

**DATED** \_\_\_\_\_

**DRAFT (1): [DATE]**

**(1) NORTH LINCOLNSHIRE COUNCIL**

**(2) VPI IMMINGHAM LLP**

**(3) PHILLIPS 66 LIMITED**

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**AGREEMENT**

relating to land at  
**VPI Combined Heat and Power Plant, Rosper Road,  
South Killingholme, DN40 3DZ**  
made pursuant to section 106 of the Town and Country  
Planning Act 1990

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<b>"Application"</b>		means the application for full planning permission for the Development validated by the Council on 15 March 2023 and allocated reference number PA/2023/421.
<b>"Biodiversity Obligations"</b>	<b>Net Gain</b>	means any requirements or obligations in respect of a development in relation to achieving a net gain in Biodiversity Value, whether pursuant to the requirements of the Environment Act 2021, Schedule 7A of the 1990 Act, or any other requirements of a local planning authority or commitments made by the Developer in relation to the same
<b>"Biodiversity Plan"</b>	<b>Net Gain</b>	means a plan setting out how the Developer intends to deliver 61.06 Biodiversity Net Gain Units for habitats and 2.33 Biodiversity Net Gain Units for waterbodies as required under the completed BNG Metric for the Development appended at Appendix 2, which the parties agree represents a 10% biodiversity net gain
<b>"Biodiversity Units"</b>	<b>Net Gain</b>	means a unit of Biodiversity Value measured in accordance with the BNG Metric
<b>"Biodiversity Contribution"</b>	<b>Offsetting</b>	means the sum paid by the Developer to the Council pursuant to clause 1.3.3
<b>"Biodiversity Value"</b>		means the unit quantification of the size of an area and the distinctiveness, quality and condition of its habitat to provide a measure of ecological value as assessed using the BNG Metric
<b>"BNG Metric"</b>		means Biodiversity Metric 3.1 published by Natural England for measuring the biodiversity value or relative biodiversity value of habitat or habitat enhancement
<b>"Commence"</b>		means carrying out a material operation as defined in section 56(4) of the 1990 Act <b>SAVE THAT</b> for the purposes of this Deed the term "material operation" shall not include operations in connection with any work of or associated with demolition, site clearance, remediation works, environmental investigation, site and soil surveys, erection of a contractor's work compound, erection of a site office and erection of fencing to the site boundary and " <b>Commence Development</b> ", " <b>Commencement</b> " and " <b>Commenced</b> " shall be construed accordingly
<b>"Comply"</b>		means comply, perform, fulfil and/or discharge or procure compliance, performance, fulfilment and/or discharge, and " <b>Compliance</b> " shall be construed accordingly
<b>"Deed"</b>		means this Deed made under section 106 of the 1990 Act and all other enabling powers

