STATUTORY INSTRUMENTS

2008 No. 969

TRANSPORT AND WORKS, ENGLAND

OFFSHORE INSTALLATIONS, ENGLAND

ELECTRICITY, ENGLAND

The River Humber (Upper Burcom Tidal Stream Generator) Order 2008

Made - - - - 2nd April 2008

Coming into force in accordance with article 1

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SCHEDULE 1 — THE SCHEDULED WORKS
SCHEDULE 2 — FOR PROTECTION OF ASSOCIATED BRITISH PORTS

This Order is made in exercise of the powers conferred on the Secretary of State for Business, Enterprise and Regulatory Reform ("the Secretary of State") by sections 3 and 5 of, and paragraphs 1 to 5, 7, 8, 10, 11 and 15 to 17 of Schedule 1 to, the Transport and Works Act 1992(**a**) ("the 1992 Act").

In accordance with section 6 of the 1992 Act the Secretary of State has received an application for an order under section 3 of that Act, that complies with and the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006(**b**) ("the 2006 Rules").

In accordance with section 13(1) of the 1992 Act the Secretary of State has determined to make an Order under section 3 of that Act giving effect to the proposals comprised in the application.

Accordingly the Secretary of State makes the following Order:

PART 1

PRELIMINARY

Citation and commencement

1.—(1) This Order may be cited as the River Humber (Upper Burcom Tidal Stream Generator) Order 2008.

(2) This Order comes into force on the date on which the notice required by section 14(1)(b) of the Transport and Works Act 1992(**c**) is first published.

Interpretation

2.—(1) In this Order—

(**a**) 1992 c.42.
(**b**) S.I. 2006/1466.
(**c**) 1992 c.42; section 14 was amended by regulation 2 of the Transport and Works (Assessment of Environmental Effects) Regulations 2006 (S.I. 2006/958).

"A. B. Ports" means Associated British Ports;

"authorised works" means the scheduled works, the works and facilities described in article 3(3) and any other works authorised by the Order;

"the level of high water" means the level of mean high water springs;

"the limits of deviation", in relation to a work, means the limits of deviation related to that work which are shown on the works plans;

"maintain" includes inspect, maintain, repair, adjust, alter, remove, reconstruct and replace; and "maintenance" shall be construed accordingly;

"reference point" means Ordnance Survey National Grid reference point;

"river" means the river Humber;

"the scheduled works" means the works specified in Schedule 1 to this Order or any part of them;

"the sections" means the sections certified by the Secretary of State in accordance with article 19, unless the context otherwise requires;

"tidal stream generator" means the tidal stream generator described in paragraph 1 of Schedule 1 to this Order;

"tidal work" means so much of any authorised work as is on, under or over tidal waters or tidal lands below the level of high water;

"the undertaker" means Pulse Tidal Limited or any person to whom the powers conferred by this Order are transferred in an agreement pursuant to article 20;

"vessel" means a ship, boat, raft or water craft of any description and includes a non-displacement craft, a seaplane, any other thing constructed or adapted for floating on or being submersed in water (whether permanently or temporarily) and any other amphibious vehicle;

"the works plans" means the plans certified by the Secretary of State in accordance with article 19, unless the context otherwise requires.

(2) All directions, distances, lengths and points stated in any description of works or powers shall be construed as if the words "or thereabouts" were inserted after each such direction, distance, length and point.

(3) Any reference in this Order to a work identified by the number of the work shall be construed as a reference to the work of that number authorised by this Order.

PART 2

WORKS

Principal powers

Power to construct and maintain works

3.—(1) The undertaker may construct and maintain the scheduled works.

(2) Subject to article 4, the scheduled works shall be constructed and maintained in the lines or situations shown on the works plans and in accordance with the levels shown on the sections.

(3) The undertaker may, within the limits of deviation for the scheduled works, carry out, provide and maintain such of the following works and facilities as may be necessary or expedient for the purposes of, in connection with, or in consequence of, the construction or maintenance of the scheduled works, namely—

(a) temporary or permanent landing places, jetties, or moorings or other means of accommodating vessels in the construction or maintenance of the scheduled works;

(b) buoys, beacons, fenders and other navigational warning or ship impact protection works;

(c) works to alter the position of apparatus, including cables;

(d) landscaping and other works to mitigate any adverse affects of the construction, maintenance or operation of the scheduled works;

(e) works for the benefit or protection of land affected by the scheduled works;

(f) such other works and apparatus, plant and machinery of whatever nature as may be necessary or expedient.

