schedule 17 does not apply in respect of the Statutory Conservancy and Navigation Authority, and in respect of the MMO, if the Secretary of State agrees with the MMO's submissions at Deadline 1 at paragraph 3.17 of MMO's Responses to Relevant Representations **[REP1-079]**. The reference to Schedule 17 not applying in respect of the MMO is to be deleted if the Secretary of State agrees that the discharge of deemed marine licence conditions (in Schedule 3) is to be determined by way of Schedule 17, in line with the Applicant's submissions made at Issue Specific Hearing 4 (see summary of these submissions made in response to Item 7 (Draft Development Consent Order, focussing on the Draft Deemed Marine Licence) in its Written Summaries of the Applicant's Oral Case at Issue Specific Hearing 4 with Appendices **[TR030008/EXAM/9.59]**).

- 11.43 Any such consent, agreement or approval to which this Article relates must be validly given, must be given in writing and must not be unreasonably withheld or delayed by the relevant authority, body or person. This is considered necessary in order that receipt of consent required from a third party cannot unnecessarily delay implementation of the authorised project. Applying this provision to all consents, agreements or approvals is intended to provide consistency (except in respect of protective provisions and protective work to buildings where arbitration, in keeping with recently made DCOs, is considered more appropriate.
- 11.44 Paragraphs (2) and (3) of this Article follow the form of Articles 43(1) and (2) of the of the **West Midlands Rail Freight Interchange Order 2020**, tailored to the drafting of this Order, and further clarify that any approval or agreement from the relevant planning authority pursuant to a requirement in Schedule 2 (Requirements) must not be given if it would permit development:
- (a) (so far as the development falls within a Work No.) outside of the extent of the area shown on the works plans for the Work No. in which that development is comprised;
  - (b) that would exceed the maximum built element height set out in column (2) of the table at paragraph 4(4) (Detailed approval) of Schedule 2 (Requirements) for that development;
  - (c) that would be below the minimum built element height set out in column (4) of the table at paragraph 4(4) (Detailed approval) of Schedule 2 (Requirements) for that development.
- 11.45 Nor can the approval or agreement be given if it would give rise to any materially new or materially different significant effects on the environment that have not been assessed in the environmental statement or in any updated environmental information. Similar provision is made in respect of the relevant planning authority re-discharging requirements at paragraph (3).
- 11.46 Paragraph (6) provides for steps the undertaker takes to discharge or comply with the requirements in Schedule 2 before the Order is made to be treated as effective in complying with those Requirements once the Order is made, thereby avoiding the need to repeat such steps because the relevant planning authority can be comfortable that it may lawfully take these into account. The authority is not bound to take the steps into account or as to how much weight it gives the steps even if it does so. The authority, however, is given the comfort that it is lawfully entitled to do so if it wishes. This wording is prudent and sensible, recognising that developers of urgently needed infrastructure will often seek to lay the groundwork for the expeditious discharge of



Requirements once the DCO is granted, including by engaging with the relevant authorities in advance. This is a standard provision made in other DCOs, including but not limited to the **A12 Chelmsford to A120 Widening Development Consent Order 2024** at paragraph 25 of its Schedule 2 (Requirements), the **Boston Alternative Energy Facility Order 2023** at paragraph 31 of Part 2 (Procedure for Discharge of Requirements) of Schedule 2 (Requirements) and the **Thurrock Flexible Generation Plant Development Consent Order 2022** at Schedule 2 (Requirements), Part 1 (Requirements), Requirement 23.

*Article 64 (Certification of documents, public register, etc.)*

- 11.47 This Article provides for the application plans and other documents listed in Schedule 15 to be certified by the Secretary of State as true copies of those documents referred to in the Order. The undertaker must establish and (for the lifetime of the authorised project pursuant to this Order) maintain, in an electronic form suitable for inspection by members of the public, copies of all Schedule 15 documents. The Article takes the form of Article 47 of the **A47 Wansford to Sutton Development Consent Order 2023**, save for clarification in relation to how long the electronic register must be maintained in paragraph (4).

*Article 65 (Service of notices)*

- 11.48 This Article governs the proper service of notices required to be given under the Order. In particular it allows service by email with the consent of the recipient and deals with the situation of service on an unknown landowner. The Article takes the form of Article 48 of the **A47 Wansford to Sutton Development Consent Order 2023**.

## 12 SCHEDULES

- 12.1 **Schedule 1 (Authorised project)** specifies numbered works comprised in the authorised project for which development consent and the powers within the Order are sought. The works should be read alongside the works plans (TR030008/APP/4.2). More detail is provided at paragraph 2.4 above.
- 12.2 **Schedule 2 (Requirements)** contains draft requirements ("**Requirements**") corresponding to conditions which, under section 120(2) of the Act, could have been imposed on the grant of planning permission for the authorised project had it not fallen within the ambit of the Act. The Requirements apply to the construction, operation, maintenance and decommissioning of the authorised project under the Order. They broadly follow the General Model Provisions where these are relevant, and where they have been amended this has been informed by the environmental statement and discussions with NELC

and other relevant statutory consultees. NELC has confirmed in discussions with the undertaker that it is willing to assume a discharging role in relation to the Requirements.

12.3 The Requirements have been drafted taking into account the scale and nature of the Project and the mitigation required to be secured. It is important that the securing mechanisms for the mitigation are clear and understandable to a multitude of parties who will be responsible for compliance.

