

# REPORT

## **Boston Alternative Energy Facility**

### Explanatory Memorandum

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## 1 SUMMARY

- 1.1 This memorandum explains the purpose and effect of each article of, and the Schedules to, the draft Boston Alternative Energy Facility Order (the Order), as required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009. Regulation 5(2)(c) requires explanatory memoranda to explain “*the purpose and effect of provisions in the draft Order*”. Appendix 1 of this document also contains the information required under Regulation 6(4) of those Regulations.

## 2 PURPOSE OF THE ORDER

### *Background*

- 2.1 Alternative Use Boston Projects Limited (the Applicant or AUBP) is applying to the Secretary of State for Business, Energy and Industrial Strategy (the SoS) for an Order authorising the construction, operation and maintenance of a power-generation plant, known as the Boston Alternative Energy Facility (herein ‘the Facility’). The main elements of the Facility are:
- 2.1.1 wharf and associated infrastructure (including re-baling facility, workshop, transformer pen and welfare facilities);
  - 2.1.2 Refuse Derived Fuel (RDF) bale storage area, including sealed drainage with automated crane system for transferring bales;
  - 2.1.3 conveyor system between the RDF storage area and the RDF bale shredding plant. Part of the conveyor system is open and part of which is under cover (including thermal cameras);
  - 2.1.4 bale shredding plant;
  - 2.1.5 RDF bunker building;
  - 2.1.6 thermal treatment plant comprising three nominal 34 MWe combustion lines (circa 120 megawatts thermal (MWth)) and associated ductwork and piping, transformer pens, diesel generators, three stacks, ash silos and ash transfer network; and air pollution control residues (APCr) silo and transfer network;
  - 2.1.7 turbine plant comprising three steam turbine generators and make-up water facility and associated pipework and ductwork;
  - 2.1.8 air-cooled condenser structure, transformer pen and associated piping and ductwork;
  - 2.1.9 lightweight aggregate (LWA) manufacturing plant comprising four kiln lines, two filter banks with stacks, storage silos for incoming ash, APCr, and binder material (clay and silt), a dedicated berthing point at the wharf, silt storage and drainage facility, clay storage and drainage facility, LWA workshop, interceptor tank, LWA control room, aggregate storage facility and plant for loading aggregate / offloading clay or silt;
  - 2.1.10 electrical export infrastructure;

- 2.1.11 two carbon dioxide (CO<sub>2</sub>) recovery plants and associated infrastructure, including chiller units;
  - 2.1.12 associated site infrastructure, including site roads, pedestrian routes, car parking, site workshop and storage, security gate, and control room with visitor centre and site weighbridge; and
  - 2.1.13 habitat mitigation works for Redshank and other bird species comprising of improvements to the existing habitat through the creation of small features such as pools/scrapes and introduction of small boulders within the Habitat Mitigation Area.
- 2.2 A more detailed description of the Facility is contained in Chapter 5 of the Environmental Statement (document reference 6.2.5).

#### *Nationally Significant Infrastructure Projects*

- 2.3 The Planning Act 2008 (the 2008 Act) makes a distinction between different types of generating facilities. For a project to be a Nationally Significant Infrastructure Project (NSIP), it must come within the limits set out in section 15(2)-(4). The Facility is a NSIP within sections 14(1)(a) and 15(2) of the 2008 Act by virtue of the Facility requiring the building, commissioning and operating of a generating station with an energy generating capacity greater than 50 MWe.
- 2.4 As the Facility is a NSIP, development consent must be obtained from the Secretary of State to authorise it, and an application for a Development Consent Order (DCO) must be made to the Secretary of State, care of the Planning Inspectorate, under section 37 of the 2008 Act.

### **3 ASSOCIATED DEVELOPMENT**

- 3.1 The Order also seeks consent for development which would constitute associated development under section 115 of the 2008 Act, and which is included in the “authorised development” listed in Schedule 1.
- 3.2 Guidance<sup>1</sup> on associated development has been issued by the Secretary of State for Communities and Local Government. In this guidance associated development is described as being ‘*typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project*’ (paragraph 6) and ‘*requires a direct relationship between associated development and the principal development. Associated development should therefore either support the construction or operation of the principal development, or help address its impacts. Associated development should not be an aim in itself but should be subordinate to the principal development*’ (paragraph 5).

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<sup>1</sup> Department for Communities and Local Government (2013). Planning Act 2008: Guidance on associated development applications for major infrastructure projects. Accessed June 2020  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/192681/Planning\\_Act\\_2008\\_-\\_Guidance\\_on\\_associated\\_development\\_applications\\_for\\_major\\_infrastructure\\_projects.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/192681/Planning_Act_2008_-_Guidance_on_associated_development_applications_for_major_infrastructure_projects.pdf).

- 3.3 Work Number 1 as described in Schedule 1 to the Order comprises the NSIP. Work Numbers 2 to 7 of Schedule 1 to the Order contain associated development to the NSIP. Work Numbers 2 to 7 are all:
- 3.3.1 directly associated with the NSIP, as they are all required for the construction, operation or maintenance of the NSIP, or to mitigate its impacts (paragraph 5(i) of the guidance);
  - 3.3.2 subordinate to the NSIP - none of them are an aim in themselves (paragraph 5(ii));
  - 3.3.3 proportionate to the nature and scale of the NSIP (paragraph 5(iv)); and
  - 3.3.4 of a nature which is typically brought forward alongside a generating station (paragraph 6).
- 3.4 Noting that there is no requirement for a DCO to distinguish between these two categories, the Applicant has therefore chosen not to differentiate the NSIP and associated development works in Schedule 1 to the Order.

#### **4 ANCILLIARY MATTERS**

- 4.1 The Order also contains several ancillary matters, i.e. provisions not consisting of development.
- 4.2 The main ancillary matter is a power to acquire land compulsorily in accordance with section 120(4) of the 2008 Act, required for the authorised development, or to facilitate, or that are incidental to the authorised development under section 122 of the 2008 Act. Justification for these powers is set out in the Statement of Reasons (document reference 3.1) that accompanies the application.
- 4.3 The Order seeks to apply and modify statutory provisions in relation to the compulsory acquisition of land. It is for this reason that under sections 117 and 120(5) of the 2008 Act, the Order must be made by way of Statutory Instrument. The Order is therefore in that form.
- 4.4 Other ancillary matters include the diversion and stopping up of streets public rights of way in the vicinity of the Facility, the use of private roads, and the creation of new accesses and the application and disapplication of legislation relating to the Facility.

#### **5 DRAFT ORDER**

- 5.1 The purpose and effect of the provisions of the Order are now explained in sequence. Although the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (the Model Provisions) has been repealed, the Order draws on the Model Provisions, as well as precedent set by DCOs that have been made and particularly those relating to generation station NSIPs.
- 5.2 Several made DCOs contain articles which incorporate a provision by which the promoter must obtain consent, agreement or approval from a third party before it may do something and that such consent, agreement or approval shall not be unreasonably withheld, as well as a longstop default provision to the effect that, if the relevant third party fails to respond, the consent, agreement or approval shall be deemed to have been given.

- 5.3 The Applicant considers this approach to be necessary to remove the possibility for undue delay and to provide certainty that the authorised development can be delivered in a timely fashion. This approach is also considered to be proportionate in that, having undertaken extensive pre-application consultation and the order having been rigorously examined, the delivery of the authorised development should not be held up unreasonably, if it has been approved by the Secretary of State.
- 5.4 The draft Order includes, therefore, at articles 12(5); 13(8); 15(2), 20(8); and 21(6) a deemed consenting regime to apply whereby if a consent etc, is required and no such consent etc is provided within 28 days of receiving an application for consent or approval, the consenting authority is deemed to have granted consent.
- 5.5 For completeness, references to “AUBP” below should be read as references to its agents or contractors, and to any other persons who have the benefit of the Order or any statutory rights transferred to them under Article 9.
- 5.6 The provisions of the Order are now explained in sequence.

### **Part 1 – Preliminary**

#### *Article 1 – Citation and commencement*

- 5.7 Article 1 sets out the name of the Order, establishing how it may be cited in subsequent legislation. It also states the date on which the Order comes into force. This article did not appear in the Model Provisions. However, it is a standard article that is included in all DCOs.