Power to deviate

4. In constructing or maintaining any scheduled works, the undertaker may deviate—

(a) laterally from the lines or situations shown on the works plans to any extent within the limits of deviation; and

(b) vertically from the levels shown on the sections to any extent not exceeding 2 metres upwards and to any extent downwards.

Protection of navigation

Tidal works not to be executed without approval of the Secretary of State

5.—(1) A tidal work shall not be constructed or altered except in accordance with plans and sections approved by the Secretary of State and subject to any conditions and restrictions imposed by the Secretary of State before the work is begun.

(2) If a tidal work is constructed or altered in contravention of this article or any condition or restriction imposed under this article—

(a) the Secretary of State may by notice in writing require the undertaker at its own expense to remove the tidal work or any part of it and restore the site to its former condition; and

(b) if it appears to the Secretary of State urgently necessary so to do, he may remove the tidal work or part of it and restore the site to its former condition and any expenditure incurred by the Secretary of State in so doing shall be recoverable from the undertaker.

Provision against danger to navigation

6.—(1) In case of damage to, or destruction or decay of, a tidal work or any part thereof the undertaker shall as soon as reasonably practicable—

(a) notify A. B. Ports; and

(b) lay down such buoys, exhibit such lights and take such other steps for preventing danger to navigation as A. B. Ports may from time to time direct.

(2) If it appears to A. B. Ports urgently necessary to do so in order to secure the safe navigation of the river by all vessels, it may lay down such buoys and exhibit such lights and take such other steps for preventing danger to navigation as A. B. Ports may direct are reasonably necessary.

(3) Any expenditure incurred by A. B. Ports in consequence of it exercising powers under paragraph (2) shall be recoverable from the undertaker.

Abatement of works abandoned or decayed

7.—(1) Where a tidal work is abandoned, or suffered to fall into decay, the Secretary of State or A. B. Ports may by notice in writing require the undertaker at its own expense either to repair and restore the work or any part of it, or to remove the work and restore the site of the work to its former condition, to such an extent and within such limits as the Secretary of State or A. B. Ports may specify in the notice.

(2) Where a work consisting partly of a tidal work and partly of works on or over land above the level of high water is abandoned or suffered to fall into decay and that part of the work on or over land above the level of high water is in such condition as to interfere or to cause reasonable apprehension that it may interfere with the right of navigation or other public rights over the

foreshore, the Secretary of State or A. B. Ports may include that part of the work, or any portion of it, in any notice under this article.

(3) This article shall not apply to any decommissioning of the authorised works in accordance with a decommissioning plan approved by the Secretary of State under any condition imposed in a licence granted under section 5 of the Food and Environment Protection Act 1985(**a**).

(4) If there is any inconsistency between any requirements of the Secretary of State and A. B. Ports under article 7(1) or article 7(2) the requirement of the Secretary of State shall prevail.

Survey of tidal works

8.—(1) The Secretary of State may at any time, if he deems it expedient, order a survey and examination of a tidal work or of the site upon which it is proposed to construct the work, and any expenditure incurred by the Secretary of State in any such survey and examination shall be recoverable from the undertaker.

(2) Subject to paragraph (3) such surveys shall not be ordered more frequently than once a year, and before ordering such a survey the Secretary of State shall—

(a) consult the undertaker in order to establish what relevant survey information is already available; and

(b) give the undertaker an opportunity to carry out the survey itself.

(3) Paragraph (2) shall not apply in an emergency.

(4) Paragraphs (1) to (3) apply to A. B. Ports as if it were the Secretary of State.

(5) A. B. Ports' annual survey of the river in the performance of its functions as navigation authority shall not be treated as a survey ordered by A. B. Ports under this article.

Permanent lights and navigational safety aids

9. After the completion of the tidal works the undertaker shall exhibit every night from sunset to sunrise such lights, if any, and shall provide such markers, if any, and take such other steps for the prevention of danger to navigation as A. B. Ports may from time to time direct.

Lights on tidal works during construction

10. The undertaker shall at or near a tidal work during the whole time of the construction, alteration, enlargement, replacement, relaying, reconstruction or extension of the work exhibit every night from sunset to sunrise such lights, if any, and take such other steps for the prevention of danger to navigation as A. B. Ports may from time to time direct.

Execution of works in default

11.—(1) If, on the expiration of 30 days from the date when a notice under article 5(2)(a) or 7(1) is served upon the undertaker it has failed, without reasonable excuse, to comply with the requirements of the notice, the Secretary of State or A. B. Ports (as the case may be) may execute the works specified in the notice.

(2) Any expenditure incurred by the Secretary of State or A. B. Ports (as the case may be) in so doing shall be recoverable from the undertaker.