12.4 Unless otherwise specified, the Requirements apply to the whole Project. Some Requirements, however, are specific to a particular part of it. In some cases, to ensure consistency, a Requirement applies to a number of similar works. This approach aims to simplify the interpretation and discharge of Requirements. Where works or phases of the development require specific controls, those have been provided for as standalone Requirements:

12.4.1 **Requirement 1** (*Interpretation*) contains a number of definitions used in Schedule 2. "Commence", for example, is a term not used in the main articles of the Order. Paragraph 1 of Schedule 3 (Deemed marine licence) separately defines "commence" for its purposes in a manner more appropriate to the UK marine area. "Commence" is therefore used and defined only in this Schedule 2 as beginning to carry out any material operation (as defined in section 155 (when development begins) of the 2008 Act) forming part of the authorised project or the relevant part of it other than operations consisting of site clearance (excluding the clearance of trees or other vegetation from Long Strip), demolition work, environmental surveys and monitoring, investigations for the purposes of assessing ground and geological conditions, the receipt and erection of construction plant and equipment (excluding in relation to Work No. 9), the erection of temporary contractor and site welfare facilities (excluding in relation to Work No. 9), the diversion, laying and connection of services, the erection of any temporary means of enclosure, the temporary display of site notices or advertisements. This provision is preceded, as amended, in **The Port of Tilbury (Expansion) Order 2019** and **The Lake Lothing (Lowestoft) Third Crossing Order 2020**. This definition of "commence" in Schedule 2 is used only in the following Requirements for the purposes stated:

(a) Requirement 6 – there are restrictions on commencement of works until a construction environmental management plan is approved for those works;

(b) Requirement 7 – there are restrictions on commencement of works until a construction traffic management plan is approved for those works;

- (c) Requirement 12 – there are restrictions on commencement of works until a drainage strategy is approved for those works;
- (d) Requirement 15 – there are restrictions on commencement of works until a remediation strategy applicable to them to deal with any contamination is approved.

12.4.2 In each case, applications to discharge the Requirements may be submitted in respect of part or parts of the Order limits. Accordingly, the intention of the exclusions in the definition of “commence” is to allow works to be undertaken ahead of approval of the construction environmental management plan, construction traffic management plan, drainage strategy and remediation strategy which do not give rise to adverse impacts and the need for the control of those impacts, as secured through those plans and strategies. The justification for each of the activities excluded from the term “commence” is as follows:

- (a) site clearance (excluding the clearance of trees or other vegetation from Long Strip) – vegetation clearance does not typically fall within the definition of “development” and can be carried out at any time without needing planning permission and no monitoring or controls are required. No significant environmental effects arise from such works - the works are constrained by statutory requirements e.g. for nesting birds. Indeed, site clearance will be carried across the Order limits from time to time in the usual way;
- (b) demolition work – it is accepted that demolition work can in practice lead to likely significant environmental effects. However, in this case, the only demolition will comprise removal of a small prefabricated building in Work No. 5 which will require deconstruction, and which will not lead to significant environmental effects requiring control through the above plans and strategies or monitoring;
- (c) environmental surveys and monitoring – environmental surveys and monitoring activities have been undertaken and are ongoing across the Order limits. For example, there has been ongoing monitoring of groundwater. These activities are not intrusive and can be carried out at any time without needing planning permission. No likely significant environmental effects are considered to arise requiring control through the above plans and strategies or monitoring (the very purpose being to permit investigation and monitoring);
- (d) investigations for the purposes of assessing ground and geological conditions – as confirmed in Chapter 21 of the environmental statement (document reference

TR030008/APP/6.2), significant ground investigation works have been carried out across the Order limits and additional works are being completed. The works typically involve the creation of boreholes and trial pits. No likely significant environmental effects are considered to arise from the minor works comprised in these activities requiring control through the above plans and strategies or monitoring;

- (e) receipt and erection of construction plant and equipment and erection of temporary contractor and site welfare facilities (save Work No. 9) – it is not envisaged that any significant environmental effects will arise from these limited operations which would facilitate site set up, having excluded Work No. 9. Accordingly, no monitoring or controls are proposed;
- (f) diversion, laying and connection of services –this would, for example, allow early installation of temporary power connections. In the event that this requires below ground works, any such works would be subject to approval of an appropriate remediation strategy under Requirement 15 (as identified above). No other likely significant environmental effects are considered to arise requiring control through the above plans and strategies or monitoring;
- (g) erection of any temporary means of enclosure – temporary (rather than permanent) fencing may be used on site during construction. The installation of such fencing involves a small amount of local excavation for installation of fence posts and does not give rise to likely significant environmental effects requiring control through the above plans and strategies or monitoring;
- (h) temporary display of site notices or advertisements – the installation of such notices or advertisements would require minimal works which would not be intrusive or give risk to likely significant environmental effects requiring control through the above plans and strategies or monitoring.

12.4.3 The activities described above, excluded from the definition of “commence” in Schedule 2 of the Order, have been assessed within the environmental statement (document reference TR030008/APP/6.2) as set out in Schedule 1 (Authorised project) of the Order (or would otherwise comprise necessary works which do not give rise to any materially new or materially different significant effects from those assessed as referred to in Schedule 1). However, as indicated above and given their limited scale, none have the potential to lead to significant adverse environmental effects. In light of that, none of these activities (alone or in aggregate) have the potential to

lead to significant adverse cumulative effects if considered together with any other relevant developments. Further, none are considered to have the potential to act together to generate significant in-combination effects. As such, given the nature of the effects, ABP does not consider that any additional monitoring or controls are required.

12.4.4 The definition of “commence” in Schedule 2 of the Order accords with the Government’s guidance entitled Planning Act 2008: Content of a Development Consent Order for Nationally Significant Infrastructure Projects (April 2024) (the “**DCO Content Guidance**”). As noted, none of the preliminary works excluded in its are so extensive that they are considered likely to have significant environmental effects. They do not conflict with the list of “typical examples of matters” which are not acceptable preliminary works “unless appropriate controls are secured in another manner” set out in the DCO Content Guidance. Taking each item on the DCO Content Guidance’s list in turn:

- (a) Major earthworks – the exclusions from the definition of “commence” do not include major earthworks.
- (b) Clearance of trees and ground clearing – whilst the exclusions do include site clearance, the clearance of trees or other vegetation from Long Strip is excluded. No significant environmental effects are anticipated to arise from such works outside Long Strip. The works are also constrained by statutory requirements, e.g. for nesting birds.
- (c) Activities affecting protected species – the surveys reported on in ES Chapter 8: Nature Conservation (Terrestrial Ecology) [**APP-050**] and at Environmental Statement Survey Updates for Deadline 1 of the Examination [**REP1-044**] indicate that no such protected species are likely to be present on site. Mitigation is proposed on a precautionary basis for Work No. 1 (in respect of water vole) and Long Strip (in respect of bats) – the exclusions from the definition of “commence” do not affect these areas.
- (d) Activities affecting archaeological remains – archaeological surveys have been completed as reported on in ES Chapter 14: Historical Environment (Terrestrial) [**APP-056**]. ‘Major earthworks’ are excluded and so impacts to archaeological remains are not expected.