<b>"Development"</b>	means the development of the Site and all other operations and works permitted by the Planning Permission to construct and operate a post-combustion carbon capture plant, including carbon dioxide compressor and metering, cooling equipment, stacks, substations, internal roads, partial ditch realignment, new and modified services, connections, internal roads, accesses, maintenance and laydown areas
<b>"Expert"</b>	means an independent person of at least 10 years standing in the area of expertise relevant to the dispute to be agreed between the Parties or, failing agreement, to be nominated at the request and option of any of them, at their joint expense, by or on behalf of the President for the time being of the Law Society
<b>"Force Majeure Event"</b>	means any circumstance not within a party's reasonable control including, without limitation (a) acts of God, flood, drought, fire earthquake, or other natural disaster (b) epidemic or pandemic; (c) terrorist attack, civil war, civil commotion or riots, war, threat of or preparation for war, armed conflict, imposition of sanctions, embargo or breaking off of diplomatic relations; or (d) nuclear, chemical or biological contamination;
<b>"Other Developer"</b>	means any developer(s) at the Site other than VPI Immingham Limited
<b>"Parties"</b>	means the parties to this Deed and <b>"Party"</b> shall be construed accordingly
<b>"Plan"</b>	means the plan attached at [Appendix 1]
<b>"Planning Permission"</b>	means the planning permission to be granted by the Council pursuant to the Application
<b>"Reasonable Endeavours"</b>	means attempt to fulfil the relevant obligation by expending effort and money as in all the circumstances may be reasonable to expect, which may include engaging professional and other advisers as appropriate but does not require a Party to take proceedings (including any appeal) in any court, public inquiry, or other hearing (unless specified to the contrary)
<b>"Site"</b>	means the land against which this Deed may be enforced as more particularly described in Schedule [1] and shown edged red on the Plan.
<b>"Updated Biodiversity Net Gain Plan"</b>	means: <ul style="list-style-type: none"> <li>(a) an updated measurement calculated using the BNG Metric with an updated baseline which reflects the nature and extent of any development carried out by any Other Developer at the Site; and</li> <li>(b) an updated plan setting out how the Developer intends to deliver the number and type of Biodiversity Net Gain Units required to achieve a 10% biodiversity net gain based on the updated BNG Metric measurement referred to in (a).</li> </ul>

**"Working Day"** means a day other than a Saturday or Sunday or public holiday in England

- 1.2 In this Deed, unless otherwise indicated, reference to any:
- 1.2.1 Recital, Clause, sub-clause, paragraph number, Schedule, Appendix or plan is a reference to a Recital, Clause or sub-clause of, paragraph number of, Schedule to, Appendix to or plan annexed to this Deed;
  - 1.2.2 words importing the singular meaning include the plural meaning and vice versa;
  - 1.2.3 words of the masculine gender include the feminine and neuter genders and words denoting actual persons include companies, other corporate bodies, firms or legal entities and all such words shall be construed interchangeably in that manner.
- 1.3 Headings where they are included are for convenience only and are not intended to influence the construction and interpretation of this Deed.
- 1.4 Any notice, notification, consent, approval, agreement, request or statement or details to be made, given or submitted under or in connection with this Deed shall be made or confirmed in writing.
- 1.5 Wherever an obligation falls to be performed by more than one person, the obligation can be enforced against every person so bound jointly and against each of them individually unless there is an express provision otherwise.
- 1.6 Each of the Parties to this Deed shall act in good faith and shall co-operate with each of the other Parties to facilitate the discharge and performance of all obligations on them contained in this Deed and the Owner and the Developer shall comply with any reasonable requests of the Council to provide documentation within its possession (such documentation to be provided by the Owner or the Developer at its own expense) for the purposes of monitoring compliance with the obligations contained in this Deed.
- 1.7 Where this Deed requires a matter to be agreed by, approved by or consented to by any of the Parties, the relevant Party shall act reasonably in respect of such agreement, approval or consent and such agreements, approval or consent shall not be unreasonably withheld or delayed.

## 2. **LEGAL BASIS**

- 2.1 This Deed is made under:
- 2.1.1 section 106 of the 1990 Act; and
  - 2.1.2 Part 6 of the Environment Act 2021.
- 2.2 The obligations, covenants, and undertakings on the part of the Owner and the Developer in this Deed are planning obligations for the purposes of section 106 of the 1990 Act and so bind the Owner's and the Developer's interests in the Site. Subject to Clause 8, the obligations, covenants and undertakings on the part of the Owner and the Developer are entered into with the intent that they are enforceable not only against the Owner and the Developer but also against any successors in title or assigns of the Owner and the Developer and any person claiming through or under the Owner and/or

the Developer an interest or estate in the Site or any part of it as if that person had been the original covenanting party in respect of the interest for the time being held by it.

2.3 So far as the obligations, covenants and undertakings in this Deed are given by or to the Council, they are entered into under the relevant powers referred to in Clause 2.1 and those obligations, covenants and undertakings are enforceable by or against the Council.

