

Appendix 1

National Highways' responses to the Applicant's submissions at Deadline 4 (REP4-035)

National Highways (NH) set out below its responses to the Applicant's submissions made at Deadline 4 (REP4-035) which in turn was a response to the submissions of NH at Deadline 3 (REP3-139). NH's submissions at Deadline 3 have not been repeated below but the same numbering is used.

ID	Applicant's Responses	NH Response
1. Introduction		
1.1	Noted. No response required.	-
1.2	Noted. The Applicant would like to clarify that the cables will be installed using trenchless crossing techniques under the SRN. The Applicant would not be seeking to temporarily possess the carriageway but acknowledges that some ground monitoring equipment may need to be placed on apparatus within the carriageway which would be agreed with National Highways following established approval processes for the placing of such equipment.	Noted.
1.3	Noted. No response required	-
1.4	Noted. No response required.	-
1.5	The Applicant would like to clarify that the draft DCO (Revision G) [document reference 3.1] does not include a specific provision which gives it powers to impose traffic regulation orders.	Noted.
1.6	As set out in The Applicant's Statutory Undertakers Position Statement (Rev B) [REP3-083], the Applicant did not initially include protective provisions for National Highways at submission in August 2022 of the Application because National Highways initial proposed draft protective provisions were	Noted. National Highways maintains its position that it requires the latest set of protective provisions it has submitted to be included within the DCO. NH will continue to work with the Applicant to agree the form of protective provisions to be included within the DCO.

	received too close to the submission of the application to include them in the draft DCO at that time. The Applicant included within the draft DCO [document reference 3.1] at Deadline 3 a set of protective provisions for National Highways which are based on the protective provisions it had been actively negotiating with National Highways over five months up until February 2023.	
2. Objection		
2.1	Noted. No response required.	-
2.2	<p>With regards to (a) and the inclusion of protective provisions for National Highways, the Applicant notes that it has included a set of protective provisions for National Highways in its draft DCO at Deadline 3. These are included in Part 14 of Schedule 14 of the draft DCO (Revision G) [document reference 3.1]. It is acknowledged in The Applicant's Statutory Undertakers Position Statement (Revision B) [REP3-083], that these protective provisions are subject to negotiation. This is particularly so in light of the latest set of draft protective provisions that National Highways has submitted to the Examination as part of its further written representation [REP3-139].</p> <p>With regards to point (b), the Applicant confirms that it will enter into a co-operation agreement with National Highways and is engaging with National Highways to move negotiations on an appropriate co-operation agreement forwards urgently. The Applicant will provide a further update on the progress of those negotiations at Deadline 5 in line with its commitment to do so in response to Q2.8.1.2(d) in The Applicant's Response to the Examining Authorities Second Written Questions [REP3-101].</p>	Noted. NH is working with the Applicant to seek to agree protective provisions and a co-operation agreement as soon as possible.
3. Protective Provisions		
3.1	As noted above, the draft DCO (Revision G) [document 3.1] includes protective provisions for the benefit of National Highways at Part 14 of Schedule 14. The Applicant will continue to negotiate the draft protective provisions with National Highways and will provide a more detailed update on progress at Deadline 5.	Noted.

3.2	<p>The Applicant does not agree that the protective provisions for National Highways in the form included at Appendix 1 of its further written representation [REP3-139] should be included in the Applicant's draft DCO [document reference 3.1]. The Applicant has noted that the original protective provisions provided to the Applicant in August 2022 were less onerous than either of the two more recent versions of protective provisions provided by National Highways. The Applicant is continuing to negotiate with National Highways in order to reach agreement on the form of protective provisions that should be included in the draft DCO [document reference 3.1] for the benefit of National Highways.</p>	<p>Noted. The latest set of protective provisions submitted by National Highways is the minimum it considers necessary to protect its position.</p> <p>The protective provisions have been subject to a recent legal review in line with usual legal due diligence, hence the update. The latest set provides greater protection to National Highways from third party development that affects the strategic road network and land owned by National Highways on which it carries out of its functions as a strategic highway authority.</p>
3.3	<p>National Highways comments are noted and the Applicant reiterates that it is continuing to engage with National Highways to agree appropriate protective provisions with them. Please also see the Applicant's response at ID4.2 below with regards to 'serious detriment'.</p>	<p>Noted. Please see response to ID 4.2 below concerning serious detriment.</p>
<p>4. Compulsory Acquisition</p>		
4.1	<p>Noted. No response required</p>	<p>-</p>
4.2	<p>National Highways objection is noted. The Applicant has set out clearly in its Statement of Reasons (Revision D) [REP3-019] why it considers that there is a compelling case in the public interest to compulsorily acquire land or create rights and impose restrictive covenants in, on, over or under land in all the plots included in the Book of Reference (Revision E) [REP3-015]. The Applicant notes for clarity that it is not seeking to acquire permanently under Article 19 any land forming part of the existing SRN or land that is proposed to become part of the SRN pursuant to The A47 North Tuddenham to Easton Development Consent Order 2022 (the 'A47 Tuddenham Order') (which is currently subject to judicial review). The Applicant does not consider that the inclusion of the plots where National Highways has an interest in the relevant land or where the land is included within the A47 Tuddenham Order presents a serious detriment to National Highways carrying out its statutory duties. Interactions with the existing A47 and A11 will be appropriately managed through the protective provisions for National</p>	<p>National Highways is a strategic highway company under the provisions of the Infrastructure Act 2015 and is the highway authority, traffic authority and street authority for the Strategic Road Network (SRN). As such we have responsibilities for managing the SRN in accordance of our Licence and statutory duties in the Highways Act 1980 with which we must comply. This duty also encompasses the reasonable requirements of road safety. National Highways is also subject to the network management duty under section 16 of the Traffic Management Act 2004, which the acquisition of land or rights in land may interfere with.</p> <p>Whilst the Applicant states that there is no proposal to permanently acquire land forming part of the SRN under Article 19 of the draft DCO it is clear that under Article 20 permanent rights in the SRN under the DCO are sought by the Applicant. National Highways is listed as the owner of a number of plots over which permanent acquisition of rights and temporary possession of land is sought. National Highways objects to the compulsory acquisition of rights</p>