Offences

12. If the undertaker, without reasonable excuse, fails to—

(a) comply with a direction given under article 6, 9 or 10; or

(b) give notification as required by article 6,

(**a**) 1985 c.48.

it shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

PART 3

MISCELLANEOUS AND GENERAL

Power to operate and use works

13. Subject to article 15, the undertaker may operate and use the authorised works as a system for generating and transmitting electricity.

Disapplication of section 9 of the Humber Conservancy Act 1899 and section 6 of the Humber Conservancy Act 1905

14. Section 9(ii) (licences for execution of works) of the Humber Conservancy Act 1899(**a**) and section 6(2) (no erections in Humber below river lines or without licence above river lines) of the Humber Conservancy Act 1905(**b**) shall not apply to the authorised works.

Removal of authorised works

15. The undertaker shall remove—

(a) Work No. 1 (except that, in relation to the two piles, it shall only remove as much as is practicable); and

(b) Works Nos. 2 and 3,

no later than three years after the date on which this Order is made and shall, subject to the exception in paragraph (a), restore the sites of the works to their former condition, subject to natural change.

Obstruction and misuse of authorised works

16. Any person who without reasonable excuse—

(a) obstructs another person from constructing or maintaining any of the authorised works under the powers conferred by this Order;

(b) makes fast to any part of any tidal work; or

(c) in any other way interferes with any of the authorised works or their operation,

shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Exclusion zone for navigation, trawling and anchoring

17.—(1) Subject to paragraph (3) there shall be a temporary exclusion zone ("exclusion zone") extending to any waters within 75 metres of any part of Work No 1 and Work No 2 during the construction, relaying, replacement, removal or decommissioning of those works or any part of those works.

(2) Any person who without reasonable excuse navigates a vessel within an exclusion zone shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(3) An exclusion zone shall not come into effect until 7 days after the publication by A. B. Ports of a notice to mariners specifying—

(**a**) 1899 c.cci.
(**b**) 1905 c.clxxix.

(a) the date of publication of the notice; and

(b) the location and extent of the exclusion zone and its intended duration.

(4) The exclusion zone shall terminate on the completion of the construction, relaying, replacement, removal or decommissioning of the works to which it relates.

(5) As soon as reasonably practicable following the termination of an exclusion zone A. B. Ports shall publish notice of the termination by means of a notice to mariners.

(6) This article shall not apply to a person navigating a vessel within the exclusion zone for the purpose of, or in connection with, the construction, maintenance or operation of the authorised works.

Certain land to be treated as operational land

18. Planning permission which is deemed by a direction under section 90(2A) of the Town and Country Planning Act 1990(**a**) to be granted in relation to works authorised by this Order shall be treated as specific planning permission for the purposes of section 264(3)(a) of that Act (cases in which land is to be treated as operational land for the purposes of that Act).

Certification of plans, etc.

19.—(1) The undertaker shall, as soon as practicable after the making of this Order, submit to the Secretary of State copies of the works plans and sections sent to him with the application for this Order in accordance with rule 10(3) of the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006(**b**).

(2) The Secretary of State shall, on receipt of such works plans and sections, certify that they are true copies of the works plans and sections so sent to him.

(3) A document so certified shall be admissible in any proceedings as evidence of the contents of the document of which it is a copy.

Transfer of powers

20.—(1) The undertaker may, with the consent of the Secretary of State, enter into, and carry into effect, agreements for the transfer to another person of all or any of the powers conferred on the undertaker by this Order.

(2) The exercise of any power conferred by this Order by any other person in accordance with an agreement under paragraph (1) shall be subject to the same obligations and liabilities under this Order as would apply if that power were exercised by the undertaker.

(3) Not later than 21 days before any such agreement comes into effect which provides for the transfer to another person of powers relating to any tidal works the undertaker shall give written notice to the Secretary of State and to A. B. Ports stating the name and address of the person to whom the powers are being transferred and the date when the transfer is to take effect.

For protection of A. B. Ports

21. The provisions of Schedule 2 to this Order shall have effect.

Saving for Trinity House

22. Nothing in this Order shall prejudice or derogate from any of the rights, duties or privileges of the Corporation of Trinity House of Deptford Strond.

(**a**) 1990 c.8.
(**b**) S.I. 2006/1466.

Crown rights

23.—(1) Nothing in this Order affects prejudicially any estate, right, power, privilege, authority or exemption of the Crown, and in particular, nothing in this Order authorises the undertaker to take, use, enter upon or in any manner interfere with any land, hereditaments, or rights of whatsoever description (including any part of the shore or bed of the sea or any river, channel, creek, bay or estuary)—

(a) belonging to Her Majesty in right of Her Crown and under the management of the Crown Estate Commissioners, without the consent in writing of those Commissioners; or

(b) belonging to a government department or held in trust for Her Majesty for the purposes of a government department, without the consent in writing of that government department.

