

Planning Act 2008

Marine and Coastal Access Act 2009

**The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations
2009 Regulation 5(2)(c)**

The Proposed Tidal Lagoon Swansea Bay (Generating Station) Order

Explanatory Memorandum

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Introduction

1. This memorandum accompanies an application for development consent (the "Application") by Tidal Lagoon Swansea Bay plc ("TLSB"). The memorandum explains the purpose and effect of each article of, and Schedule to, the draft Tidal Lagoon Swansea Bay (Generating Station) Order (the "Order") as required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009.
2. It also highlights and explains the purpose and effect of any departures from the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (the "model provisions") as recommended by Planning Inspectorate Advice Note 13 *Preparation of a draft order granting development consent and explanatory memorandum*. It is noted that this advice does not constitute formal guidance to which regard must be had under section 50 of the Planning Act 2008 ("PA 2008") and that the Localism Act 2011 removed the requirement for the decision-maker to have regard to the prescribed model provisions in deciding an application for development consent. Nevertheless, as stated by the Planning Inspectorate in Advice Note 13, the model provisions are intended as a guide for applicants in drafting orders, rather than a rigid structure, and have been treated as such.
3. The Order is based on the model provisions but occasionally departs from those clauses and draws from and reflects the drafting used in previous development consent orders and orders made under the Transport and Works Act 1992 and Harbours Act 1964.

The purpose of the Order

4. TLSB (referred to in the Order as "the undertaker") has made an application for development consent to the Secretary of State for Energy and Climate Change (the "Secretary of State") to construct and operate a tidal powered generating station, with a nominal rated capacity of 240 MW, on land in and adjacent to Swansea Docks between the dredged channels of the Rivers Tawe and the Neath and in Swansea Bay (the "Project").

5. The Project is an offshore generating station. It is a tidal range scheme, comprising of offshore works, onshore works, and a cable and grid connection. The Project consists of an irregular U-shaped seawall that will enclose the seabed and foreshore from the eastern bank of the River Tawe to the south-eastern corner of the new Swansea University Bay Campus, which is currently under construction. The impounded area of water will be approximately 11.5km² contained by a seawall that is around 9.5km in length. It is intended that the full extent of the Project will be accessible to the public at certain times for use as an education, leisure and sporting facility.
6. These elements are described more fully below. It also seeks powers for that purpose compulsorily, or by agreement, to acquire land or rights in land pursuant to section 120 of the PA 2008.
7. The Order also seeks powers under section 120(3) and (4) and Part 1 of Schedule 5, paragraph 2, to the PA 2008 to authorise the creation, extinguishment and interference with interests in or rights over land.
8. The proposed output of the Project would be in excess of 100 MW and therefore, whilst being offshore, it is classified as a nationally significant infrastructure project (“NSIP”) for the purposes of sections 14 and 15 of the PA 2008. Under the PA 2008, an application for development consent is required under s37 to authorise construction and operation for such a generating station. Consequently, the undertaker has made the Application for development consent to the Secretary of State (by way of the Planning Inspectorate) of which the draft Order forms part.

Compulsory acquisition powers

9. The Order also seeks powers of compulsory acquisition for land required for the Project, or to facilitate, or that is incidental to the Project under section 122 of the PA 2008. It also seeks associated powers including the acquisition of rights to construct and maintain the Project. A justification for these powers is set out in full in the Statement of Reasons that accompanies the Application.
10. The Order also seeks to apply and modify statutory provisions in relation to the compulsory acquisition of land. For this reason, under sections 117 and 120(5) of the

PA 2008, the Order must be made by Statutory Instrument. The Order is, therefore, drafted in that form and complies with current requirements for formatting of Statutory Instruments.

PRELIMINARY

Articles 1 and 2 of the Order contain preliminary provisions.

Article 1 (Citation and Commencement) provides for the commencement and citation of the Order.

Article 2 (Interpretation) provides for the interpretation of the Order. Amongst other things, this article defines maintenance as including maintain, inspect, repair, adjust, alter, remove, clear, refurbish, reconstruct, decommission, demolish, replace and improve. This provides for greater clarity elsewhere in the Order in relation to the powers of the undertaker. A definition of "commence" has also been inserted to clarify the preliminary works that may be carried out before the authorised development can be said to be commenced.

OPERATIVE PROVISIONS

Articles 3 to 51 of the Order contain provisions for and relating to the authorised development, the compulsory acquisition of land and rights and miscellaneous and general provisions.