#### *Article 2 - Interpretation*

- 5.8 The purpose of article 2(1) is to define terms used in the remainder of the Order.
- 5.9 Article 2 makes alterations to the model provisions to accommodate the departures from the model provisions elsewhere in the Order, and to add required definitions that are relevant in the context of the authorised development, for example the “date of final commissioning.”
- 5.10 Definitions to note include:

- 5.10.1 “commence” means beginning to carry out any material operation, as defined in section 155 of the 2008 Act (which explains when development begins), comprised in or carried out for the purposes of the authorised development other operations consisting of pre-construction ecological mitigation, environmental surveys and monitoring, investigations for the purpose of assessing ground conditions (including the making of trial boreholes), receipt and erection of construction plant and equipment, installation of construction compounds, erection of a footbridge, erection of temporary viewing structure, temporary car parking, erection of construction welfare facilities, erection of any temporary means of enclosure, the temporary display of site notices or contractors’ signage and notices and “commencement” and “commenced” are to be construed accordingly;

This makes it clear that a number of works that would constitute a “material operation” without meaning that the authorised development has been “commenced”. This enables the Applicant to undertake certain preparatory works

prior to the submission of relevant details for approval under the requirements contained in Schedule 2, which AUBP considers proportionate. The works that are excluded from the definition of commencement are either de minimis or have minimal potential for adverse impacts. They may in some cases need to be carried out in order to comply with the pre-commencement requirements (for example, to inform assessments and proposals required to be submitted for approval). AUBP should be permitted to carry out low-impact preparatory works following the grant of the Order while it is working to discharge the pre-commencement requirements, thereby helping to minimise the construction timetable.

The definition of “commence” used is tailored to the requirements of the authorised development, but these provisions are widely precedented (see for example the M20 Junction 10a Development Consent Order 2017 and the Silvertown Tunnel Order 2018).

- 5.10.2 “maintain” in relation to the authorised development includes to inspect, repair, adjust, alter, remove, refurbish, reconstruct, replace and improve and “maintenance” and “maintaining” are to be construed accordingly. The inclusion of “adjust” or “alter” is justifiable on the basis that during maintenance operations changes to existing specifications may be required. Similarly, “remove” is included as it may be necessary to remove something in order to repair, clean or replace it, for example. “Improve” is included as technology will improve over the life of the authorised development and therefore there may be opportunities to “improve” the workings of the plant and equipment by, for example, the removal of an old moving part and replacing it with a new, more efficient moving part. The proper maintenance of the Facility is an essential part of ensuring ongoing efficient and safe operation.
- 5.10.3 “Order land” is defined as the land shown on the land plan and Crown land plan which is within the Order limits and described in the book of reference.
- 5.10.4 “Order limits” references the Order limits as shown on the works plans within which the authorised development may be carried out.
- 5.11 Article 2(2) provides that a broad definition of “rights over land” applies to the Order.
- 5.12 Article 2(3) provides that measurements 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. Thus, this provision allows for a small tolerance with respect to any distances and points, although works will take place within the limits of deviation. It is commonplace to include such provision in an Act or instrument authorising linear infrastructure (see, for example, section 56(5)(c) of the Crossrail Act 2008, and article 2(3) of the National Grid (North London Reinforcement Project) Order 2014).
- 5.13 Article 2(4) provides that areas given in the Book of Reference are approximate as these are not covered by article 2(3). This is intended to clarify the status of the area measurements in the Book of Reference, and the purpose and effect of the term “approximately” in this context is the same as set out in paragraph 5.12. The term “approximately” is required to be read in to all plot area measurements in the Book of Reference, as these measurements are given in square metres, and each measurement is rounded up to the nearest whole square metre.

- 5.14 Articles 2(5) and 2(6) tie references to lettered/numbered points and numbered works in the Order to the relevant plans referenced and Schedule 1 of the Order, respectively.
- 5.15 Article 2(7) clarifies that references to “Schedule”, are unless otherwise stated, references to the Schedules of the Order.
- 5.16 Article 2(8) confirms that the expression “includes”, when used in the Order, is to be construed without limitation.
- 5.17 Article 2(9) clarifies that references to any statutory body includes that body’s successors from time to time.
- 5.18 Article 2(10) clarifies that references to “part of the authorised development” are to be construed as references to stages, phases or elements of the authorised development.

## **Part 2 – Principal Powers**

### *Article 3 – Development consent granted by the Order*

- 5.19 Article 3(1) grants the development consent by giving AUBP the power to carry out the authorised development, which is described in Schedule 1. This article makes the consent subject to the requirements that are listed in Schedule 2.
- 5.20 Article 3(2) states that any enactment applying to land within the Order limits has effect subject to the provisions of the Order. Article 3(2) has been included and is necessary in order to ensure that there are no acts of a local or other nature that would hinder the construction and operation of this NSIP. AUBP has carried out a proportionate search of local legislation that applies within reasonably close proximity to land within the Order limits, but no search can be completely exhaustive and there remains the possibility that a local act or provision may have been overlooked. Including this article ensures that the construction and operation of the Facility are not jeopardised by any incompatible statutory provisions which might exist, i.e. a provision which would be an absolute restriction that could not be dealt with unless by statutory amendment. The provision would prevent delay in this situation by ensuring that the Facility could be constructed without impediment. This is a heavily precedented article (see most recently article 3(2) of the A19/A184 Testo’s Junction Alteration Development Consent Order 2018 and article 3(2) of the M42 Junction 6 Development Consent Order 2020). Specific local enactments identified through AUBP’s proportionate search of local legislation are disapplied under article 43 (amendment of local legislation).

### *Article 4 – Maintenance of the authorised development*

- 5.21 This article sets out the scope within which AUBP may maintain the authorised development. “Maintain” is defined in article 2(1) as including “inspect, repair, adjust, alter, remove, refurbish, reconstruct replace and improve”, with these terms bearing their common-sense meanings. Maintenance of the authorised development, within the meaning that would be authorised by this article, has been assessed in the Environmental Statement, and the power is constrained, through the definition of “maintain”, by the proviso that maintenance works must not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement (document references 6.2, 6.3 and 6.4).



*Article 5 – Maintenance of drainage works*

- 5.22 The purpose of this article is to make it clear that any realignment of drainage or other works to them that are carried out as part of the Project do not affect the existing allocation of responsibility for maintenance of those drains, unless this is agreed between AUBP and the responsible party. Responsibility for maintenance of drainage works may sit with the Environment Agency, an internal drainage board, a Lead Local Flood Authority or a landowner.
- 5.23 This provision is well precedented (see for example, article 5 of the A19/A184 Testo's Junction Alteration Development Consent Order 2018 and article 5 of the M42 Junction 6 Development Consent Order 2016).

*Article 6 – Operation of the authorised development*

- 5.24 Article 6 permits the operation of the generating station comprised in the authorised development and is included pursuant to section 140 of the Planning Act 2008. Article 5(2) specifically preserves the need for any other operational consent that may be needed for the authorised development in addition to the Order. The wording of this Article has precedent in article 5 of the Eggborough Gas Fired Generating Station Order 2018 and article 5 of the Riverside Energy Park Order 2020.

*Article 7 – Limits of Deviation*

- 5.25 This article is included to allow for flexibility for the works to be carried out and maintained within the limits identified on the works plans as well as providing for lateral deviation within the limits of deviation for those works shown on the works plan and for the vertical deviation of the works.
- 5.26 The purpose of this provision is to provide the necessary flexibility when constructing the authorised development, reducing the risk that the proposed development as approved cannot later be implemented for unforeseen engineering or geological reasons.
- 5.27 The lateral limits of deviation are shown on the works plans and constrain the location of these works within the limits of deviation but the definition does allow construction activities for those works to be carried out anywhere within the order limits.
- 5.28 The vertical limits of deviation have been set to any amount necessary or convenient downwards. Again, the purpose is to provide a necessary but proportionate degree of flexibility in the construction of the authorised development and to reduce risk. The reference to "...any extent downwards..." is taken from the DCO general model provisions and also the TWA model provisions. An element of flexibility in downwards deviation is required so that any construction can reflect extant ground conditions when the works are carried out.
- 5.29 A general exception to the application of the limits of deviation is also set out allowing these limits to be exceeded if AUBP can demonstrate to the satisfaction of the Secretary of State that to do so would not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement (document references 6.2, 6.3 and 6.4).
- 5.30 A similar approach has been adopted on other DCOs including the National Grid (King's Lynn B Power Station Connection) Order 2013 and also the National Grid (North London Reinforcement Project) Order 2014.