12.4.5 Once the authorised project is “begun” for the purposes of Requirement 2 (which has the meaning given in section 155 of the 2008 Act, i.e. by a material operation), the provisions of the Order will apply to any works undertaken pursuant to the Order. Some works do not meet the threshold of being a “material operation” and do not need

planning permission. These would include vegetation clearance, environmental surveys and monitoring and investigations for the purposes of assessing ground and geological conditions. Those works could be carried out at any stage (and indeed have been carried out). All works undertaken pursuant to the Order (once the authorised project has “begun”) are controlled by the Order – this includes the excluded works referred to above. They must, for example be permitted by Schedule 1. As such, their environmental effects will have been assessed in the environmental statement (or their effects must be no different to those effects as have been assessed). The requirements in Schedule 2 (Requirements)) therefore apply to all the excluded works where applicable on the terms of those requirements. The construction hours set out in Requirement 9 will apply to the excluded works involving works of construction. Requirement 15 will also still apply, providing that no below ground works may be done (outside of the UK marine area) until a written remediation strategy to deal with any contamination of the relevant part of the Order limits which is likely to cause significant harm to persons or pollution of controlled waters or the environment has, following consultation with the Environment Agency on matters related to its function, been submitted to and approved by the relevant planning authority. Accordingly, if any below ground works are engaged by the excluded activities, they would be subject to the provisions of Requirement 15. Requirement 15 does not apply to the clearance of trees or other vegetation from the Long Strip but this does not alter the analysis because such clearance will be governed by compliance with the Long Strip construction environmental management plan secured by Requirement 6(5). It is only in the three cases, as follows, where the definition of “commence” permits, as described above, the excluded works to be undertaken without compliance with terms of the Order, being ahead of approval of the construction environmental management plan (Requirement 6), construction traffic management plan (Requirement 7) and drainage strategy (Requirement 12).

- 12.4.6 **Requirement 2** (*Time limits*) provides that the authorised development must be begun (for the purposes of section 155 of the 2008 Act) within 5 years of the date of the Order coming into force.
- 12.4.7 **Requirement 3** (*Parts of the authorised project*) provides that any application to NELC pursuant to Schedule 2 (Requirements) relating to only part of the authorised project must include a plan showing the part to which the application relates, parts in relation to which applications have been approved previously and parts where the requirement remains to be satisfied. This gives the authority clarity as to the context for each application.
- 12.4.8 **Requirement 4** (*Detailed approval*) provides that construction must not commence above the ground floor slab of certain buildings until

external materials are approved. Such details must be in general accordance with the principles contained within the hydrogen production facility design code (defined at paragraph (1) (Interpretation) of the Schedule). Further, the external paint finish of the ammonia storage tank must be approved before it is brought into operational use. This enables NELC to consider the materials and finishes of the most prominent buildings and storage tank. The Requirement also sets the maximum height for the permanent built elements of the authorised project across the relevant Work Nos. and the minimum heights for the Hydrogen production unit flare stack. This ensures that the works reflect the parameters which have been subject to environmental impact assessment. See Section 4 above for how this Requirement interacts with the wider approach to parameters.

12.4.9 **Requirement 5** (*Phasing*) provides that the jetty forming part of the NSIP must be available for use before the ammonia storage tank and hydrogen production units are brought in operational use. This ensures that the proposed hydrogen production facility can only be constructed in association with the NSIP. The Requirement also provides that no more than two hydrogen production units and one hydrogen liquefier may be commenced until a plan of the phase of works relating to the additional hydrogen production units or hydrogen liquefiers has been submitted and approved. This ensures that NELC can approve the phasing of the key parts of the development beyond those assessed in the environmental statement as phase 1 and can take account of the levels and impacts arising from construction activity associated with subsequent phases. See Section 3 above for how this Requirement interacts with the wider approach to parameters.

12.4.10 **Requirement 6** (*Construction environmental management plan*) provides that no part of Work No. 1 outside of the UK marine area (i.e. above mean high water springs and thus outside of the jurisdiction of the deemed marine licence at Schedule 3 of the Order) must commence (excluding the clearance of trees or other vegetation from Long Strip) until NELC has approved a construction environmental management plan for it, following consultation with the MMO. This construction environmental management plan is currently intended to be the same document as the construction environmental management plan to be approved by the MMO under paragraph 8 of the deemed marine licence, which the Requirement clarifies is possible, i.e. a single document contemplated for Work No. 1. The Requirement makes separate provision for a construction environmental management plan to be approved by NELC in respect of works forming part of Work No. 2 (excluding the clearance of trees or other vegetation from Long Strip) and Work Nos. 3 – 9 before those works are commenced. All of the construction environmental management plans submitted to NELC must be in general accordance with the outline construction environmental management plan (document reference

TR030008/APP/6.5), which sets out the anticipated construction environmental management requirements for the authorised project. The construction of the works specified will then be undertaken in accordance with the approved plan(s). In relation to the clearance of trees or other vegetation from Long Strip, the Requirement provides for these works to be carried out in accordance with the Long Strip construction environmental management plan (document reference TR030008/EXAM/9.90) specific to those works, which the undertaker is seeking to agree with NELC in advance of the grant of the Order. The Long Strip construction environmental management plan is included in the list of documents at Schedule 15 (Documents and plans to be certified) to be certified by the Secretary of State pursuant to Article 64 (Certification of documents, public register, etc.). The outline construction environmental management plan (document reference TR030008/APP/6.5) provides for the submission of more than one final CEMP for approval to enable the final CEMPs to be prepared in relation to individual works. The approval and certification of the Long Strip construction environmental management plan will enable the clearance works in Long Strip to be carried out early in the construction programme. The undertaker intends to (where possible) avoid carrying out the tree and vegetation clearance works during bird nesting season in Long Strip, and as such intends to carry out the relevant Long Strip clearance works as soon as possible after the Order may be granted and has come into force.