Article 3 (Development consent etc. granted by the Order) grants development consent for the authorised development within the Order limits thereby authorising the construction of the authorised development. The authorised development means the development under sections 14(1)(a) and 15(3) of the PA 2008. In identifying the development authorised by this Order *Article 3* also makes provision for the works authorised by this Order to be constructed in the lines or situations shown on the works plans and for the numbered works specified in *Schedule 1* to the Order to be constructed within the limits of deviation shown on the works plans. It provides greater clarity in relation to the individual works shown on the drawings and reflects the way in which the authorised development is composed of the respective works. This is a

standard approach used in hybrid bills and Orders made under the Transport and Works Act 1992 and the Harbours Act 1964. It is also an appropriate approach here. The authorised development is also to be carried out in accordance with the requirements set out in Part 2 of *Schedule 1* (authorised development).

Article 4 (Non-material changes) provides for section 96A of the Town and Country Planning Act 1990 to apply to proposed changes to the Order but only in relation to articles 3, 5, 7, 39 and Part 3 of Schedule 1 to the Order.

Article 5 (Maintenance of authorised development) provides for the maintenance of the authorised development within the Order limits. It includes provisions to reflect the particular needs that will arise in relation to the maintenance of the authorised development itself. This includes the carrying out and maintenance of such works as may be necessary or expedient for the purposes of, or for purposes ancillary to, the construction of the authorised development including, amongst other things, altering the position of apparatus and works of decommissioning and demolition. The matters to which this power relates are not exhaustive and would not entitle the undertaker to do anything outside the scope of the authorised development.

Article 6 (Operation of Generating Station) authorises specifically the undertaker to operate the authorised development in accordance with the provisions of this Order or an agreement made under this Order. It is included pursuant to section 140 of the PA 2008.

Article 7 (Benefit of the Order) enables with the consent of the Secretary of State agreements to be made between the undertaker and other persons for the transfer or grant of any or all of the benefit of the provisions of this Order and such related statutory rights as agreed between the undertaker and the other person. However the benefit of *Articles 9 to 11, 13 to 34 and 39* is not ordinarily transferable as it is important that the public should be aware of the identity of the person in whom such powers are vested.

- Article 8* (*Defence to proceedings in respect of statutory nuisance*) provides that no one shall be able to bring statutory nuisance proceedings under the Environmental Protection Act 1990 in respect of noise, if (a) the nuisance is created in the course of carrying out or maintenance of the authorised development and for which notice has been given under section 60 or consent obtained under section 61 or 65 of the Control of Pollution Act 1974 or which is not reasonably avoidable or (b) the nuisance relates to premises being used in accordance with a monitoring scheme.
- Article 9* (*Street works*) confers authority on the undertaker to interfere with and execute works in or under the streets specified in *Schedule 2 (streets subject to street works)* within the Order limits and for the purposes of the authorised development. The authority given by this article is a statutory right for the purposes of section 48(3) (streets, street works and undertakers) and 51(1) (prohibition of unauthorised street works) of the New Roads and Street Works Act 1991. Certain provisions of the 1991 Act apply to works carried out under this article.
- Article 10* (*Temporary stopping up of streets*) provides for the temporary stopping up of streets subject to the consent of the local highway authority concerned which may attach reasonable conditions to any such consent or, in the case of the temporary stoppages of those streets specified in *Schedule 3 (streets to be temporarily stopped up)* to this Order, following consultation with the local highway authority. Reasonable access must be provided to pedestrians in some circumstances.
- Article 11* (*Access to works*) confers powers for the purposes of the authorised development to provide or improve access at the location specified in *Schedule 4 (access to works)* or in the case of other locations within the Order limits provided that approval of the relevant planning authority following consultation with the highway authority is obtained.

- Article 12 (Agreements with street authority)* authorises street authorities and the undertaker to enter into agreements relating to the carrying out of works in the street and the stopping up, alteration or diversion of streets.
- Article 13 (Discharge of water)* enables the undertaker to discharge water into any watercourse, public sewer or drain in connection with the construction and maintenance of the authorised development with the approval and superintendence (if provided) of the authority to which the watercourse, public sewer or drain belongs (such approval not to be unreasonably withheld) and subject to certain other conditions. For the purposes of this article, and in light of the particular circumstances of the authorised development, the definition of watercourse includes tidal waters within Swansea Bay in order that the undertaker can discharge into Swansea Bay, subject to the conditions relating to other discharges into controlled waters.
- Article 14 (Protective work to buildings)* enables the undertaker to carry out protective works to any building within the Order limits as may be necessary or expedient. Provision is included for the payment of compensation for loss and damage.
- Article 15 (Authority to survey and investigate the land)* confers upon the undertaker a power to survey and/or investigate land. The power includes an ability to make trial holes, to use and leave apparatus on the land in question and to enter on land. *Article 15* also makes provision in relation to the payment of compensation.
- Article 16 (Right to dredge)* enables the undertaker to dredge and dispose of dredged materials. Any disposal of dredged material is subject to conditions approved or prescribed by Natural Resources Wales, and the power granted is only exercisable after consultation with the relevant port authority.
- Article 17 (Tidal works not to be executed without the approval of the Welsh Government)* requires the undertaker to seek the approval of the relevant