*Article 8 – Benefit of the Order*

- 5.31 This Article makes it clear that it is the undertaker who may take the benefit of the Order.
- 5.32 The purpose of paragraph (2) is to clarify the exceptions where the Order will self-evidently benefit others. Absent this provision, there would be a contradiction since strictly speaking only AUBP could benefit from these works. The same wording has been accepted and approved by the Secretary of State in other orders, for instance the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 (see article 8(2)) and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 (see article 7(2)).
- 5.33 Article 8(3) provides that Work Number 3 is for the benefit of the undertaker, Harlaxton Engineering Services Limited and Western Power Distribution Plc (WPD). This is because Harlaxton will be responsible for the detailed design, alignment and construction of the electrical connection cabling and supporting infrastructure delivered within Work No. 3 to connect to the WPD compound. WPD will be responsible for connection from the WPD compound to the 132 kV overhead line.

*Article 9 – Consent to transfer benefit of Order*

- 5.34 This Article makes detailed provision for the transfer of the benefit of the Order and supplements Article 7. Under Article 8, the consent of the Secretary of State is needed before the undertaker can transfer the benefit of the Order, but such consent is not required where:
- 5.34.1 the transferee or lessee is the holder of a licence under section 6 of the Electricity Act 1989; or
- 5.34.2 where the compensation provisions for the acquisition of rights or interests in land or for effects on land have been discharged or are no longer relevant.
- 5.35 Article 8 is based on the notification procedure contained Article 7 of the Wrexham Gas Fired Generating Station Order 2017 and Article 8 of the Riverside Energy Park Order 2020.
- 5.36 The justification for the provisions in Article 8 is that in such cases, the transferee or lessee will either be of a similar financial and regulatory standing to the undertaker so as to protect the provision for compensation for rights or interests in land that are compulsorily acquired pursuant to the Order, or there are no outstanding actual or potential compulsory acquisition claims. Article 8(5) provides that where the consent of the Secretary of State is not needed, the undertaker must still notify the Secretary of State in writing prior to the transfer or grant of the benefit of the provisions of the Order.

**Part 3 – Streets**

*Article 10 – Street works*

- 5.37 This Article is a model provision intended to permit in certain streets (as specified in Schedule 3) the carrying out of street works for the purposes of the authorised development. Article 10(3) brings in sections 54 to 106 of the New Roads and Street Works Act 1991 (the 1991 Act) to apply to any street works carried out pursuant to article 10(1). This provides protection for the street authority for the street in question.

*Article 11 – Application of the 1991 Act*

- 5.38 This article departs from the model provisions to provide that relevant provisions of the 1991 Act shall apply to a temporary stopping up of a street under article 13 (temporary closure, alteration, diversion and restriction of use of streets and private means of access), even if no street works (within the meaning of the 1991 Act) are being carried out. This would, for example, require AUBP to make arrangements, so far as practicable, for utilities to gain access to their apparatus. Comparable provisions are commonly included in Transport and Works Act Orders and have also appeared in DCOs (see article 10 of the Network Rail (Ipswich Chord) Order 2012; article 4 of the Nottingham Express Transit Order 2009, article 3 of the London Underground (Victoria Station Upgrade) Order 2009 and article 11 of the Great Yarmouth Third River Crossing Development Consent Order 2020.
- 5.39 This prevents confusion as to whether works in respect of a temporarily stopped up street are 'street works' for the purposes of the 1991 Act and also simplifies the implementation of those works by providing for a single process in respect of streets which are stopped up and those which are not.

*Article 12 - Power to alter layout, etc., of streets*

- 5.40 This article permits AUBP and anyone else with the benefit of the Order to alter, either permanently or temporarily, the layout of the streets listed in Part 1 (permanently) and Part 2 (temporarily) of Schedule 4 to the Order to accommodate the authorised development.
- 5.41 Paragraph (2) provides a broader power to alter the layout of any street within the Order limits and the layout of any street having a junction with such a street (i.e. where the street is not listed in Schedule 4) and the person undertaking the work is not the street authority for that street. To exercise this broader power, the consent of the street authority must be obtained.
- 5.42 Article 12(3) provides that any street altered temporarily under this article must be restored to the reasonable satisfaction of the street authority.
- 5.43 As explained earlier, a street authority that fails to respond to an application for consent within 28 days of the application being made is deemed to have given its consent.
- 5.44 This provision is necessary to give full effect to the power to carry out the authorised development as is provided for under section 120(5) of the Act.

*Article 13 – Temporary closure, alteration, diversion and restriction of the use of streets*

- 5.45 This article allows for the temporary closure, alteration, diversion or restriction of the use of streets for the purposes of the authorised development.
- 5.46 Paragraph (2) differs from the Model Provisions and confers a power on AUBP where the use of a street, within the Order limits, has been temporarily closed, altered, diverted or restricted under this article to use it as a temporary working site. This provision has precedent in a number of made DCOs including the Riverside Energy Park Order 2020 and the Immingham Open Cycle Gas Turbine Order 2020.
- 5.47 Paragraph (3) states that reasonable access for pedestrians going to or from properties abutting a temporarily closed, altered, diverted or restricted street must be provided.

- 5.48 Without limitation on the scope of paragraph (1), paragraph (4) provides for the temporary closure, alteration, diversion or restriction of streets specified in Schedule 5, subject to the provision of temporary closures, alteration, diversions or restrictions as specified in Schedule 5 where the consent of the street authority is not required.
- 5.49 Paragraph (5) confirms that AUBP must not close, alter, divert or restrict those streets listed in Schedule 5 without first consulting the street authority and, in respect of any other street, without the consent of the street authority (such consent not to be unreasonably withheld or delayed).
- 5.50 Paragraph (6) provides a right to compensation for any person suffering loss due to the suspension of a private right of way under this article.
- 5.51 Paragraph (7) confirms that any temporary diversion provided under paragraph (4) in respect of the streets closed, diverted, altered or restricted listed in Schedule 5 is not required to be of a higher standard than the temporarily closed, altered, diverted or restricted street.
- 5.52 Paragraph (8) has been added to impose a time limit of 28 days after which a street authority which fails to respond to an application for consent is deemed to have granted consent, so as not to delay the proposed development unnecessarily. This provision has been used in other DCOs (see National Grid (North London Reinforcement Project) Order 2014 and article 12 of the A19/A184 Testo's Junction Alteration Development Consent Order 2018). This approach is considered justified as the works proposed under paragraph (5)(b) are temporary in nature and, this provision will provide greater flexibility and certainty in delivering the authorised development.

*Article 14 – Permanent stopping up of streets*

- 5.53 This article, and Schedule 6 (permanent stopping up of streets) to which it relates, follows the general model provision 10 (public rights of way) and provides for the permanent stopping up of the streets and footpaths listed in Schedule 6 provided an agreed alternative right of way has been created.

*Article 15 – Access to works*

- 5.54 This Article is a model provision which permits the undertaker to form new or to improve existing means of access in the locations specified in Parts 1 and 2 of Schedule 4. For clarity, temporary and permanent means of access are dealt with separately. Other means of access or works can also be provided in other locations reasonably required for the authorised development. Such accesses may only be created with the consent of the planning authority after consulting the highway authority. If the authority fails to respond to the application within 28 days (as explained above), it will be deemed to have granted consent.

*Article 16 – Use of private roads*

- 5.55 This article authorises the temporary passage by AUBP (or other persons who are transferred this statutory right pursuant to article 8) – in common with other permitted users – of private roads within the Order limits by persons or vehicles, for the purposes of, or in connection with, the construction and maintenance of the authorised development, without the need for AUBP to take temporary possession of the land under article 36 of the Order. There is precedent for this article, for example in the Silvertown Tunnel Order 2018 (article 13), the Port of Tilbury

(Expansion) Order 2019 (article 16) and the Lake Lothing (Lowestoft) Third Crossing Order 2020 (article 14).

5.56 This article therefore creates a power to “use” a private road for a temporary period that is proportionate to the limited nature of the use, rather than extinguishing, suspending or permanently interfering with the private rights of a landowner (through the acquisition of a permanent right). This is akin to the powers for temporary use under article 35 (temporary use of land for carrying out the authorised development) of the Order; however, it is distinguished because AUBP does not require the exclusive use and possession of the private roads while exercising this power. The article is necessary because AUBP will need to use private roads inside the Order limits (e.g., Nursery Road, Bittern Way, and Callen Road).

5.57 Paragraph (2) provides that AUBP will be liable to compensate any person who has suffered loss or damage as a result of the exercise of this power. Paragraph (3) is included to clarify that any dispute as to a person’s entitlement to compensation, or as to the amount of such compensation, is to be determined under Part 1 of the Land Compensation Act 1961.