12.4.11 **Requirement 7** (*Construction traffic management plan*) provides that no part of the project outside of the UK marine area (except the clearance of trees or other vegetation from Long Strip) may commence until a construction traffic management plan has been approved by NELC for that part. Such plan(s) must be in general accordance with the outline construction traffic management plan (document reference TR030008/APP/6.7), which sets out the anticipated construction traffic management policies for the authorised project. Each part of the Project outside of the UK marine area (and excluding the Long Strip tree and vegetation clearance) will then be carried out in accordance with the approved plan(s). The Long Strip construction environmental management plan which is to be approved and certified under the Order, must be complied with when carrying out the works of tree and vegetation clearance in Long Strip. The Long Strip construction environmental management plan will contain all necessary measures to mitigate the impact of these works to enable the undertaker to carry out the relevant clearance works early in the construction programme without awaiting the approval of the construction traffic management plan.

12.4.12 **Requirement 8** (*Highway works*) provides that prior to the commencement of works to public highway maintainable at the public expense, written details of them are to be submitted and approved by



the relevant planning authority following consultation with the highway authority. The details must include a plan of any land that is not public highway but is proposed to form part of such public highway for the purposes of article 10 (Power to alter layout, etc., of streets). Details of the design of the underground culvert forming part of Work No. 4 and the back-filling and making good to the highway, as well as the construction methodology for the installation of the underground culvert, must also be submitted to and approved by the relevant planning authority following consultation with the highway authority prior to the commencement of construction of that underground culvert. The approved details and methodology must be complied with.

12.4.13 **Requirement 9** (*Construction hours*) provides that construction works for Work Nos. 2 - 7 must only take place within certain hours. Under Requirement 9(2), there is scope to undertake specified works outside those hours where materially new or materially different effects do not arise other than those assessed in the environmental statement (document reference TR030008/APP/6.1). The works set out in Requirement 9(2) are listed below, with justification as to why each is required:

- (a) Works that cannot be interrupted, including concrete pours, or that need to be conducted outside of normal work hours for safety reasons, including radiographic testing – The pouring of concrete for foundations has to be done continuously to ensure a consistent strength and composition across the entirety of the foundation. The time required for a concrete pour can extend beyond the usual working day or, for unforeseen reasons, may on occasion need to do so. Further, the welding of plates to create the ammonia tank inner wall, floor and roof is a substantial task that requires pre-heating of the plates and cannot easily be stopped once started.
- (b) Emergency works – This is self-explanatory. If an emergency occurs, there may need to be out-of-hours working to ensure that the site is safe or that no adverse effects on the environment occur. For example, if a crane being used on site mid-lift (due to a failure of the hydraulic system), works would be required to fix the crane and complete the lift rather than leaving a load in the air.
- (c) Works that are carried out with the prior approval of the relevant planning authority – This provides appropriate flexibility for works to be agreed with NELC to ensure an efficient construction programme. As is noted above, any such works cannot give rise to materially new or different environmental effects than those assessed.

- (d) Works that do not exceed maximum permitted levels of noise at each agreed monitoring location to be determined with reference to the ABC Assessment Method for the different working time periods, as set out in BS 5228-1:2009+A1:2014, unless otherwise agreed with the relevant planning authority for specific construction activities – This enables certain “quiet” work to be done which would not cause any adverse impacts on amenity. For example, this could include wiring and the performance of other checks. Again, this helps facilitate a smooth and efficient construction programme.
- (e) Works necessary to support the construction of Work No. 1. – This is required by the main contractor for non-disruptive activities throughout the maritime works. Non-disruptive works include moving of jack-up and crane barges, resupply of construction and consumable materials, welding and grouting operations, crew transfer and emergency response. This is required for the following reasons:
- (i) Tidal constraints: For safety and operational reasons, barge movements are only permitted at high slack water in proximity to the Immingham Oil Terminal.
  - (ii) Logistics: The port of Immingham is the UK’s busiest port by tonnage and therefore loc and pilotage bookings are tightly scheduled. The ability to schedule construction vessel movements outside of core working hours is essential.
  - (iii) Health, safety and welfare: Construction workers will require transferring from/to the working barges at the beginning/end of shifts. If this cannot be completed safely within core hours, and 24-hour working is not permitted, then workers will be stranded on the working barges until the next core hour period.
  - (iv) Weather: Maritime construction is heavily dependent on favourable weather to progress safely. These weather windows for non-disruptive activities may occur outside of core working hours.
  - (v) Production and schedule: Activities such as welding and grouting are slow and time consuming to complete. The ability to continue these activities outside of core hours is beneficial.
  - (vi) Interface with third parties: The port of Immingham functions 24 hours a day. The ability for non-disruptive works to be integrated with third parties is beneficial.

- (vii) Making safe of the works: If during the core working hours there is equipment breakdown, inclement weather, etc., that prevents the contractor making the works safe. It is essential that this 'making safe' is allowed to continue.

12.4.14 In all cases, the works cannot give rise to materially new or different effects than those assessed in the environmental statement (document reference TR030008/APP/6.1).

12.4.15 **Requirement 10** (*Landscape and ecology management plan*) prevents any part of Work No. 3, Work No. 5 or Work No. 7 from being brought into operational use until details of landscape and ecology measures associated with that part, the timing of their provision and a plan for securing their establishment and maintenance have been submitted and approved. Such details must accord with the outline landscape and ecology management plan (document reference TR030008/APP/6.9) which sets out the anticipated landscape and ecology management requirements for the project. The particular works will then be carried out, established and maintained in accordance with these details. This is to secure landscape and ecology enhancement measures within the site. This Requirement also provides for the replacement of trees/shrubs that are removed, die or become seriously damaged/diseased within five years of planting.