enforcing authority, in this case Natural Resources Wales Marine Licensing Team, for any tidal works to be constructed, reconstructed, extended, enlarged, replaced or relaid if not commenced five years from the date of the Order coming into effect. However, such approval of the Welsh Government is not required where a suitable marine licence has been granted in respect of such tidal work.

Article 18 (*Abatement of tidal works abandoned or destroyed*) provides for the relevant enforcing authority to require the undertaker to repair or restore at its own expense any tidal works abandoned or suffered to fall into decay, and which includes any works consisting partly of works on or over the land above the level of high water which may interfere with the right of navigation of other public rights over the foreshore.

Article 19 (*Survey of tidal works*) allows the Welsh Government to order a survey at the undertaker's expense of a tidal work or of land on which a tidal work is proposed be constructed.

Article 20 (*Lights on tidal works etc. during construction*) requires the undertaker to exhibit lights between sunset and sunrise on any tidal work or on any plant or equipment in the seaward construction area during construction.

Article 21 (*Provision against danger to navigation*) requires the undertaker to notify Trinity House in cases of damage or destruction to a tidal work and lay buoys and/or exhibit lights to prevent any danger to navigation.

Article 22 (*Permanent lights on tidal works*) requires the undertaker to exhibit lights at the outer extremity of a tidal work from sunset to sunrise.

Article 23 (*Compulsory acquisition of land*) authorises the undertaker to acquire the land listed in the book of reference and to use it for the purposes authorised by the Order. Articles 3 and 6 of the Order authorise the construction and operation of the authorised development. Therefore, under section 158 of the PA 2008, the undertaker has statutory authority to construct and operate the authorised

development even where in doing so the undertaker breaches or interferes with rights and restrictive covenants which may burden the land.

Article 24 (*Statutory authority to override easements and other rights*) provides that by virtue of section 158 of the PA 2008 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 the land and affecting any other land including any natural right to support, or breach any restriction as to user of land arising by virtue of contract. It also provides that by virtue of section 152 of the PA 2008, compensation may be payable under section 10 of the Compulsory Purchase Act 1965 for any such interference or breach.

Article 25 (*Power to override easements and other rights*) authorises the undertaker to take land discharged of the benefit of restrictive covenants and instances where land subject to third party rights is acquired by agreement, in addition to the power to take free from all rights, trusts and incidents conferred by *Article 28* of the Order.

The power on which reliance is placed to authorise extinguishment, etc. is section 120(3) and (4) and paragraphs 2 (creation, suspension, extinguishment, etc. of interests in or rights over land) and 3 (the abrogation or modification of agreements relating to land) of Schedule 5 of the PA 2008. In reliance on this power, section 237(1) of the Town and Country Planning Act 1990 ("1990 Act") has been applied in an amended form in order to reflect the provisions of that section as inserted by Schedule 9, paragraph 4 of the PA 2008. As such, there is no requirement for separate drafting analogous to sub-sections (1) and (1A) of section 237 of the 1990 Act. The relevant activities equivalent to these sections are set out in *Article 25(2)*.

Article 25(1) provides for the statutory successors of the undertaker to benefit from this power as well as persons deriving title under them. This is appropriate given the different status and roles of the undertaker and local authorities, to the latter of which section 237 of the 1990 Act ordinarily

applies. It enables the interest of the undertaker to be treated appropriately within the undertaker's group companies, subject always to the provisions of the Order.

Article 25(2) is notable for including paragraph c. This means that the change of use of the land subject to the provision to enable its use for (inter alia) generation of electricity, is also covered by this article. This reflects the text inserted by the PA 2008 into section 237 of the 1990 Act.

Article 25(3) reflects section 237(2) of the 1990 Act. No drafting is included analogous to section 237(3) of the 1990 Act, because it may be necessary to alter the apparatus of statutory undertakers using the powers of this Order. Protective provisions should be sought by affected statutory undertakers should they be concerned about the effect of this provision.

Article 25(4) is included for the purposes of clarity.

Article 25(5) deals with compensation and is drawn from and reflects section 237(4) of the 1990 Act.