2.4 Nothing in this Deed restricts or is intended to restrict the proper exercise at any time by the Council of any of their statutory powers, duties, functions or discretions in relation to the Site or otherwise.

### 3. **CONDITIONAL ENTRY**

3.1 Subject to Clause 3.2, this Deed is conditional upon and will not take effect until the Planning Permission has been granted and has been Commenced.

3.2 Clause 12 comes into effect on the date of this Deed.

### 4. **DURATION**

4.1 This obligations in this Deed will cease to take effect if the Planning Permission:-

4.1.1 is quashed, revoked or otherwise withdrawn at any time so as to render this Deed or any part of it irrelevant, impractical or unviable; or

4.1.2 is modified by any statutory procedure without the consent of the Developer; or

4.1.3 expires before Commencement.

4.2 Where this Deed ends the Council must remove all entries made in the Register of Local Land Charges in respect of this Deed within 20 Working Days of the Deed ceasing to have effect.

4.3 In the event the Planning Permission is challenged by way of judicial review or an earlier decision of the Court has been appealed following such a challenge the provisions of this Deed shall be suspended until the challenge has either been finally dismissed or a decision has been issued by the relevant Court save in respect of those obligations required to be discharged where works are continuing under the Planning Permission notwithstanding the judicial review challenge or where the Parties agree to waive such suspension.

4.4 In the event that any new planning permissions(s) are granted by the Council pursuant to Section 73 of the 1990 Act (as amended) and unless otherwise agreed between the Parties:

4.4.1 The obligations in this Deed shall relate to and bind any subsequent planning permissions(s) in respect of the Site granted pursuant to Section 73 of the 1990 Act and the Site itself; and

4.4.2 The definitions of Application, Development and Planning Permission in this Deed shall be construed to include reference to any application under Section 73 of the 1990 Act, the planning permissions(s) granted thereunder and the development permitted by such subsequent planning permission(s); and

- 4.4.3 This Deed shall be endorsed with the following words in respect of any future Section 73 application:

*“the obligations in this Deed relate to and bind the Site in respect of which a new planning permission referenced [ ] has been granted pursuant to section 73 of the Town and Country Planning Act 1990 (as amended).”*

PROVIDED THAT nothing in this clause shall fetter the discretion of the Council in determining any application(s) under section 73 of the 1990 Act or the appropriate nature and/or quantum of Section 106 obligations in so far as they are materially different to those contained in this Deed and required pursuant to a determination under Section 73 of the 1990 Act whether by way of a new Deed or supplemental Deed pursuant to Section 106 of the 1990 Act.

## 5. OWNER'S COVENANTS WITH THE COUNCIL

- 5.1 The Owner and the Developer on behalf of itself and its successors in title to its interest in the Site, covenants with the Council:
- 5.1.1 to Comply with each obligation, covenant and undertaking on the part of the Owner or the Developer contained in this Deed and set out in Schedule 2;
- 5.1.2 to notify the Council within 20 Working Days of any change in ownership of any of its interests in the Site occurring before all the obligations under this Deed have been discharged. The notice must contain details of the transferee's full name and registered office (if a company, or usual address if not) together with a plan showing the area of the Site.

## 6. THE COUNCIL'S COVENANTS

- 6.1 The Council covenants with the Owner and the Developer to Comply with each obligation, covenant and undertaking on the part of the Council contained in this Deed and as set out in Schedule 2.
- 6.2 The Council covenants with the Owner and Developer:-
- 6.2.1 to issue the Planning Permission for the Development promptly on completion of this Deed;
- 6.2.2 following a written request from the Owner or the Developer, made at any time after any obligation under this Deed has been fulfilled, to issue a letter of release in substantially the form attached at Appendix 3 in respect of that obligation within 20 Working Days after the date on which it receives the request.