#### *Article 17 - Agreements with street authorities*

5.58 This Article is a model provision which authorises street authorities and the undertaker to enter into agreements relating to the construction of a street or the carrying out of works in the street and the alteration and diversion of the street. In addition to the model provisions, it provides for such agreements to deal with the strengthening, improvement or repair of any streets, which is common in many similar orders. Similar wording has been used in other made Orders, including the Hirwaun Generating Station Order 2015, the Progress Power (Gas Fired Power Station) Order 2015 and the Wrexham Gas Fired Generating Station Order 2017.

#### *Article 18 - Traffic regulation measures*

5.59 This Article allows, with the consent of the traffic authority, the undertaker to regulate traffic on roads (defined as a public highway maintained by and at the expense of the traffic authority) to the extent that is necessary for the purposes of or in connection with the construction of the authorised development. The Article gives effect to any permission, prohibition or restriction on stopping, parking, waiting, loading or unloading of vehicles on any road and other provision as to the direction or priority of vehicular traffic on any road.

5.60 The Article also makes it clear that any prohibition, restriction or other provision made by the undertaker under Article 13 has effect as if duly made by the traffic authority under the Road Traffic Regulation Act 1984 or the local authority under the Road Traffic Regulation Act 1984.

5.61 The Article is not in the general model provisions but there is a precedent for it in the Wrexham Gas Fired Generating Station Order 2017 (Article 14) and the Riverside Energy Park Order 2020 (article 16). This Article is considered necessary to ensure that the authorised development can be constructed without unnecessary delay.

### **Part 4 – Supplementary Powers**

#### *Article 19 – Powers in relation to relevant navigations or watercourses*

5.62 This article will permit AUBP to carry out specified activities relating to navigations or watercourses. The undertaker must use reasonable endeavours (except in the case of

emergency) to notify the owner of any mooring affected by the exercise of powers conferred by paragraph (1)(b). Paragraph (3) provides that compensation is payable to those affected by the exercise of powers conferred by paragraph (1)(b). This article is not in the Model Provisions but is a bespoke article, the inclusion of which is essential to ensure the undertaker can carry out the authorised development expeditiously, and is precedent (see article 16 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016).

*Article 20 – Discharge of water*

- 5.63 This article sets out the circumstances in which AUBP is entitled to discharge water into a sewer or watercourse. Essentially, this can be done with the consent of the owner of the sewer or watercourse. The article is similar to the general model provision, except paragraph (8) has been added to provide that if an authority fails to respond within 28 days of an application for approval or consent under this article it shall be deemed to have been given or granted. This reasons for the inclusion of this paragraph are explained earlier.
- 5.64 It is too early to say whether such discharges to private watercourses will be needed, as they will be very specific to ground conditions at the time of construction. AUBP has not, at this time, approached any such owners though they will be contacted as soon as possible when appropriate. Any owner that may potentially be affected will have been included in consultation.
- 5.65 This article has precedent in article 15 of the Immingham Open Cycle Gas Turbine Order 2020 and article 17 of the Riverside Energy Park Order 2020.

*Article 21 - Authority to survey and investigate the land*

- 5.66 This article gives AUBP the power to enter certain land for the purpose of surveying and investigating. The article provides that Applicant must give 14 days' notice before exercising the powers of entry, and that compensation is payable for any loss or damage. Paragraphs (1) to (5) are based on the Model Provisions and have precedent in a number of made DCOs to date. Paragraphs (6) and (7) have precedent in the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016.
- 5.67 The drafting in paragraph (1) departs from the Model Provisions by authorising surveys on land which may be affected by the authorised development. This extension beyond the Order limits has precedent (see article 23 of the M42 Junction 6 Development Consent Order 2020, article 16 of the Immingham Open Cycle Gas Turbine Order 2020, and article 19 of the Riverside Energy Park Order 2020). Powers to make excavations and boreholes to investigate groundwater and discharge water onto land are also included, to ensure that AUBP is able to undertake all necessary activities in connection with surveying the land.
- 5.68 Paragraph (7) applies section 13 of the Compulsory Purchase Act 1965, thereby providing an enforcement mechanism (by way of a warrant) where entry onto land under the article is refused.

*Article 22 - Protective work to buildings*

- 5.69 The purpose of this article (which is included in the model provisions and the majority of made orders to date) is to allow the undertaker to undertake protective works such as underpinning to buildings affected by the authorised development and to set out the procedure that will apply in those circumstances.

- 5.70 Article 22(12) applies section 13 of the Compulsory Purchase Act 1965, thereby providing an enforcement mechanism (by way of a warrant) where entry onto, or possession of, land under the article is refused.

*Article 23 - Felling or lopping of trees*

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

- 5.72 The article is included to ensure that the undertaker has adequate powers to construct, operate and maintain the authorised development. The undertaker does not have any other statutory powers available to it in order to fell or lop trees or shrubs and so the article is considered necessary to ensure that trees or shrubs do not obstruct the construction, operation or maintenance of this nationally significant infrastructure.

*Article 24 - Removal of human remains*

- 5.73 This article is based on article 17 of the Model Provisions. This article has been included as AUBP has not been able to rule out the presence of any human remains within the Order land and is considered necessary so that there is no delay in the implementation of the authorised development. The article should be read with article 41 (disapplication of legislative provisions, etc.) which disapplies section 25 of the Burial Act 1857.

- 5.74 This article departs from the Model Provision in that paragraph (14) 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 M42 Junction 6 Development Consent Order 2020 (article 48). Paragraph (15) requires that the undertaker seeks and complies with direction from the Secretary of State under paragraph (12) regarding the treatment of such remains following their removal.

**Part 5 – Powers of Acquisition and Possession of Land**

*Article 25 – Compulsory acquisition of land*

- 5.75 This article authorises the compulsory acquisition of so much of the Order land as is required for the construction, operation or maintenance of the authorised development or is incidental to it or necessary to facilitate it. The Article broadly follows the model provision, although reference to compensation for the extinguishment or suspension of a private right of way has been deleted as this is dealt with in article 28 (private rights).

- 5.76 Article 25(2) makes it clear that the powers in this Article are subject to the powers and restrictions in article 27 (time limit for exercise of authority to acquire land compulsorily) and paragraph (9) of article 35 (temporary use of land for carrying out the authorised development).

- 5.77 The provision is necessary to secure the delivery of the Facility as set out in more detail in the Statement of Reasons (document reference 3.1) accompanying the application.

*Article 26 – Compulsory acquisition of land – incorporation of the mineral code*

- 5.78 This article incorporates Parts 2 and 3 of Schedule 2 of the Acquisition of Land Act 1981. This means that where AUBP 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 development) unless they are expressly included in the conveyance. Such an article is included in the Model Provisions (article 19) and is necessary to exempt mines and mineral interests from compulsory acquisition under the Order.

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

- 5.79 This article gives AUBP five years to issue 'notices to treat' or a 'general vesting declaration' to acquire the land that is subject to the power of compulsory purchase. These are the two main procedural methods by which the process of acquiring land is undertaken should this Order be made. The time period is the same as that contained in the general model provisions article.

*Article 28 – Private rights*

- 5.80 In order for it to be possible to implement the Facility, provision is needed for the extinguishment of private rights in the Order land that would be incompatible with that implementation. This article supplies this provision.
- 5.81 Paragraph (1) provides for the extinguishment of private rights and restrictive covenants over Order land subject to compulsory acquisition under the Order, from the moment of acquisition or occupation of that land.
- 5.82 Paragraph (2) provides that rights over Order land that is already owned by AUBP are also extinguished, at the point that any activity authorised by the Order interferes with or breaches those rights.
- 5.83 Paragraph (3) provides for the temporary suspension of private rights over Order land that is not acquired but is occupied temporarily by AUBP in order to construct the Facility. The suspension is for the duration of the occupation.
- 5.84 Paragraphs (4) to (7) make provision for compensation and for circumstances where rights are preserved. Paragraph (4) provides that any right holders who suffers loss caused by the extinguishment or suspension of rights will be entitled to compensation.
- 5.85 Paragraph (8) sets out a list of matters deemed to be private rights to provide certainty as to the scope of the article. The list of deemed private rights is broad in order to ensure that any right which could potentially interfere with the implementation of the Facility can be extinguished.
- 5.86 This approach is proportionate and draws on the precedents of the Rookery South (Resource Recovery Facility) Order 2011, the Wrexham Gas Fired Generating Station Order 2017, the Immingham Open Cycle Gas Turbine Order 2020 and article 17 of the Riverside Energy Park Order 2020 and the M42 Junction 6 Development Consent Order 2020.