Drafting reflecting sub-sections 237(5) and (6) of the 1990 Act has not been included in *Article 25*. This is because it is not appropriate, where the undertaker parts with its undertaking in respect of the authorised development, for it to retain a residual liability. It is more appropriate for that liability to devolve upon the person that is for the time being the relevant statutory undertaker and/or landowner.

Article 25 includes text at *Article 25(6)* which reflects the drafting in section 237(7) of the 1990 Act.

Article 25(7) has been inserted to clarify that this power does not apply to section 106 or section 278 Agreements under the 1990 Act.

Article 26 (*Private rights of way*) provides for the extinguishment of private rights of way over land subject to compulsory acquisition and provides for the payment of compensation for persons who suffer loss as a result. The article excludes

the rights of statutory undertakers and also those rights that have been expressly notified as not being subject to the extinguishment by the undertaker.

Article 27 (*Time limit for exercise of authority to acquire land compulsorily*) imposes a time limit of five years from the Order coming into effect for the exercise of the proposed powers of acquisition and possession.

Article 28 (*Compulsory acquisition of rights*) empowers the undertaker to acquire existing rights or create new rights in the Order land and for land to be discharged from any rights upon acquisition or vesting. It provides for the payment of compensation to be determined in the case of dispute before the Lands Chamber of the Upper Tribunal.

Article 29 (*Application of the Compulsory Purchase (Vesting Declarations) Act 1981*) provides for the application, with modifications, of the Compulsory Purchase (Vesting Declarations) Act 1981 which contains vesting procedures for land subject to compulsory purchase.

Article 30 (*Acquisition of subsoil only*) authorises the undertaker to acquire so much of, or such rights in, the subsoil of any land referred to in *Article 23* compulsorily. It confirms that in such circumstances the undertaker would not be required to acquire an interest in any other part of that land.

Article 31 (*Acquisition of part of certain properties*) enables the undertaker to acquire a part rather than the whole of properties subject to compulsory acquisition and contains a procedure enabling the relevant owner in certain circumstances to require the whole to be taken, with disputes being determined by the Lands Chamber of the Upper Tribunal. This provision would substitute section 8(1) of the Compulsory Purchase Act 1965.

Article 32 (*Rights under or over streets*) provides that the undertaker may use a street for the authorised development without being required to acquire any part of the street or any easement or right in the street subject to certain provisions for compensation.

Article 33 (*Temporary use of land for carrying out the authorised development*) provides that the undertaker may enter upon and take possession of land specified in *Schedule 5 (land of which temporary possession may be taken)* relating to specified parts of the construction of the authorised development. It may also carry out other activities set out in the article, including works of mitigation, without a requirement that they be removed. This enables mitigation works to remain in place without the undertaker needing to retain a permanent interest in the land. The article includes notice provisions that the undertaker must comply with, and requirements for the restoration of any such land used in this way. This power would be used (*inter alia*) for dredging, installation of the electrical grid connection and access provisions. Provision is made for compensation.

Article 34 (*Temporary use of land for maintaining authorised development*) provides that the undertaker may take temporary possession of land specified in *Schedule 5 (land of which temporary possession may be taken)* to the Order reasonably required for the purpose of maintaining the authorised development and to construct such temporary works and buildings on the land as may be reasonably necessary for that purpose during a period of five years from the date on which that part of the authorised development is first opened for use. Provision is also made for compensation.

Article 35 (*Statutory undertakers*) applies provisions relating to statutory undertakers contained in the 1990 Act and would give the undertaker the power to extinguish rights of statutory undertakers, subject to certain conditions, in relation to land acquired, appropriated, used or about to be used by the undertaker. This provides for a more general power, where it may be impracticable to specify all relevant apparatus in the book of reference and on land plans.

Article 36 (*Railway and navigation undertakings*) provides that except in the case of emergency, the undertaker is not permitted to break up or open a street (not being a highway maintainable at public expense) controlled, managed or maintained by a railway undertaker or forming part of a level crossing

belonging to a railway undertaker or a navigation authority or to any other person unless with the consent of the relevant undertaker, authority or person.

Article 37 (*Application of landlord and tenant law*) overrides the application of landlord and tenant law in so far as it may prejudice the operation of any agreement for leasing the whole or part of the authorised development or the right to operate the same and any agreement for the construction, maintenance, use or operation of the authorised development or any part of it entered into by the undertaker.

Article 38 (*Operational land for purposes of 1990 Act*) provides that for the purposes of section 264(3)(a) of the 1990 Act the development consent granted by the Order shall be treated as specific planning permission.

Article 39 (*Felling or lopping of trees*) enables the undertaker to fell or lop trees and shrubs for the purposes of preventing obstruction or interference with the authorised development. Provision is included for the payment of compensation for loss and damage.