12.4.16 **Requirement 11** (*Woodland compensation plan*) provides that unless otherwise approved by the relevant planning authority, the woodland compensation plan (document reference TR030008/EXAM/9.34) must be complied with. The woodland compensation plan is included in Schedule 15 (Documents and plans to be certified) to be certified by the Secretary of State pursuant to Article 64 (Certification of documents, public register, etc.), and is to secure woodland compensation outside of the Order limits.

12.4.17 **Requirement 12** (*Surface water drainage*) provides that there shall be no commencement of any part of the permanent works (i.e. Work No. 1 outside of the UK marine area, Work No. 2, Work No. 3, Work No. 5 or Work No. 7) until a drainage strategy is submitted and approved for that part. Any strategy must accord generally with the outline drainage strategy forming part of the environmental statement. The restriction on commencement until approval of the drainage strategy does not apply to the Long Strip tree and vegetation clearance works, for the same reasons given in relation to the carve out of these works from the restriction on commencing certain works until the construction environmental management plan under Requirement 6 and construction traffic management plan under Requirement 7 (referred to at paragraphs 12.4.10 and 12.4.11 respectively).

- 12.4.18 **Requirement 13** (*Flood risk assessment*) provides that the project outside of the UK marine area must be in general accordance with the approved flood risk assessment forming part of the environmental statement, which sets out how the Project will manage flood risk.
- 12.4.19 **Requirement 14** (*Queens Road residential properties*) comprises two parts. The first part prevents the operational use of Work No. 7 (part of the hydrogen production facility) until certain steps are fulfilled in respect of defined residential and part residential properties on Queens Road. Compulsory acquisition powers are sought in respect of those properties, as their continued residential use is considered by Air Products following specialist advice to be incompatible with the hydrogen production facility and an impediment to the grant of the hazardous substances consent that is necessary for the operation of that facility. Three steps are required before operational use of Work No. 7 commences. First, the undertaker must have taken possession of all those properties following compulsory acquisition or acquisition by agreement. Second, the use of those properties for residential purposes must have permanently ceased. Third, notice of such possession and cessation of use must have been served on the planning authority.
- 12.4.20 The second part of Requirement 14 then secures that, from the date of notice being served, no part of the relevant properties may be used for residential purposes whilst Work No. 7 is in operational use.
- 12.4.21 Requirement 14 therefore provides a mechanism for formal notification to the planning authority of the cessation of permanent residential use. In turn, that gives certainty to NELC as the party responsible for granting and enforcing the hazardous substances consent that the residential use of the properties has or will be secured before operational use of Work No. 7. There is no requirement for NELC to give any form of approval in connection with Requirement 14. Requirement 14 is still enforceable, however, and this is the critical issue. It would be a criminal offence for Air Products, without reasonable excuse, to operate Work No 7 without securing possession of the relevant properties and cessation of their residential use. It would also be a criminal offence for Air Products to subsequently reinstate such a use. This is a robust mechanism for securing compliance.
- 12.4.22 Any additional requirement, such as an obligation to obtain the planning authority's approval of possession or cessation of use, would add an unnecessary administrative burden. Those matters are a question of fact and there is nothing of substance in respect of which the planning authority needs to exercise its judgement
- 12.4.23 **Requirement 15** (*Contaminated land*) provides that no works may commence in certain parts of the permanent works areas (i.e. Work

No. 1 outside of the UK marine area and Work Nos. 2 – 7) until a written remediation strategy for that part has been submitted and approved, in order to deal with any contamination likely to cause significant harm to persons or pollution of controlled waters or the environment. In the event that unexpected contamination is discovered in those Work Nos., works must cease in the relevant part until a site investigation and assessment report and, if necessary, a remediation strategy has been submitted and approved. Any remediation must accord with the outline remediation strategy within the environmental statement. Any verification reports required by a remediation strategy must be submitted to NELC. The restriction on commencement until approval of the written remediation strategy does not apply to the Long Strip tree and vegetation clearance works, for the same reasons given in relation to the carve out of these works from the restriction on commencing certain works until the construction environmental management plan under Requirement 6, construction traffic management plan under Requirement 7 and drainage strategy under Requirement 12 (referred to at paragraphs 12.4.10, 12.4.11 and 12.4.17 respectively).

12.4.24 **Requirement 16** (*External lighting*) provides that no part of Work No. 1 outside of the UK marine area or Work Nos 2, 3, 5 and 7 is to be brought into operational use until a written scheme of the proposed operational external lighting for that part has been submitted and approved. Any such scheme(s) must accord with the lighting assessment report contained in the environmental statement, which explained the anticipated lighting measures. The particular works must then be operated in accordance with the relevant scheme.

12.4.25 **Requirement 17** (*Control of noise during operational use*) provides that no part of Work Nos 3, 5 and 7 can be brought into operational use until a written scheme for noise management relating to that part, has been submitted and approved. Each scheme must demonstrate that the effects of noise on the noise sensitive receptors identified in chapter 7 of the environmental statement are no worse than the residual effects identified in that chapter. The works must then be operated in accordance with such scheme(s). This enables NELC to approve the noise mitigation measures associated with the operation of the permanent works.

12.4.26 **Requirement 18** (*Decommissioning environmental management plan*) provides that prior to decommissioning of Work Nos. 2 (except the jetty access road because the jetty is not proposed to be decommissioned), 3, 4, 5, 6 or 7, a scheme of decommissioning must be submitted and approved. Any such scheme(s) must be in general accordance with the outline decommissioning environmental management plan (document reference TR030008/APP/6.6) referred to at Schedule 15, submitted in accordance with Article 64. The

decommissioning of such works must then be undertaken in accordance with the approved scheme(s).

12.4.27 **Requirement 19** (Operational travel plan) provides that no part of Work Nos 3, 5 and 7 can be brought into operational use until an operational travel plan related to those parts has been submitted and approved. This plan must be in general accordance with the outline operational travel plan and the works must then be undertaken in accordance with the approved plan.