(2) A consent under paragraph (1) may be given unconditionally or subject to such conditions or upon such terms as may be considered necessary or appropriate.

Signed by authority of the Secretary of State for Business, Enterprise and Regulatory Reform

Richard Mellish
Director, Development Consents and Licensing Reform,
Department for Business, Enterprise and Regulatory Reform

2nd April 2008

SCHEDULE 1

Article 2(1)

THE SCHEDULED WORKS

1. The works which the undertaker is authorised to construct and maintain by article 3(1) are the following works in the Humber Estuary in the parish of Stallingborough, North East Lincolnshire—

(a) Work No. 1 — A tidal stream electrical generating station situated at reference point 522700 E and 415850 N and near to the buoy at the site known as Upper Burcom consisting of—

(i) a tidal stream generator mounted on two piles approximately 6 metres apart which will rise approximately 20 metres above the river bed; and

(ii) two hydrofoils of approximately 13 metres in length fixed to the piles by a collar approximately 4 metres above the river bed;

(b) Work No. 2 — A cable commencing at the tidal stream generator comprised in Work No. 1 and terminating at the proposed transformer, Work No. 3;

(c) Work No. 3 — A transformer adjacent to the existing electrical substation situated at reference point 521952E and 414916N ("the substation") including a cable connecting the transformer to the substation.

2. In this Schedule reference to the locations of the tidal stream generator or to the substation are references to the centre point of that tidal stream generator or the substation as shown on the works plans.

SCHEDULE 2

Article 21

FOR PROTECTION OF ASSOCIATED BRITISH PORTS

1. In this Schedule—

"accumulation" means any accumulation of silt or other material which constitutes an impediment to navigation;

"construction" includes execution and placing, maintenance, extension, enlargement, alteration, replacement, relaying, and removal, (including for the avoidance of doubt the removal of the tidal stream generator in accordance with article 15), and "construct" and "constructed" shall be construed accordingly;

"erosion" means any erosion of the bed or banks of the river or of any jetty or other structure of whatever nature;

"plans" includes sections, descriptions, drawings and specifications.

2. For the protection of A. B. Ports the following provisions have effect unless otherwise agreed in writing between the undertaker and A. B. Ports.

3.—(1) Before commencing the construction of a tidal work the undertaker shall furnish to A. B. Ports for its approval, which it shall not unreasonably withhold, plans of the work showing the general mode of construction; and such works—

(a) shall not be constructed otherwise than in accordance with such plans as may be approved by A. B. Ports; and

(b) shall be executed to the reasonable satisfaction of A. B. Ports.

(2) When submitting plans to the Secretary of State pursuant to article 5 of this Order, the undertaker shall—

(a) send a copy of those plans to A. B. Ports; and

(b) on receipt of approval of plans or of any conditions or restrictions imposed by the Secretary of State, send a copy to A. B. Ports.

(3) If A. B. Ports fails to express its disapproval of any plans within 56 days after they have been delivered to it under sub-paragraph (1), it shall be deemed to have approved them.

4. The undertaker shall give to A. B. Ports not less than 14 days' written notice of its intention to commence the construction of a tidal work and, not more than 14 days after completion of such construction, shall give to A. B. Ports written notice of such completion.

5. The undertaker shall at all reasonable times during construction of the tidal works and thereafter allow A. B. Ports, its servants and agents, access to the tidal works and all reasonable facilities for inspection of any tidal work.

6.—(1) After the purpose of any temporary works has been accomplished the undertaker shall with all reasonable dispatch, or after a reasonable period of notice in writing from A. B. Ports requiring the undertaker so to do, remove any such temporary works or any materials relating thereto which may have been placed below the level of high water by or on behalf of the undertaker.

(2) If the undertaker fails to do so within a reasonable period after receiving such notice, A. B. Ports may remove the same and may recover the reasonable costs of doing so from the undertaker.

7.—(1) If during the construction of a tidal work it is agreed, or in the absence of agreement it is proved to the satisfaction of an arbitrator appointed under paragraph 13, that any accumulation or erosion has been caused wholly or partly by the construction of any of the works, the undertaker, if so requested by A. B. Ports acting reasonably, shall remedy such accumulation or erosion to the

extent attributable to such construction or exercise of powers in the manner specified in sub-paragraph (3).

(2) If the undertaker refuses or fails to do so, A. B. Ports may itself cause the work to be done and may recover the reasonable cost of doing so from the undertaker.