## 7. SUCCESSORS IN TITLE AND RELEASE

- 7.1 References in this Deed to the Council include the successors to their respective statutory functions and include persons deriving title through or under them.
- 7.2 Subject to Clause 7.4, references to the Owner or the Developer include their heirs, assigns, successors in title and persons deriving title through or under them.
- 7.3 The obligations in this Deed are not binding on or enforceable against any statutory undertaker or other person who acquires any part of the Site or any interest in it for the purposes of supplying Utilities or public transport services;

7.4 If the Owner or the Developer disposes of part or the whole of its interest in the Site, the Owner or the Developer will be released from its obligations in this Deed which will no longer be enforceable against the Owner or the Developer in relation to the Site or that part of the Site disposed of, except to the extent that disposal is the grant of an easement, restriction, restrictive covenant or similar and without prejudice to any subsisting liability for any antecedent breach arising before parting with that interest.

## 8. **OTHER DEVELOPMENT**

Nothing in this Deed shall prohibit or limit the right to develop any part of the Site in accordance with a planning permission (other than the Planning Permission) granted (whether or not on appeal) after the date of this Deed.

## 9. **ENFORCEMENT PROTOCOL**

9.1 Before taking action to enforce any of the provisions of this Deed the Council will give written notice to the Owner or the Developer stating the nature of the breach, the steps required to remedy the breach and specifying a reasonable timescale for the Owner or the Developer for remedying the breach.

9.2 The Council will also give the Owner or the Developer the opportunity to discuss the breach with the Council and the timescale and steps for remedying it prior to the remedy being carried out. The Council will take into account any reasonable representations made by the Owner and the Developer.

9.3 If the Owner or the Developer does not diligently remedy the breach within the time period agreed under the notice (or such longer period subsequently agreed with the Council) the Council shall issue to the Owner or the Developer a final notice before taking further enforcement action. If the Owner or the Developer does not use Reasonable Endeavours to remedy the breach within the stated time period in such final notice or longer period as agreed with the Council the Council will be able to pursue legal remedies.

## 10. **MORTGAGEE'S CONSENT**

10.1 The Parties agree that any mortgagee or chargee from time to time will only be liable for any breach of the provisions of this Deed during such period as it is a mortgagee in possession of the Site when it becomes bound by the obligations as if it were a person deriving title from the Owner. It will not be liable for any breach of the provisions of this Deed after it has parted with or released its interest in the Site.

## 11. **DISPUTE RESOLUTION**

11.1 If a dispute between the Parties persists beyond 10 Working Days and the Parties are not able to resolve and relates to any matter contained in this Deed (excluding any matter of law), the dispute may be referred to the Expert by any Party.

11.2 The Expert will act as an expert and not as an arbitrator and his decision shall be final and binding on the Parties.

11.3 Each Party will bear its own costs and the Expert's costs unless the Expert determines otherwise will be paid as determined by him.

11.4 The Expert will be appointed subject to an express requirement that he must reach his decision and communicate it to the Parties within the minimum practical timescale allowing for the nature and complexity of the dispute, and in any event not more than

20 Working Days from the date of his appointment to act. His decision will be given in writing with reasons and in the absence of manifest error will be binding on the Parties.

- 11.5 The Expert will be required to give notice to each of the Parties, inviting each of them to submit to him within 10 Working Days written submissions and supporting material and will afford to the Parties an opportunity to make counter submissions within a further 5 Working Days in respect of any such submission and material.

12. **LEGAL COSTS**

On completion of this Deed the Developer will pay to the Council the reasonable and proper legal costs incurred in the negotiation, preparation and execution of this Deed of no more than £1,100.00.

13. **CONTRACTS (RIGHTS OF THIRD PARTIES) ACT**

Nothing in this Deed will create any rights in favour of or be enforceable by any person who is not a party to this Deed under the Contracts (Rights of Third Parties) Act 1999.