*Article 29 - Power to override easements and other rights*

- 5.87 This article provides that by virtue of section 158 of the 2008 Act in carrying out or using the development authorised by the Order and doing anything else authorised by the Order, the undertaker may interfere with any easement, liberty, privilege, right or advantage annexed to land and affecting other land, including any natural right to support, or breach any restriction as to use of land arising by virtue of contract. It also provides that by virtue of section 152 of the 2008 Act, compensation may be payable under section 10 of the Compulsory Purchase Act 1965 for any such interference or breach.
- 5.88 This is not a model provision, but is added to clarify the position with regard to rights burdening land required for the authorised development. It has precedent, for example, the Lake Lothing (Lowestoft) Third Crossing Order 2020 and the Riverside Energy Park Order 2020. The reference to restrictions as to use of land arising in contracts was included in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014.

*Article 30 - Application of the 1981 Act*

- 5.89 This article applies the provisions of the Compulsory Purchase (Vesting Declarations) Act 1981 to compulsory acquisition under the Order. Vesting declarations are one of two procedures for the compulsory acquisition of land (the other being by means of serving a notice to treat). Vesting declarations allow title in the land concerned to pass to the acquiring authority more quickly than using the notice to treat method. They also enable several parcels of land to be acquired under the same legal instrument and therefore more efficiently than under the notice to treat procedure.
- 5.90 Such an article has been included in the model provisions and the majority of orders made to date but the drafting used in the Order has been adapted to incorporate and reflect the changes brought about by the Housing and Planning Act 2016. These modifications have precedent in the Silvertown Tunnel Order 2018.

*Article 31 - Modification of Part 1 of the 1965 Act*

- 5.91 This article modifies the provisions of Part 1 of the Compulsory Purchase Act 1965 as applied to the Order by section 125 of the 2008 Act. This provision reflects recent changes introduced by the Housing and Planning Act 2016. Paragraphs (1) to (3) amend the provisions of the Compulsory Purchase Act 1965 so they are consistent with the terms of the Order and paragraph (4) makes it clear that the notice periods introduced by the Housing and Planning Act 2016 do not apply to the temporary possession or use of land under Articles 35 or 36 of this Order. These modifications have broad precedent in the Wrexham Gas Fired Generating Station Order 2017, the Silvertown Tunnel Order 2018 and the Riverside Energy Park Order 2020.

*Article 32 - Acquisition of subsoil or air-space only*

- 5.92 This article permits the undertaker to acquire only the subsoil or air-space of land which is to be compulsorily acquired, and gives the undertaker the ability to minimise the extent of interests acquired from owners. The purpose of this article is to give AUBP the flexibility to minimise so far as is possible the extent of interests to be acquired, with consequently less impact on landowners and lower compensation payments.

*Article 33 – Rights under or over streets*

- 5.93 The purpose of this article is to allow AUBP to appropriate and use land above or below streets within the Order limits, without having to acquire the street or any right or easement in it. The exercise of this power, without full acquisition, is prohibited in the circumstances set out in paragraph (3). Compensation is payable for any loss or damage caused to an owner or occupier of land affected by the power of appropriation where no acquisition has taken place.
- 5.94 This article was included in the Model Provisions and the majority of DCOs made to date. It is considered that the article remains necessary for the authorised development, notwithstanding the effect of the Housing and Planning Act 2016, and it was retained in recent DCOs (see, for example, article 32 of the M42 Junction 6 Development Consent Order 2020 and article 30 of the Riverside Energy Park Order 2020).

*Article 34 - Temporary use of land for carrying out the authorised development*

- 5.95 The purpose of this article is, inter alia, to allow the land set out in Schedule 7 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Facility but land acquisition is not required permanently. The authorisation of temporary possession prevents AUBP having to permanently acquire land which is required to construct the authorised development but which is not needed permanently and therefore assists in minimising the interference with landowners' rights.
- 5.96 The inclusion of this article is important to ensure that the authorised development can be carried out efficiently and expeditiously following the making of the Order. AUBP is entitled either to occupy and use land pending its permanent acquisition, or to temporarily occupy and use land in Schedule 7, with provision made for the restoration of the land (subject to exceptions listed in paragraph (5)) and the payment of compensation to the affected landowners and occupiers for any loss or damage arising. These powers are considered to be reasonable given the status of the authorised development as an NSIP. The article has precedent in many DCOs (see for example article 29 of the A19/A184 Testo's Junction Alteration Development Consent Order 2018).
- 5.97 More particularly, paragraph (1)(a)(i) allows the land set out in Schedule 7 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Facility but for which full title is not required outright permanently. The land which falls within this subparagraph includes land which will be occupied temporarily and then subject to permanent rights (e.g. diversion of utilities apparatus) and/or land in respect which permanent structures will be erected during temporary possession. In line with this, paragraph (1)(d) confirms that the authorised development as listed in Schedule 1 can be undertaken on land that has been temporarily occupied.
- 5.98 Paragraph (1)(a)(ii) allows for the temporary occupation of any of the Order land that is subject to the powers of permanent acquisition, but in respect of which no process for acquisition has yet been commenced. The rationale for this is that it reduces the amount of land that is required to be subject to outright acquisition. Thus, article 25 with article paragraph (1)(a)(ii) make it possible for AUBP to occupy land temporarily initially and only proceed to acquire permanently that part which is necessary for the Project as constructed. The benefits of this are lesser impacts on landowners and lower costs to AUBP, which is in the public interest. In line with this,

paragraph (1)(d) confirms that the authorised development as listed in Schedule 1 can be undertaken on land that has been temporarily occupied.

- 5.99 Paragraph (2) and (3) make provision for the service of notices. Paragraph (3) is provided to ensure that AUBP is not inhibited from taking temporary possession of land in circumstances where there is a danger to the authorised development, the public or the surrounding environment. This provision has been included in made temporary possession articles (see, for example, article 34 of the M42 Junction 6 Development Consent Order 2020).
- 5.100 Under paragraph (8), any dispute as to the satisfactory removal of temporary works and restoration of land under paragraph (5) does not prevent AUBP from giving up possession of the land. This provision is considered to be reasonable as it clarifies that AUBP is able to give up possession of land, and bring to an end any obligations associated with that possession, without affecting any duty on AUBP to undertake restorative work on land in the event that a dispute under paragraph (5) is resolved in a landowner's favour.
- 5.101 Paragraph (10) prevents AUBP from acquiring the land listed in Part 1 of Schedule 7 but allows rights or subsoil only.
- 5.102 Paragraph (13) makes clear that the power in this article can be exercised on more than one occasion. This change is intended to clarify the intention behind the model provision rather than to expand its scope.

*Article 35 - Temporary use of land for maintaining the authorised development*

- 5.103 This article provides for the temporary use of land for maintenance of the authorised development. There are clear limits on the length of time that the undertaker can use land in this way, provisions around giving 28 days' notice and restoration of the land following the temporary possession.
- 5.104 This article is broadly based on the model provision and provides for the payment of compensation for that temporary use of the land. The maintenance period has been adapted from the model provision to apply to the period 5 years beginning with the date of final commissioning as opposed to the date on which the authorised development is opened for use as this is more appropriate for this type of development. Similar wording has been used in other made Orders for generating stations, including the Hirwaun Generating Station Order 2015, the Progress Power (Gas Fired Power Station) Order 2015 and the Wrexham Gas Fired Generating Station Order 2017 and the Riverside Energy Park Order 2020.

*Article 36 – Statutory undertakers*

- 5.105 Under this article, AUBP may acquire, within the Order limits, land and rights from statutory undertakers (e.g. utilities such as electricity and gas companies) to be agreed and then included and to extinguish their rights over land.
- 5.106 The article is subject to the protective provisions for these set out in Schedule 8 (protective provisions).

*Article 37 - Apparatus and rights of statutory undertakers in stopped up streets*

- 5.107 This article is based on the model provisions and provides for statutory undertakers to retain their rights in respect of their apparatus that is under streets that are stopped up pursuant to article 14 (permanent stopping up of).
- 5.108 Without this article, the statutory undertaker would not have access to the apparatus, because the right of way along the street will have been extinguished. The undertaker may require such a statutory undertaker to relocate the apparatus and the article provides for compensation in such circumstances.