(3) For the purposes of sub-paragraph (1)—

(a) in the case of an accumulation, the remedy shall be its removal; and

(b) in the case of erosion, the remedy shall be carrying out of such reconstruction works and other protective works or measures as may be necessary.

(4) Where an arbitrator has established that such accumulation or erosion has been caused in any event by factors other than the construction of a tidal work the undertaker shall be liable to remedy such accumulation or erosion only to the extent that the same is attributable to such construction or exercise.

8. The undertaker shall pay to A. B. Ports the reasonable costs of such alterations to the marking and lighting of the navigational channel of the river as may be necessary during or in consequence of the construction of a tidal work.

9.—(1) Without prejudice to the other provisions of this Schedule, the undertaker shall be responsible for, and make good to A. B. Ports, all losses, costs, charges, damages and expenses however caused (including a reasonable and proper proportion of the overhead charges of A. B. Ports) which may reasonably be incurred by or occasioned to A. B. Ports by reason of or arising from or in connection with—

(a) the perusal of plans and the inspection of any of the tidal works by A. B. Ports or its duly authorised representative;

(b) the carrying out of such surveys, inspections, tests and sampling within the river as A. B. Ports after consultation with the undertaker reasonably considers necessary to establish whether or not the discharge or dispersal of water into the river by means of any of the works is causing or has caused damage to or deterioration of any existing jetty or other structure owned or occupied by A. B. Ports;

(c) the construction or maintenance of any of the tidal works, the failure of any of the tidal works or the undertaking by A. B. Ports of works or measures to prevent or remedy danger or impediment to navigation or damage to any property of A. B. Ports arising from such construction, exercise or failure;

(d) any act or omission of the undertaker or their servants or agents whilst engaged in the construction of any of the tidal works or the exercise of the powers conferred by article 10.

(2) Without prejudice to the generality of sub-paragraph (1), the undertaker shall indemnify A. B. Ports from and against all claims and demands arising out of, or in connection with, such construction, exercise, failure or act or omission as is mentioned in that sub-paragraph.

(3) Nothing in this paragraph shall impose any liability on the undertaker to the extent that any losses, costs, charges, damages, expenses, claims or demands referred to in sub-paragraph (1) or (2) are attributable to negligence on the part of A. B. Ports or of any person in its employ or of its contractors or agents.

(4) A. B. Ports shall give to the undertaker notice in writing of any claim or demand for which the undertaker may be liable under this paragraph and no settlement or compromise of any such claim or demand shall be made without the consent in writing of the undertaker.

10. The fact that any work or thing has been executed or done with the consent of A. B. Ports and in accordance with any conditions or restrictions prescribed by A. B. Ports or in accordance with plans approved or deemed to be approved by A. B. Ports or to its satisfaction or in accordance with any directions or award of any arbitrator or in accordance with any plans approved by the Secretary of State and any conditions or restrictions imposed by him, shall not relieve the undertaker from any liability under the provisions of this Schedule.

11. With the exception of any duty owed by A. B. Ports to the undertaker expressly provided for in the foregoing provisions of this Schedule, nothing in this Order shall be construed as imposing upon A. B. Ports, either directly or indirectly, any form of duty or liability to which A. B. Ports would not otherwise be subject which is enforceable by proceedings before any court.

12. Nothing in this Order shall affect prejudicially any statutory or other rights, powers or privileges vested in, or enjoyed by, A. B. Ports at the commencement of this Order or any title of A. B. Ports in, to or over any lands or foreshore held or acquired by it.

13. Any difference arising between the undertaker and A. B. Ports under this Schedule (other than a difference as to the construction of this Schedule) shall be referred to, and determined by, a single arbitrator to be agreed between the undertaker and A. B. Ports, or, failing agreement, to be appointed by the President of the Institution of Civil Engineers.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order provides for the construction and operation of a tidal stream electricity generating station and ancillary works in the Humber Estuary and for the connection of these works to a transformer adjacent to an existing onshore electrical substation.

A copy of the works plans and sections prescribed by rule 12(1), (2), (3) and (5) of the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006 (S.I. 2006/1466) and certified in accordance with article 19 of this Order may be inspected at the offices of Pulse Tidal Limited at Innovation Technology Centre, Advanced Manufacturing Park, Brunel Way, Catcliffe, Rotherham, S60 5WG.

STATUTORY INSTRUMENTS

2008 No. 969

TRANSPORT AND WORKS, ENGLAND

OFFSHORE INSTALLATIONS, ENGLAND

ELECTRICITY, ENGLAND

The River Humber (Upper Burcom Tidal Stream Generator) Order 2008

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