14. **NOTICES**

- 14.1 Any notice or other written communication to be served on a Party or given by one Party to any other under the provisions of this Deed will be deemed to have been validly served or given if delivered by hand, sent by first class post or sent by recorded delivery post to the Party on whom it is to be served or to whom it is to be given and will conclusively be deemed to have been received on:

14.1.1 if delivered by hand, the next Working Day after the day of delivery;

14.1.2 if sent by first class post, the day 2 Working Days after the date of posting; or

14.1.3 if sent by recorded delivery, at the time delivery was signed for.

- 14.2 If a notice, demand or any other communication is served after 4.00pm on a Working Day, or on a day that is not a Working Day, it is to be treated as having been served on the next Working Day.

- 14.3 A notice or communication will be served or given:

14.3.1 on the Owner at 7<sup>th</sup> floor, 200-202 Aldersgate Street, London, EC1A 4HD or such other address as notified in writing to the other Parties from time to time, marked for the attention of *(insert details)*;

14.3.2 on the Council at Church Square House, 30-40 High Street, Scunthorpe, North Lincolnshire DN15 6NL or such other address notified in writing to the other Parties from time to time, marked for the attention of *(insert details)*;

14.3.3 on the Developer at 4<sup>th</sup> floor, Nova South, 160 Victoria Street, London, SW1E 5LB or such other address notified in writing to the other Parties from time to time, marked for the attention of *(insert details)*;

14.3.4 on any successor in title to the Owner or the Developer at that successor in title's last known address.

- 14.4 Any notice or other written communication to be given by the Council will be deemed valid and effectual if on its face it is signed on behalf of the Council by an officer or duly authorised signatory.

15. **LOCAL LAND CHARGE**

- 15.1 The Council shall register this Deed as a local land charge after the date of this Deed.
- 15.2 The Council must cancel all entries made in the Register of Local Land Charges relating to this Deed as soon as all obligations under this Deed have been satisfied or if this Deed ceases to have effect.

16. **JURISDICTION AND LEGAL EFFECT**

- 16.1 This Deed will be governed by and interpreted in accordance with English Law.
- 16.2 If any provision of this Deed is found (for whatever reason) to be invalid, illegal or unenforceable, that invalidity, illegality or unenforceability will not affect the validity or enforceability of the remaining provisions of this Deed.
- 16.3 No waiver (whether expressed or implied) by the Council of any breach or default by the Owner or the Developer in Complying with any obligation, covenant or undertaking in this Deed will constitute a continuing waiver and no waiver will prevent the Council from enforcing any obligation, covenant or undertaking or from acting upon any subsequent breach or default of any obligation, covenant or undertaking by the Owner or the Developer.

17. **FORCE MAJEURE**

- 17.1 Provided it has complied with this clause, if the Owner is prevented, hindered, or delayed in or from performing any of its obligations under this Agreement by a Force Majeure Event the Owner shall not be in breach of or otherwise liable for any such failure or delay in the performance of such obligations.
- 17.2 The Owner shall as soon as reasonably practicable after the start of the Force Majeure Event notify the Council in writing of the Force Majeure Event, the date on which it started, its likely or potential duration, and the effect of the Force Majeure Event on its ability to perform any of its obligations under this Agreement.
- 17.3 The Owner shall use Reasonable Endeavours to mitigate the effect of the Force Majeure Event on the performance of its obligations.

18. **VAT**

- 18.1 All consideration given in accordance with the terms of this Deed shall be exclusive of any Value Added Tax properly payable.

19. **DELIVERY**

- 19.1 The provisions of this Deed (other than this clause which shall be of immediate effect) shall be of no effect until this Deed has been dated.