12.4.28 [**Requirement 20** (Construction phase flood emergency response plans) provides that no part of Work No. 1 outside of the UK marine area, Work No. 2, Work No. 3, Work No. 5 or Work No. 7 (except the clearance of trees or other vegetation from Long Strip) may be commenced until a flood emergency response plan to apply during construction of that part has been submitted and approved. The plans must (so far as applicable) be in general accordance with the flood risk assessment contained in appendix 18.A of the environmental statement and the works must be carried out in accordance with the approved plans. For the reasons more particularly set out in the undertaker's response to FR 3.2 of the Examining Authority's Third Round of Written Questions the undertaker submits that the CEMP(s), by way of Requirement 6, appropriately secure the position during construction, and this additional requirement would be unnecessary and unreasonable. If the Examining Authority agrees in advance of Deadline 7, the undertaker would welcome this confirmation so that this Requirement may be deleted. Alternatively, this Requirement will be left in square brackets for the Examining Authority to determine the matter following the close of the Examination.]

12.4.29 **Requirement 21** (Operational phase flood emergency response plans) provides that no part of Work No. 1 outside of the UK marine area, Work No. 2, Work No. 3, Work No. 5 or Work No. 7 may be commenced until a flood emergency response plan to apply during operation of that part has been submitted and approved. The plans must (so far as applicable) be in general accordance with the flood risk assessment contained in appendix 18.A of the environmental statement and the approved plans must be complied with.

12.5 **Schedule 3 (Deemed marine licence)** contains the details of the deemed marine licence given effect by Article 47, including the conditions applying to the licensable activities. Discussions with the MMO are ongoing in respect of the terms of the licence.

*Part 1 – General*

12.6 **Paragraph 1 (Interpretation)** provides the definitions of key terms used in the deemed marine licence. Cross reference is made to definitions set out in Article 2 (Interpretation) of the Order because the

deemed marine licence needs to be read as an independent document, being itself capable of being varied pursuant to the Marine and Coastal Access Act 2009 (the “**2009 Act**”).

- 12.7 **Paragraph 2 (Contacts)** sets out the correspondence addresses for the MMO.
- 12.8 **Paragraph 3 (Licensed marine activities)** provides that the undertaker is authorised to carry out licensable marine activities which are not exempt from requiring a licence pursuant to section 74 of the 2009 Act. Paragraph 4 then sets out the licensable marine activities which are authorised in relation to the construction, maintenance and operation of the specified works and related to the ongoing maintenance activities for the marine works.
- 12.9 **Paragraph 4 (Licence to dredge and deposit)** provides that the undertaker is permitted to carry out capital dredging to a depth of 14.5 metres, with an allowance for the tolerances of the dredging equipment of the berth pocket (as specified in the grid coordinates in paragraph 5 (details of licensed marine activities)). The paragraph limits the approximate quantities and regulates where the materials from the capital dredge may be deposited. The paragraph notes that the undertaker is already authorised to carry out maintenance dredging within the statutory area for the authorised development without the need for a marine licence, further to exemptions under the 2009 Act arising from the existing statutory powers of ABP, and notes that the disposal of arisings from such dredging are governed by an existing marine licence.
- 12.10 **Paragraph 5 (Details of licensed marine activities)** sets out the grid coordinates in which the undertaker may carry out a licensed activity (other than the capital dredge and disposal of any arisings from such dredge within the area shown as Work No. 1 on sheets 1, 2, 3 and 4 of the works plans (TR030008/APP/4.2)), and also sets out the grid coordinates outside of which the undertaker may not carry out any capital dredging.

*Part 2 – Conditions applying to all licensable activities*

- 12.11 Part 2 sets out the deemed marine licence conditions that would control licensable works below the mean high water springs:
- (a) Paragraph 6 provides that where any provision in the deemed marine licence requires the licensed activities to be carried out with any documents, information, plans, etc. approved by the MMO prior to or under the licence, such documents, information, plans etc. are taken to include any amendments approved in writing by the MMO before the first approval of those documents, provided it has been demonstrated to the

MMO's satisfaction that the amendments do not give rise to any materially new or different environmental effects than those assessed in the environmental statement or any updated environmental information. Where the MMO's approval or agreement is required under the deemed marine licence the MMO must not give such approval or agreement where it would give rise to any materially new or different significant effects on the environment not assessed in the environmental statement or updated environmental information.

- (b) Paragraph 7 (Notifications regarding licensed activities) provides that the undertaker must inform the MMO of the commencement of the first licensed activity and of completion of the final licensed activity at least five business days before and after, respectively. The undertaker must also provide the MMO in writing with the name and function of any agent, contractor or sub-contractor who will be carrying out any licensed activity on the undertaker's behalf not less than 24 hours before commencement of that licensed activity, and if there is a change to that information the undertaker must inform the MMO in writing of that change prior to the individual to whom the new information pertains begins that licensed activity. Paragraph 7 also specifies where the undertaker must keep copies of the licence, and that the undertaker must ensure that any agents or contractors carrying out licenced activities on its behalf have been provided with and have read and understood the terms of the licence and any revisions.
- (c) Paragraph 8 (Construction environmental management plan) provides that no licensed activities can be commenced until a construction environmental management plan has been submitted to and approved by the MMO, following consultation with the relevant planning authority, the Environment Agency and Natural England on relevant matters. The construction management plan submitted to the MMO must be in accordance with the outline construction environmental management plan (document reference TR030008/APP/6.5) unless otherwise approved by the MMO, and may be comprised in the same document as the construction environmental management plan submitted pursuant to paragraph 6(1) of Schedule 2 (Requirements).
- (d) Paragraph 9 (Sediment sampling) provides that sediment sampling analyses undertaken by a laboratory validated by the MMO and approved by the MMO as part of either the 2023 sediment sampling plan or any further sediment sampling plan are valid for a period of 3 years from the date when those analyses were undertaken. Where the validity period expires,



the undertaker must submit a further sediment sampling plan request to the MMO for its approval and any sediment sampling analyses from such further sediment sampling plan must be submitted to the MMO.