*Article 38 - Recovery of costs of new connections*

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

*Article 39 – Disregard of certain improvements, etc.*

- 5.110 This article provides for the Tribunal to disregard certain interests in and enhancements to the value of land for the purposes of assessing compensation with respect to its compulsory acquisition where the creation of the interest or the making of the enhancement was designed with a view to obtaining compensation or increased compensation.
- 5.111 It complies with section 126 of the 2008 Act as it does not have the effect of modifying or excluding the application of an existing provision relating to compulsory purchase compensation. The article has precedent in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 (article 37), the River Humber Gas Pipeline Replacement Order 2016 (article 29) and the Lake Lothing (Lowestoft) Third Crossing Order 2020 (article 38), and orders under the Transport and Works Act 1992 such as the London Underground (Northern Line Extension) Order 2014 (article 32) and the Midland Metro (Wolverhampton City Centre Extension) Order 2016 (article 35).
- 5.112 The wording of this article mirrors section 4 (assessment of compensation) of the Acquisition of Land Act 1981 (in this paragraph "the 1981 Act"). It is necessary to specifically apply the effect of section 4 of the 1981 Act in the Order. This is because the 1981 Act only applies to a compulsory purchase to which any other statutory instrument has applied its provisions and neither the 2008 Act, nor standard Order provisions, apply 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.

*Article 40 – Set off for enhancement in value of retained land*

- 5.113 This article provides that, in assessing the compensation payable to any person in respect of the acquisition of any land, the Tribunal shall set off against the value of the land any increase in value of any contiguous or adjacent land belonging to that person arising out of construction of the authorised development.
- 5.114 This article complies with section 126(2) of the 2008 Act as it does not have the effect of modifying the application of an existing provision relating to compulsory purchase

compensation. The article has precedent in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 (article 38) and the Lake Lothing (Lowestoft) Third Crossing Order 2020 (article 39), and orders under the Transport and Works Act 1992 such as the London Underground (Northern Line Extension) Order 2014 (article 33) and the Midland Metro (Wolverhampton City Centre Extension) Order 2016 (article 36).

- 5.115 The principle in this article is established in section 7 of the Land Compensation Act 1961 (effect of certain actual or prospective development of adjacent land in same ownership), which needs to be applied. Sections 120(3) and 120(5)(a) 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.

## **Part 6 – Miscellaneous and General**

### *Article 41 - Disapplication of legislative provisions etc.*

- 5.116 This article provides (pursuant to section 120(5)(a) of the 2008 Act) for the disapplication in relation to the authorised development of certain requirements which would otherwise apply under general legislation. Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order.
- 5.117 More specifically, this article provides for the disapplication of various consents which would otherwise be required from the Environment Agency, internal drainage boards or a Lead Local Flood Authority, or under the Environmental Permitting (England and Wales) Regulations 2016, the Water Resources Act 1991 or the Land Drainage Act 1991. The following provisions are disapplied under this article:
- 5.117.1 provisions prohibiting the placing of obstructions in waterways which are not main rivers under the Land Drainage Act 1991;
  - 5.117.2 byelaws made under the Land Drainage Act 1991 regulating the use and obstruction of watercourses; and
  - 5.117.3 requirements for an environmental permit for the carrying on of flood risk activity only.
- 5.118 Paragraph (2) provides for a disapplication in respect of the temporary possession provisions of the Neighbourhood Planning Act 2017. This is required as the relevant sections of the Neighbourhood Planning Act 2017 have not been brought into force and subsidiary regulations to that Act have not yet been made, and there is therefore no certainty as to the requirements of the new temporary possession regime. As such, this enables the temporary possession regime created by this Order to be applied. This approach has been accepted by the Secretary of State in DCOs following the Neighbourhood Planning Act 2017 such as the A19/A184 Testo's Junction Alteration Development Consent Order 2018 (article 2(7)) and more recently the M42 Junction 6 Development Consent Order 2020 (article 49(1)).
- 5.119 Paragraph (3) provides for a disapplication of section 25 of the Burial Act 1847 as provision in respect of the disturbance of human remains is made in article 24.

5.120 Paragraph (4) in effect disapplies the Community Infrastructure Levy Regulations 2010, by making clear that any building comprised in the authorised development is to be deemed to be of a type that does not trigger liability for payment of the Community Infrastructure Levy.

5.121 AUBP has produced a Other Consents and Licences statement (document reference 5.4) as part of this application. This sets out in greater detail the proposed approach to obtaining the other consents required for the Facility.

*Article 42 Amendment of local legislation*

5.122 This article provides (pursuant to section 120(5)(a) of the 2008 Act) for the disapplication of certain requirements which would otherwise apply under specific pieces of local legislation. Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order.

AUBP considers that, in the context of the Facility being of national significance, the Order should be the predominant authorising instrument for the works. The purpose of the regime created by the 2008 Act is to ensure that DCOs provide a unified consent for NSIPs, and the undertaker considers that disapplying and amending certain legislative provisions, as set out in the Order, is proportionate in this context. It is considered proportionate as the provision makes clear that the legislation will only be disapplied insofar as the local legislation is inconsistent with a provision of, or a power conferred by, the Order. The disapplication of local legislation in this manner is precedented (see, for example, article 3 of the Silvertown Tunnel Order 2018).

*Article 43 – Planning permission etc.*

5.123 This article permits certain development authorised by a planning permission granted under the Town and Country Planning Act 1990 that is within the Order limits to be carried out pursuant to the terms of the planning permission without breaching the Order. This provision is not a model provision, but ensures that AUBP does not breach section 161 of the 2008 Act in carrying out certain development pursuant to a grant of planning permission. These provisions have precedent in the M20 Junction 10a Development Consent Order 2017 (article 7) and the A30 Chiverton to Carland Cross Development Consent Order 2020 (article 7).

5.124 Paragraph (2) provides that the land within the Order limits in which AUBP holds an interest shall be treated as “operational land of a statutory undertaker” for the purposes of the Town and Country Planning Act 1990. The effect of that Order land being treated as operational land is that the person responsible for operating and maintaining the Facility (AUBP or any transferee of its powers) will benefit from certain permitted development rights on that land in connection with the operation of the Facility. A similar provision has been included in other made Orders for example article 37 of the Riverside Energy Park Order 2020, article 37 of the A19/A184 Testo’s Junction Alteration Development Consent Order 2018 and article 42 of the A30 to Chiverton to Carland Cross Development Consent Order 2020 followed the same approach. Other DCOs often have this article as a separate article.

5.125 Paragraph (3) clarifies that development consent granted by the Order is to be treated as a specific planning permission for the purposes of regulation 14 of the Town and Country Planning (Tree Preservation) (England) Order 2012 (the 2012 Order) and the Forestry Act 1967. The effect of this is to ensure that the exception in regulation 14(1)(a)(vii) of the 2012

Order, to the carrying out of prohibited activities in respect of TPO trees in regulation 13 of the 2012 Order, applies to activities undertaken under the Order, thus ensuring that there is parity of treatment as between any conventional planning permission and this Order.

- 5.126 This wording is necessary to ensure that AUBP is also able to carry out works to trees which may be designated as TPO trees in future, without being subject to an obligation to obtain the consent of the local planning authority under regulation 13 of the 2012 Order before carrying out those works. Without the provision, there is a risk that AUBP's ability to carry out works to those trees, and therefore to deliver the authorised development, could be frustrated. The wording has been approved by the Secretary of State in previous DCOs (see for example article 40(4) of the National Grid (Richborough Connection Project) Development Consent Order 2017).

*Article 44 - Application of landlord and tenant law*

- 5.127 This article is a model provision which would override landlord and tenant law so far as it would prejudice the operation of any agreement for leasing the whole or part of the authorised development or the right to operate the same or any agreement entered into by the undertaker for the construction, maintenance, use or operation of the authorised development.
- 5.128 This provision is required to ensure that there is no impediment to the construction, use or maintenance of the authorised development.

*Article 45 - Defence to proceedings in respect of statutory nuisance*

- 5.129 This article provides that no one shall be able to bring statutory nuisance proceedings under the Environmental Protection Act 1990 in respect of fumes, gas, dust, steam, smell, accumulations or deposits which are prejudicial to health or a nuisance, artificial light, noise or any other statutory nuisances created in the course of carrying out construction or maintenance of the authorised development or which is an unavoidable consequence of the authorised development.
- 5.130 Paragraph (2) confirms that compliance with the controls and measures described in the Code of Construction Practice or any environmental management plan approved under paragraph 10 of Schedule 2 will be sufficient, but not necessary, to show that an alleged nuisance could not reasonably be avoided. This is an article that has precedent in recent highway DCOs made, for example article 38 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 (and paragraph (2) is based on article 41(2) of the Southampton to London Development Consent Order 2020) and is necessary to clarify the scope of the defence of statutory authority arising from the grant of the Order.

