

Thanet Extension: Comments on the DCO/EM

These queries relate solely to matters raised by the drafting of the DCO, and not the merits of the proposal. They are limited by the time available for consideration, and raised without prejudice to the acceptance or otherwise of the eventual application. They are provided to assist the preparation of the next iteration.

A=Article, R=Requirement

Q No.	Section	Extract from DCO	Question/Comment
1.	General	<i>Compliance with the SI template</i>	<p>The numbering within articles is frequently incorrect as the first paragraph has not been numbered – see, for example, A3. This will need to be corrected. These comments refer to the paragraphs as <u>currently</u> numbered.</p> <p>This also extends to Schedule 1 (where Work No 1 appears to be numbered as A41), the proposed substituted text in Schedule 6, and to the requirements.</p>
2.	A2	<i>Definition of "authorised development" "and any other development authorised by this Order which is development within the meaning of section 32 (meaning of development) of the 2008 Act"</i>	<p>What "any other development" is intended to be included in this?</p> <p>Could this other development not be identified and set out in Schedule 1?</p>
3.	A2	<i>Definition of "commence" "other than operations consisting of site clearance, demolition work, archaeological investigations, environmental surveys, investigations for the purpose of assessing ground conditions, remedial work in respect of any contamination or other adverse ground conditions, diversion and laying of services, creation and laying of haul roads, erection of any temporary means of enclosure, temporary structures and/or hard standing, the temporary display of site notices or advertisements"</i>	<p>How are these exclusions from the statutory definition of commencement justified?</p> <p>As restrictions on commencement of development are commonly used in requirements, there can be conflicts with the definition. For example, R19 requires a fencing scheme to be approved by the relevant LPA before commencement of each stage. Since the "erection of any temporary means of enclosure" is excluded from the definition of commencement, the requirement is ineffective as currently worded – the fencing can be erected before the scheme is approved. A similar issue arises with R24 (archaeological investigations).</p> <p>Also, works such as site clearance, demolition and laying of services could have impacts on archaeological sites or have ecological impacts, but can all be carried out before a scheme to manage those impacts has been agreed.</p>

4.	A6	<i>Application and modification of legislative provisions</i>	The amendment text for the 1997 Act is missing – see, for example, A3 of the East Anglia 3 DCO.
5.	A8(3)	<i>Street works</i> "whether or not within the Order limits"	This would appear to provide an extremely wide power to carry out works across the country. What is the justification for this power and the precedent for its use?
6.	A12(9)	<i>Discharge of water</i> "that person is deemed to have granted consent or given approval"	Is this 28-day deemed approval appropriate?
7.	A15	<i>Public rights of navigation</i>	What is the justification for this power and the precedent for its use?
8.	A20	<i>Application of the Compulsory Purchase (Vesting Declarations) Act 1981</i>	The proposed amendments here differ from those used in recently granted DCOs – for example, it omits only s5(2) of the 1981 Act, rather than the whole section. Could more detail be provided in the EM on the amendments sought and their justification? The wording of paragraph (4) seems to be incomplete or contain typos.
9.	A35	<i>Procedure in relation to certain approvals etc.</i>	What is the justification for the bespoke procedure for the discharge of requirements set out here and in Schedule 10?
10.	A38	<i>Crown rights</i>	Would the recently approved wording in the Richborough DCO be more appropriate? In particular, as Crown land can never be taken, this omits "take" from the list of possible interferences with Crown rights.
11.	R11	<i>Stages of authorised development onshore</i>	There is currently no wording requiring the submitted scheme to be adhered to. Also, there is no opportunity for the relevant planning authority to comment on or approve the submitted scheme.
12.	R13	<i>Provision of landscaping prior to commencement</i>	The scheme changes reference throughout – "written landscaping management scheme and associated work programme", "commencement landscaping management scheme", "landscaping management scheme". This should be made consistent.
13.	R17	<i>Construction Environmental Management Plan</i>	There is currently no wording requiring the submitted plan to be adhered to.

14.	General	<i>Use of "shall"</i>	The Office of the Parliamentary Counsel Drafting Guidance document advises against the use of "shall" (see para 1.2.9). The current draft uses shall in numerous locations. These should be reworded as per the guidance.
15.	General	<i>Explanatory Memorandum</i>	<p>The PINS Advice Note 13 recommends that a tracked changes version showing changes from model provisions should be useful. This also applies where the precedent for wording is not a model provision but instead a previously granted DCO or other form of order ("The relevant precedent and the rationale for including the particular wording of a provision will need to be set out and justified in the explanatory memorandum"). The EM does not always identify the source or the justification for the wording used.</p> <p>This is likely to generate extensive questioning from the eventual ExA in order to establish the justification for the proposed wording. Clarifying the need and origin for each provision at an early stage is likely to reduce this.</p>