- (e) Paragraph 10 (Agents/contractors/sub-contractors) provides that the undertaker must notify the MMO in writing of any agent, contractor or sub-contractor who will be carrying out the licensed activities on the undertaker's behalf not less than 24 hours before commencement of that licensed activity, and the undertaker must ensure that a copy of the deemed marine licence has been provided to any agent, contractor and sub-contractor and read any understood by them.
- (f) Paragraph 11 (Cold weather construction restriction strategy) provides that no construction operations for any licensed activity can commence until the MMO, in consultation with Natural England, has approved a cold weather construction restriction strategy which must subsequently be complied with.
- (g) Paragraph 12 (Marine Noise Registry) requires the provision of certain information when impact driven or part-driven pile foundations or explosive detonation is to be used as part of foundation installing.
- (h) Paragraph 13 (Marine written scheme of archaeological investigation) provides that archaeological method statements and a written report on any consultation carried out with Historic England and the relevant planning authority must be submitted to and approved by the MMO in writing in accordance with the outline marine written scheme of investigation and a subsequent update must be provided to the MMO six weeks before commencement of any licensed activity to which the method statement relates.
- (i) Sub-paragraph (1) of paragraph 14 (Flood risk assessment) requires all licensed activities to be carried out in accordance with the approved flood risk assessment, unless otherwise approved by the MMO. [Sub-paragraphs (2) – (4) provide for approval of and compliance with construction phase flood emergency response plans but, for the reasons more. For the reasons more particularly set out in the undertaker's response to FR 3.2 of the Examining Authority's Third Round of Written Questions the undertaker submits that the CEMP(s), by way of paragraphs 8 and 15 of the deemed marine licence, appropriately secure the position during construction, and this additional deemed marine licence condition would be unnecessary and unreasonable. If the Examining Authority

agrees in advance of Deadline 7, the undertaker would welcome this confirmation so that sub-paragraphs (2) – (4) may be deleted. Alternatively, these sub-paragraphs will be left in square brackets for the Examining Authority to determine the matter following the close of the Examination.] Sub-paragraphs (5) – (7) provide for approval of and compliance with operational phase flood emergency response plans.

- (j) Paragraph 15 (Construction environmental management plan) requires all licensed activities to be carried out in accordance with the construction environmental management plan approved pursuant to paragraph 8 of the deemed marine licence, unless otherwise approved by the MMO.
- (k) Paragraph 16 (Piling and marine construction works) sets out the conditions under which marine piling is permitted to take place.
- (l) Paragraph 17 (Marine written scheme of archaeological investigation) provides that all licensed activities must be carried out in accordance with the marine written scheme of investigation.
- (m) Paragraph 18 (Concrete and cement) restricts where concrete and cement mixing and washing areas can be located and prohibits the discharge (intentional or unintentional) of waste concrete, slurry or wash water from these activities into the marine environment.
- (n) Paragraph 19 (Coatings and treatment) requires the undertaker to ensure that any coatings and treatments are suitable for use in the marine environment and are used in accordance with relevant guidelines approved by the Health and Safety Executive and Environment Agency.
- (o) Paragraph 20 (Pollution and spills) regulates the storage of fuel, oils, and chemicals and waste and requires a specified notice to the MMO Marine Pollution Response team if there is a spill of any oil, fuel or chemical within the marine environment.
- (p) Paragraph 21 (Disposal at sea) regulates the disposal of materials to be deposited, and requires the undertaker to inform the MMO of the location and quantities of material to be deposited each month under the licence.
- (q) Paragraph 22 (Dropped objects) sets out the procedure to be followed for dropped objects.

- (r) Paragraph 23 (Notice to Mariners) requires that a specified notice must be given to local mariners, fishermen's organisations and the UK Hydrographic Office before commencement of any licensed activity or phase and copied within 24 hours of its issue to the MMO and Marine Coastal Agency.

*Part 3 – Procedure for the discharge of conditions*

- 12.12 Paragraphs 24 to 27 reflect the procedure for the submission and approval or agreement of any document, strategy, information, plan protocol or statement under the deemed marine licence preferred by the MMO. These conditions, however, are to be deleted if the Secretary of State agrees that approvals by the MMO in respect of such documents, strategies, information, plans, protocols or statements under the deemed marine licence are to be determined by way of Schedule 17 (Procedure regarding certain approvals, etc.), in which case paragraph 28 should be included.
- 12.13 **Schedule 4 (Streets subject to street works)** sets out the streets to which Article 7(4) refers.
- 12.14 **Schedule 5 (Alteration of streets)** sets out the streets to which Article 9(1) refers.
- 12.15 **Schedule 6 (Permanent stopping up of highways)** lists those parts of streets to be permanently stopped up pursuant to Article 11.
- 12.16 **Schedule 7 (Public rights of way to be permanently stopped up)** lists the public rights of way to be permanently stopped up pursuant to Article 12.
- 12.17 **Schedule 8 (Temporary restriction or alteration etc. of the use of streets or public rights of way)** lists the public rights of way whose use is to be restricted, altered or diverted temporarily pursuant to Article 13.
- 12.18 **Schedule 9 (Access to works)** lists the permanent and temporary means of access to be formed and laid out pursuant to Articles 15(a) and (b).
- 12.19 **Schedule 10 (Traffic regulation measures)** lists the traffic regulation measures which may be imposed pursuant to Articles 56(1)(a) to (d).
- 12.20 **Schedule 11 (Modification of compensation and compulsory purchase enactments for the creation of new rights and imposition of new restrictive covenants)** relates to Article 24 (Compulsory acquisition of rights) and modifies existing compensation

legislation including the Land Compensation Act 1973 and the Compulsory Purchase Act 1965. It is commonly included in made DCOs, including for example Schedule 6 of each of the **Cleve Hill Solar Park Order 2020** and the **A47 Wansford to Sutton Development Consent Order 2023**, which this Schedule mirrors.