*Article 46 - Protective provisions*

- 5.131 This article provides for Schedule 8, which protects the interests of certain statutory undertakers, to have effect.

*Article 47 – Deemed marine licence*

- 5.132 This article constitutes deemed consent (as provided for under section 149A of the 2008 Act) under section 65 of the Marine and Coastal Access Act 2008. Schedule 9 sets out the terms on which the licence would be granted. The overall structure of this licence reflects that found

in Schedule 15 to the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014, Schedule 12 of the Silvertown Tunnel Order 2018, and Schedule 12 of the Lake Lothing (Lowestoft) Third Crossing Order 2020 and Schedule 13 of the Great Yarmouth Third River Crossing Development Consent Order 2020.

*Article 48 - Certification of documents, etc.*

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

*Article 49 - Service of notices*

- 5.134 This article, governs how any notices that may be served under the Order are deemed to have been served properly. In particular it allows service by email with the consent of the recipient, and deals with the situation of service on an unknown landowner. The provision is necessary because the service of notice provisions under sections 229 and 230 of the 2008 Act only apply to notices served under the 2008 Act itself and do not apply to notices served under the Order. This Article has precedent in a number of orders, for example, the Riverside Energy Park Order 2020 and the Immingham Open Cycle Gas Turbine Order 2020.

*Article 50 - Arbitration*

- 5.135 This article governs what happens when two parties disagree in the implementation of any provision of the Order, except where expressly agreed otherwise. The matter is to be settled by arbitration, and if the parties cannot agree on who the arbitrator should be, this is decided by the President of the Institution of Civil Engineers. Precedent is provided by most DCOs.

*Article 51 - Procedure in relation to approvals, etc., under Schedule 2*

- 5.136 This article contains additional provisions in respect of any approval, consent or agreement which is required to be given under the Order. It provides that any such approval, consent or agreement given by the relevant body must be given in writing.
- 5.137 It also provides that the procedures set out in Schedule 2 (requirements) apply to any consent, agreement or refusal which needs to be obtained under the Requirements set out in Schedule 2 and any other consents required under the Order. The article clarifies the procedure which applies in respect of these additional consents.
- 5.138 Part 2 of Schedule 2 (procedure for discharge of requirements) sets out the appeal process in relation to such matters and where an appeal can be made to the Secretary of State to discharge matters including the requirements in Schedule 2 (requirements) and other consents or approvals required under the Order.
- 5.139 This article and associated Schedule 2 (requirements) reflect the approach taken in the National Grid (North London Reinforcement Project) Order 2014 (article 45 and Schedule 3).
- 5.140 This appeal process is considered proportionate and justified in light of the size and scale of the authorised development proposed by the Order to ensure the delivery of the authorised development.



*Article 52 – No double recovery*

- 5.141 This article provides that compensation is not payable both under this Order and any other enactment, contract or other rule of law. It follows that well established principle of equivalence that a claimant is compensated for no more and no less than their loss.
- 5.142 This article has precedent in the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014, the National Grid (Richborough Connection Project) Development Consent Order 2017, the North London Heat and Power Generating Station Order 2017 and the Riverside Energy Park Order 2020.

*Article 53 - Guarantees in respect of payment of compensation*

- 5.143 This article relates to the funding mechanism for compulsory acquisition. This requires that before the powers of compulsory acquisition are exercised, AUBP must put in place either a guarantee or an alternative form of security. This wording is based on the Wrexham Gas Fired Generating Station Order 2017 and the Riverside Energy Park Order 2020.

## **6 SCHEDULES**

- 6.1 **Schedule 1 (Authorised development)** - specifies numbered works comprised in the authorised development (the NSIP) for which development consent is sought and other associated development works . The works should be read alongside the works plans.
- 6.2 **Schedule 2 (Requirements)** - contains draft 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 development had it not fallen within the regime of the Act. The requirements have a similar purpose to planning conditions.
- 6.3 Requirement 1 (Interpretation) contains a number of definitions used in Part 1 of Schedule 2.
- 6.4 Requirement 2 (Time limits) provides that the authorised development must not commence later than 5 years from the date of the Order coming into force.
- 6.5 The effect of Requirement 3(1) is that, where the authorised development is carried out, it must be carried out in accordance with the design principles contained in the Design and Access Statement (document reference 5.3) and the preliminary scheme design shown on the Indicative Generating Station Plans (document reference 4.9) and Indicative Wharf Plans (document reference 4.11) unless otherwise agreed in writing by the relevant planning authority, provided that any amendments to those documents showing departures from the preliminary scheme design would not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement.
- 6.6 Requirement 3(1) allows for a proportionate and acceptable level of flexibility in the final design of the Facility, something that is considered necessary and appropriate in delivering complex major infrastructure projects such as this, where an appropriate degree of flexibility is in the public interest. Importantly, that flexibility is limited to the scope of the assessment.
- 6.7 AUBP emphasises that Requirement 3(1) links any such changes to the environmental effects reported in the Environmental Statement and so that which is permitted by Requirement 3 can

be distinguished from the provisions concerning “tailpiece” provisions in paragraphs 17.3 to 17.6 of Advice Note Fifteen.

- 6.8 Requirement 4 (Parameters of authorised development) This requirement requires that the authorised development must not exceed the maximum dimensions and, where applicable, the minimum dimensions as set out in Table 1. This requirement ensures that the authorised development does not exceed the envelope that has been assessed by the Environmental Statement (document reference 6.2, 6.3, 6.4).
- 6.9 Requirement 5 (Landscape and ecological mitigation strategy) prevents any part of the authorised development from commencing until landscape and ecological mitigation strategy has been submitted to and approved by the relevant planning authority, following consultation by the undertaker with the Environment Agency, Natural England, Lincolnshire Wildlife Trust and the Royal Society for the Protection of Birds. The requirement is drafted to enable AUBP to submit a strategy in respect of the part of the authorised development that it wants to "commence", without having to provide a strategy covering all parts. Therefore, the requirement could be discharged through one strategy or multiple strategies. The requirement requires the submitted strategy or strategies to be substantially in the accordance with the outline landscape and ecological mitigation strategy (which is a certified document under article 48. The requirement also lists certain items that the strategy must contain. The strategy / strategies is/are to be implemented as approved.
- 6.10 Requirement 6 (Archaeology) prevents any part of Work Numbers 1, 2, 3, 4, 5 and 6 from commencing until a written scheme of investigation for that part has been submitted to and approved by the relevant planning authority. The submitted scheme of investigation is required to reflect the relevant mitigation measures set out in the Outline Written Scheme of Investigation (document reference 7.3). Any archaeological investigations must be carried out in accordance with the approved scheme and by a suitably qualified person or organisation approved by the planning authority.
- 6.11 Requirement 7 (Highway access) provides that no part of Work Number 7 may commence until details of the siting, design and layout of any new or temporary means of access to a highway in that part or any alteration to an existing means of access to a highway in that part have been submitted to and approved by the relevant planning authority.
- 6.12 Requirement 8 (Surface and foul water drainage) provides that no part of the authorised development may commence until for that part a surface water drainage strategy has been submitted to and approved by the relevant planning authority, following consultation with the Environment Agency, lead local flood authority and relevant internal drainage board on matters related to their function. The requirement requires the strategy to be substantially in accordance with the information set out in the Flood Risk Assessment (document reference 6.4.13). The strategy be implemented as approved and maintained throughout operation unless otherwise agreed with the relevant planning authority.
- 6.13 Requirement 9 (Ground conditions and ground stability) provides that no part of authorised development may commence until intrusive geotechnical and geo-environmental ground investigations have been carried out. The ground investigations must be substantially in accordance with a sampling plan that sets out the approach to sampling to gather sufficient data to undertaker a generic quantitative risk assessment as set out in Chapter 11 of the Environmental Statement (document reference 6.2.11), which is a certified document under

article 48 and Schedule 10. The outcomes of the ground investigations must be taken into account in the preparation of the code of construction practice.