Article 40 (*Disapplication of the Commons Act 2006*) provides that the provisions of the Commons Act 2006 in relation to new registration of town and village greens, or non-registration or mistaken registration of greens under the Registration of Commons Act 1965 shall not have effect in respect of the Order land.

Article 41 (*Disapplication of the Energy Act 2004*) provides that the authorised development may be considered a "renewable energy installation" for the purposes of the Energy Act 2004 by disapplying the relevant element of the definition section 104(4)(b) which states that the definition of renewable energy installation included that "it is not connected with dry land by a permanent structure providing access at all times for all purposes". In being considered as a renewable energy installation, the authorised development may be subject to a requirement by the Secretary of State to submit a programme for decommissioning under section 105 of the Energy Act 2004. Article 40(2) limits the scope of what such a decommissioning programme may comprise.

- Article 42* (*Development consent obligation*) provides for the undertaker to enter into an obligation expressed to be under section 106 of the 1990 Act in respect of land in which the undertaker does not have an interest. Any such planning obligation will take effect from the date of the undertaker's acquisition of an interest in the relevant land, or at the date of commencement of development authorised by the Order, whichever date is the earlier.
- Article 43* (*Development consent obligation - enforcement*) makes provision for enforcement of any obligation entered into under *Article 42* by a specified planning authority other than the planning authority for which the land bound is situated.
- Article 44* (*Byelaws*) provides for the undertaker to make byelaws for the efficient management and regulation of the authorised development subject to confirmation by the Secretary of State. The article sets out those matters for which byelaws may make provision. The byelaws may include provisions making a breach of the byelaws a summary offence with a fine not exceeding level 3 on the standard scale. The procedure for making and confirming byelaws is modelled on that used for local authority byelaws under section 236 of the Local Government Act 1972.
- Article 45* (*Procedure in relation to certain approvals, etc.*) provides that any consent or approval from a consenting body required by the provisions of the order shall be given in writing and not unreasonably withheld and gives effect to *Schedule 6* to the Order which sets out the procedure for the discharge of requirements. The derivation of this provision is set out below in relation to *Schedule 6*.
- Article 46* (*Certification of plans etc*) requires the undertaker to submit copies of the book of reference, land plans and work plans referred to in the Order to the decision-maker for certification as true copies following the making of the Order.
- Article 47* (*Arbitration*) makes provision for differences arising under any provision of the Order other than those referred to in the Lands Chamber of the Upper

Tribunal, and unless otherwise agreed between the parties, to be settled by arbitration.

Article 48 (Planning, etc. jurisdiction) provides that the area within the Order limits shall accrete to the relevant local planning authority the City and County of Swansea from the date on which the Order comes into effect until the date when the authorised development is completed for the purposes of the 1990 Act and the Control of Pollution Act 1974. This confers on the local planning authority powers of enforcement for those offshore areas ordinarily outwith its administrative jurisdiction.

Article 49 (Saving for Trinity House) provides that nothing in the Order prejudices or derogates from any of the rights, duties or privileges of Trinity House.

Article 50 (Protection of Interests) gives effect to *Schedule 7 (Protective Provisions)*.

Article 51 (Crown Rights) contains a saving for Crown land which enforces the protections contained in the PA 2008, being that no land or interest belonging to the Crown can be acquired, used or otherwise interfered with, except with the consent of the relevant Crown authority.

Schedule 1 (Authorised development) Part 1 of this Schedule specifies the authorised development comprising the scheduled works; Part 2 of the Schedule specifies the building heights of the various elements of the authorised development given as heights above ordnance datum; and Part 3 of the Schedule sets out certain requirements that the undertaker must meet in relation to the construction and operation of the authorised development. These requirements take a similar form to planning conditions.

Schedule 2 (Streets subject to street works - Article 9) sets out those streets subject to street works.

Schedule 3 (Streets to be temporarily stopped up - Article 10) specifies the streets to be temporarily stopped up.

- Schedule 4* (Access to works - Article 11) sets out the new access to be constructed as part of the works.
- Schedule 5* (Land of which temporary possession may be taken - Articles 33 and 34) specifies which plots the undertaker may take temporary possession for the purposes of constructing specified works.
- Schedule 6* (Procedure for discharge of requirements - Article 45) sets out the process to be followed in relation to applications made to a discharging authority for any agreement or approval required by a requirement in the Order. It is based on the procedure contained within the Hinckley Point C (Nuclear Generating Station) Order 2013, as made by the Secretary of State on 18 March 2013.
- Schedule 7* (Protective provisions - article 50) will set out any protective provisions sought by statutory undertakers as appropriate.

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