- 12.21 **Schedule 12 (Land in which only new rights etc. may be acquired)** sets out the rights which may be acquired compulsorily and restrictive covenants imposed compulsorily on land pursuant to Article 24.
- 12.22 **Schedule 13 (Land of which only temporary possession may be taken)** sets out the land in respect of which temporary possession powers only may be exercised, pursuant to Article 31.
- 12.23 **Schedule 14 (Protective provisions)** sets out the provisions for the benefit of statutory bodies or undertakers that may be affected by the authorised project, including the following:
- (a) **Part 1** provides protective provisions for the protection of the Statutory Conservancy and Navigation Authority and the Harbour Master, Humber has agreed in its statement of common ground [REP4-025] that it is content with them.
  - (b) **Part 2** provides protective provisions for the Environment Agency. Productive discussions continue in relation to agreeing these and no impediment is envisaged to agreement before the end of the Examination.
  - (c) **Part 3** provides protective provisions for Northern Powergrid. Productive discussions continue in relation to agreeing these and no impediment is envisaged to agreement before the end of the Examination.
  - (d) **Part 4** provides protective provisions for Anglian Water and are in agreed form (see row 8 of the statement of common ground [[TR030008/EXAM/9.25]]).
  - (e) **Part 5** provides protective provisions for Network Rail. The protective provisions reflect the agreed position between the undertaker and Network Rail, save in relation to paragraphs 55(1) – (3) in square brackets and the second set of text in square brackets at paragraph 56(6), which should be deleted if the Secretary of State agrees with the undertaker's representation with reference [TR030008/EXAM/9.82] that it would be inappropriate for Network Rail to prohibit the use of powers over the interests in land of Network Rail without the consent of Network Rail, which may be withheld unreasonably,

in circumstances where this could create an impediment to the delivery and operation of the authorised project. That wording in square brackets should be retained if the Secretary of State does not agree with the undertaker's representation.

- (f) **Part 6** provides protective provisions for NELC as lead local flood authority and are in agreed form (see row dDCO03 of the statement of common ground [REP4-021]).
- (g) **Part 7** provides protective provisions for Cadent Gas Limited. Productive discussions continue in relation to agreeing these and no impediment is envisaged to agreement before the end of the Examination.
- (h) **Part 8** provides protective provisions for operators of electronic communications code networks. No representations have been made by such operators in respect of these provisions.
- (i) **Part 9** provides protective provisions for the internal drainage board, NELDB, and are in agreed form (see row 4 of the statement of common ground [TR030008/EXAM/9.18]).
- (j) **Part 10** provides protective provisions for CLdN Ports Killingholme Limited and are in agreed form, following withdrawal of CLdN's objection to the application for the authorised project by email dated 17 July 2024.

12.24 **Schedule 15 (Documents and plans to be certified)** lists the documents and plans to be certified pursuant to Article 64.

12.25 **Schedule 16 (Arbitration rules)** relates to Article 62 and is included to achieve a fair, impartial and binding award on substantive differences between the parties. The objective is to achieve determination within 4 months from the date the arbitrator is first appointed to ensure that any disputes are resolved quickly. In the context of the pressing need for the Project identified in the National Policy Statement, it is considered desirable that any disputes are resolved promptly to enable delivery of the authorised project in as timely a way as possible. The form of wording mirrors Schedule 13 of the **Millbrook Gas Fired Generating Station Order 2019** and Schedule 9 of the **Cleve Hill Solar Park Order 2020**:

12.25.1 Schedule 16 refers to the person who commenced the arbitration as the Claimant and the other party as the Respondent. The timetable for the process is as follows:

- (a) Within 14 days of the Arbitrator being appointed the Claimant has to serve on the Respondent and the Arbitrator a statement of case and all supporting evidence to support the claim.
- (b) Within 14 days of receipt of the Claimant's statement of case and supporting evidence the Respondent will serve a statement of defence and all supporting evidence to support its defence, together with any objections to the Claimant's documentation.
- (c) Within 7 days of receipt of the Respondent's documentation the Claimant may make a Statement of Reply.

12.25.2 The parties would be liable for their own costs of the arbitration, unless otherwise directed by an award made by the arbitrator. Costs will include the arbitrator's costs together with the reasonable legal fees and other costs incurred by the other party.

12.26 **Schedule 17 (Procedure regarding certain approvals, etc.)** relates to Article 63 and provides a bespoke procedure for applications to relevant authorities (as defined in the Schedule) for any consent, agreement or approval required or contemplated by the provisions of the Order. This is to ensure that such applications are dealt with efficiently and within certain timescales in the context of the national need of the Project. Provision is, accordingly, made for deemed approval of applications in specified circumstances. The Schedule also makes provision for appeals to be made in the event of a refusal of an application or if the relevant authority requires further information to be provided. The form of that wording mirrors that of a number of recently made DCOs but particularly Schedule 12 of the **Riverside Energy Park Order 2020**. Provision is made for the payment of fees incurred by the relevant planning authority in the discharge of Requirements in Schedule 2 on terms which NELC has confirmed are agreed.

## 13 **PORT ZONE SECURITY AREA**

The purpose of maritime security is to detect and deter security threats and implement preventative security measures. In the wake of 9/11, the International Maritime Organisation adopted an International convention known as the International Ship and Port Facility Security Code. UK Ports are therefore classified as Port Security Authorities ("PSAs") with the appointment of a Port Security Officer and the delineation of a PSA boundary. PSAs are required to complete a security risk assessment which feeds into a Port Security Plan. The Regulator with oversight with regard to this process is the Department for Transport. In due course from as and when IGET approaches operation ABP as the PSA will engage with DFT to ensure compliance.

This process necessarily sits outside of the 2008 Act and thus is not addressed in the Order.

14 **HAZARDOUS SUBSTANCES CONSENT**

An application for hazardous substances consent for the Project was validated by NELC as the relevant hazardous substance authority on 6 April 2023 (reference: DM/0088/23/HS) for "the storage and industrial process of Hydrogen, Anhydrous (Ammonia) and Aqueous Ammonia and the storage of Liquefied Petroleum Gas, Acetylene, Petroleum Products, Aqueous Ammonia, P2 Flammable gases and P4 Oxidising gases". The application is pending determination. The HSE (together with the EA) is a statutory consultee as the competent authority under the Control of Major Accident Hazards Regulations 2015 and therefore will be engaged by NELC as part of its decision making process. Comments and information requests have been received from NELC, the HSE and local police which are in the process of being addressing.

**END**