- 6.14 Requirement 10 (Code of construction practice) prevents any part of the authorised development from commencing until a code of construction practice has been submitted to and approved by the relevant planning authority. The requirement is drafted to enable the undertaker to submit the code in respect of the part of the authorised development that it wants to "commence", without having to provide a code covering all parts. Therefore, the requirement could be discharged through one code or multiple codes. The requirement requires the submitted code or codes to be substantially in accordance with the outline code of construction practice (which is a certified document under article 48 and Schedule 10) and must reflect the mitigation measures set out in the Register of Environmental Actions and Commitments (document reference 7.6). The requirement also lists certain items that it must contain. The code/codes is/are to be implemented as approved.
- 6.15 Requirement 11 (Construction Hours) specifies the hours in the day within which all construction work associated with the authorised development must be carried out. The restrictions do not apply to work that is approved in advance by the relevant planning authority, is within existing or new buildings, is associated with an emergency or is associated with slip form working.
- 6.16 Requirement 12 (Construction traffic management plan) restricts any part of the authorised development from commencing until a construction traffic management plan has been submitted to and approved by the relevant planning authority. The requirement also lists certain items that it must contain. The plan is to be implemented as approved.
- 6.17 Requirement 13 (Flood risk emergency plan) provides that no part of the authorised development may commence until a flood risk emergency plan has been submitted to and approved by the relevant planning authority following consultation with a number of listed bodies. It lists the items it must include and requires the plan to be implemented as approved.
- 6.18 Requirement 14 (Navigation management plan) provides that no part of Work Number 4 may commence until for that part a navigation management plan has been submitted to and approved by the relevant planning authority, following consultation with the Port of Boston. It lists the items it must include and requires the plan to be implemented as approved.
- 6.19 Requirement 15 (Operational lighting scheme) prevents any part of Work Numbers 1, 2, 3, 4 and 5 from commencing until a written scheme for the management and mitigation of operational external light emissions for that part has been submitted to and approved by the relevant planning authority. The requirement requires the submitted scheme to be substantially in accordance with the outline lighting strategy. The scheme is to be implemented as approved.
- 6.20 Requirement 16 (Community benefits) provides for a plan detailing the arrangements to promote employment, skills and training development opportunities for local residents during construction and employment opportunities during operation of the authorised development to be submitted to and approved by the relevant planning authority. The plan is to be implemented and maintained as approved.
- 6.21 Requirement 17 (Phasing of construction and commissioning of Work Nos.1 and 2) provides that no part of the authorised development may commence until a phasing programme setting

out the commencement of construction and the anticipated start of commissioning and the anticipated date of final commissioning for each of Work Nos. 1 and 2 has been submitted to and approved by the relevant planning authority. The phasing programme must provide for the anticipated date of final commissioning as soon as reasonably practicable and it must be implemented as approved.

- 6.22 Requirement 18 (Waste hierarchy scheme) requires that prior to commissioning, the undertaker must submit to the relevant planning authority for approval a scheme, which sets out arrangements for maintenance of the waste hierarchy in priority order and which aims to minimise recyclable and reusable waste received at the authorised development during the commissioning and operational period of the authorised development. It lists the items it must include and requires the plan to be implemented as approved.
- 6.23 Requirement 19 (Control of operational noise) requires that prior to commissioning any part of Works Numbers 1, 2, 3, and 4 a written noise monitoring scheme must be submitted to and approved by the relevant planning authority and lists the items it must include. The noise level at each monitoring location must not exceed the permitted level specified for that location in the scheme except for in the circumstances specified in the requirement.
- 6.24 Requirement 20 (Notice of start of commissioning and notice of date of final commissioning) requires the undertaker to give notice to the relevant planning authority of the intended start of commissioning of Work Number 1A, with notice of the actual start of commissioning being given not later than 7 days from the actual start. Within 7 days of completing final commissioning, the undertaker is to provide the relevant planning authority with notice of the date upon which the commissioning process was duly completed (which can clearly be monitored by the processes being carried out at the plant). This requirement assists the relevant planning authority in monitoring the requirements.
- 6.25 Requirement 21 (Combined heat and power) requires the undertaker to submit to the relevant planning authority for its approval a report (CHP review) updating the combined heat and power assessment. It sets out what the CHP review must include and requires the undertaker to take the actions identified in the CHP review. It requires the submission of revised CHP reviews.
- 6.26 Requirement 22 (Decommissioning) requires that within 24 months of the permanent cessation of operation of Work Numbers 1 and 2 a scheme for the restoration and aftercare of land for Work Numbers 1, 2, 3, 5 and 6 must be submitted to and approved by the relevant planning authority. It sets out what the scheme must include. Sub-paragraph (2) requires that the scheme must also identify provision for the ongoing maintenance and aftercare of Work 4, which will remain in situ to maintain the appropriate level of flood defence, and the mitigation works contained within the habitat mitigation area, which will remain in situ to provide habitat for redshank and other bird species. The scheme is to be implemented in accordance with the phasing set out therein.
- 6.27 Requirement 23 (Amendments to approved details) allows the relevant planning authority to approve amendments to certified documents, the parameters in requirement 4, and other details, schemes or plans approved by the relevant planning authority. This is to allow flexibility in the detailed design stage, however this flexibility is given strict parameters in that it only applies to the extent the subject matter of the approval is unlikely to result in materially new or materially different effects to those assessed in the Environmental Statement (document

reference 6.2, 6.3 and 6.4). A similar Requirement appeared in the Progress Power (Gas Fired Power Station) Order 2015 and the Riverside Energy Park Order 2020.

- 6.28 Requirement 24 (Electricity generation cap) provides that authorised development must not generate more than 300 megawatts unless otherwise agreed by the relevant planning authority. This allows for the generating capacity to of the Facility to increase within the strict limited that the relevant planning authority is satisfied that any increase would not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement. This allows for a proportionate level of flexibility if in the future technology improvements allow for a greater amount of renewable energy to be generated with no materially different effects to those assessed.
- 6.29 Requirement 25 (Tonnage caps) specifies a number of annual tonnage caps for waste, bottom ash and aggregate. These must not be exceeded unless otherwise agreed by the relevant planning authority provided that the relevant planning authority is satisfied that any increase would not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement (document reference 6.2, 6.3 and 6.4). Like Requirement 24 this is designed to allow for a proportionate level of flexibility if technology improves such that an increased amount of waste can be processed with no materially different effects to those assessed.
- 6.30 Part 2 of Schedule 2 (Procedure for discharge of requirements) applies to any consent, agreement or refusal which needs to be obtained under the Requirements set out in Part 1 of Schedule 2 or under any other provision of the Order. It clarifies the procedure which applies in respect of these additional consents.
- 6.31 **Schedule 3 (Streets subject to street works)** sets out the streets referred to in article 10 subject to street works.
- 6.32 **Schedule 4 (Streets subject to alteration of layout)** sets out the streets, referred to in article 12 and article 15, the layouts of which are subject to permanent or temporary alterations.
- 6.33 **Schedule 5 (Temporary closure, alteration, diversion and restriction of the use of streets)** sets out the streets and public rights of way which are subject to temporary closure, alteration, diversion or restriction under article 13.
- 6.34 **Schedule 6 (Permanent stopping up of streets)** sets out the public rights of way subject to a stopping up order article 14.
- 6.35 **Schedule 7 (Land of which temporary possession may be taken)** sets out the land referred to in article 35 which AUBP may temporarily occupy and the purpose for which that temporary occupation may be taken.
- 6.36 **Schedule 8 (Protective provisions)** sets out the provisions for the protection of statutory undertakers affected by the authorised development. Part 1 provides protection for the electricity, gas, water and sewerage undertakers. Part 2 provides protection for operators of electronic communications code networks. Part 3 provides protection for highways and traffic. Part 4 provides protections for the Environment Agency. Part 5 provides protection for drainage authorities.
- 6.37 These are draft provisions and subject to change.

- 6.38 **Schedule 9 (Deemed marine licence)** sets out the terms of the marine licence. The works to create the wharf and berthing pocket, will result in the extent of the area below mean high water springs increasing during the construction period and this has been taken into account in specifying the licensable marine activities in Part 2 of the deemed marine licence. The final form of the deemed licence has not yet been agreed. The Applicant is engaged in ongoing discussions with the MMO regarding the terms of, and any conditions attached to, the deemed licence.
- 6.39 **Schedule 10 (Documents and plans to be certified)** lists the documents and plans to be submitted with the application and to be certified by the Secretary of State. The list is subject to change.