**EXECUTED AS A DEED** by the parties on the date which first appears in this Deed.

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**SCHEDULE 1**

**LAND AND TITLE(S)**

**PART 1**

**OWNER**

<b>Description of Land</b>	<b>Title Documents</b>
Land at VPI Immingham Combined Heat and Power Plant, Rosper Road, South Killingholme, DN40 3DZ	HS299803

**PART 2**

**DEVELOPER**

<b>Description of Land</b>	<b>Title Documents</b>
Land at VPI Immingham Combined Heat and Power Plant, Rosper Road, South Killingholme, DN40 3DZ	HS373281
	HS371807
	HS322075

## SCHEDULE 2

### 1. BIODIVERSITY NET GAIN

- 1.1 Subject to paragraph 1.2, the Developer covenants with Council that it shall not Commence Development until it has submitted a Biodiversity Net Gain Plan to the Council and the Council has approved the same, such approval not to be unreasonably withheld or delayed.
- 1.2 The Developer and the Council agree that in the event that prior to Commencement any development works are undertaken on the Site by any Other Developer:
- 1.2.1 the Developer shall be entitled (in its sole discretion) to prepare and submit an Updated Biodiversity Net Gain Plan to the Council; and
- 1.2.2 if the Developer elects to submit an Updated Biodiversity Gain Plan to the Council the Developer covenants with the Council that it shall not Commence Development until the Council has approved the same, such approval not to be unreasonably withheld or delayed.
- 1.3 The Developer and the Council agree that the Biodiversity Net Gain Units to be delivered pursuant to the Biodiversity Net Gain Plan for the Development may be delivered by any or a combination of the following:
- 1.3.1 the creation of new or enhanced habitats at the Site;
- 1.3.2 the purchase of land by the Developer for the purpose of delivering, maintaining, managing, and monitoring new habitats on that land for a period of at least 30 years;
- 1.3.3 the payment of the Biodiversity Offsetting Contribution; and/or
- 1.3.4 the purchase of Biodiversity Net Gain Units from third party landowners and/or suppliers.
- 1.4 The Developer and the Council agree that where the Biodiversity Net Gain Units are to be delivered on land other than the Site, the habitat enhancements represented by the Biodiversity Net Gain Units shall be secured for a period of 30 years either by way of:
- 1.4.1 an agreement between the (i) the landowner of the land on which the Biodiversity Net Gain Units are situated, and (i) the local planning authority in whose area such land is located pursuant to section 106 of the 1990 Act; or
- 1.4.2 a conservation covenant between the landowner of the land on which the Biodiversity Net Gain Units are situated and a "responsible body" as defined under section 117 of the Environment Act 2021.
- 1.5 The Council covenants and agrees:
- 1.5.1 to use any Biodiversity Offsetting Contribution for the purpose of the delivery, maintenance, management and monitoring of newly created or enhanced habitats outside the Site for a period of at least 30 years and not any other purpose;

- 1.5.2 to hold any Biodiversity Offsetting Contribution in an Interest Bearing Account pending use; and
- 1.5.3 from time to time following a reasonable request by the Developer to provide the Developer with a breakdown of expenditure from any Biodiversity Offsetting Contribution that has been expended or committed through a contract or spending allocation approved by the relevant committee, member or officer.

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**APPENDIX 1 – PLAN OF THE SITE**

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**APPENDIX 2 – COMPLETED BNG METRIC**

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### APPENDIX 3 – LETTER OF RELEASE

#### TO BE TYPED ON THE COUNCIL'S HEADED NOTEPAPER

Dear [Owner] or [Developer]

We refer to the obligation(s) imposed upon the [Owner] or [Developer] contained in [include reference to clause no. and Schedule reference for the relevant obligations] of the Deed made pursuant to s 106 of the Town and Country Planning Act 1990 dated [ ] and made between [ ].

The planning obligations which are specified in the Schedule below have been fulfilled.

Schedule

[Specify released obligations]

We hereby acknowledge receipt of [include reference to relevant submission] that you have submitted and agree that the planning obligations referred to in the Schedule above have been fulfilled and hereby release the [Owner] or [Developer] from any further liability in respect of those planning obligations.

Yours faithfully

For and on behalf of the Council being duly authorised to do so