<p>Highways (including, as appropriate, compliance with established National Highways' certification and approval processes for the use of HDD under the SRN). In the event National Highways A47 Tuddenham scheme is constructed, the potential interactions between the A47 scheme can and will be appropriately managed through protective provisions and/or a co-operation agreement to be entered into by the parties.</p> <p>To succeed in an argument under section 127, National Highways must provide convincing argument and evidence of the detriment that it asserts, which it has not done to date. It is clear from previous considerations of section 127 that serious detriment is a high bar. Just because there is any adverse impact or detriment will not mean that serious detriment exists. In particular, the Applicant would highlight the decision on the Lake Lothing DCO where the Secretary of State did not accept the argument from ABP (the port authority) that the detriment it would suffer met the 'serious' element of the test. A copy of the Lake Lothing DCO Recommendation Report and the Secretary of State's Decision Letter can be found at Appendix A below. See in particular paragraphs 5.8.148 - 5.8.156 of the DCO Recommendation Report and paragraphs 25 and 35 of the Secretary of State's Decision Letter.</p>	<p>as included in the Order and this objection is set out in more detail in its submission at Deadline 3 (REP3-139).</p> <p>It is National Highways' view that the proposed acquisition of land and rights as part of the authorised development would cause serious detriment to National Highways and prevent it from complying with their statutory duties under the Highways Act 1980 and also under its Licence.</p> <p>National Highways is required by its licence to hold and manage land and property in line with, and as a function of, its legal duties as highway authority. The compulsory acquisition of land and rights under the development consent order may put National Highways in breach of its land and property duty</p> <p>The proposed compulsory acquisition of rights in land together with the extinguishment of private rights over land (pursuant to Article 21 of the DCO) in itself may cause serious detriment to National Highways' SRN. As operator of the SRN, its numerous aims and objectives under the Licence include the requirement to manage the SRN, a critical national asset, in the public interest and ensure the effective operation of the SRN, whilst protecting and improving the safety of the SRN. The acquisition of rights and/or the extinguishment of rights held by National Highways, by a private developer, in and/or over the SRN, has the potential to disrupt the operation of the SRN such that National Highways is not able to adequately carry on its functions pursuant to the Licence.</p> <p>From the above proposed compulsory acquisition of rights and extinguishment of rights, the following consequential impacts may arise, which also have the potential to cause serious detriment to National Highways:</p> <ul style="list-style-type: none"> • General impacts on the A47 and the SRN – not taking into account the made A47 North Tuddenham to Easton Development Consent Order 2022 (A47 TUD DCO), the proposed authorised development would have impacts on the operation of the SRN. These impacts are described in more detail in NH's submission at Deadline 3 (REP3-139). In particular: <ul style="list-style-type: none"> ○ NH notes from Figure 1 included with the Outline Construction Traffic Management Plan (OCTMP) (REP3-062) that a number
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		<p>of highways forming part of the SRN, including the A47, A11, and the A1270 will be required for construction traffic movements for the construction of the proposed authorised development. Whilst the Applicant will be required to mitigate its effects on the SRN, ultimately National Highways will be responsible for the day-to-day operation of the SRN to the public and the Department for Transport. National Highways requires that it is fully consulted in relation to the discharge of any requirements under the DCO that relate to construction traffic management. The Applicant welcomes the addition of its inclusion as a consultee in relation to Requirement 15 of the DCO (REP4-003) but notwithstanding this, there will still be an impact on the SRN by virtue of the proposed authorised development and this could cause serious detriment to NH's undertaking.</p> <ul style="list-style-type: none">○ In addition to the above, the Applicant notes that existing access directly off the A47 are proposed to be used for construction access and early works accesses. This is as set out in the Access to Works Plans (AS-051). The use of access from the SRN is likely to have a direct impact on the SRN and impact on National Highways' ability to carry out its undertaking pursuant to its Licence.○ NH notes that the Applicant proposes to install its onshore cables beneath the SRN which will likely have direct impacts of the operation of the SRN. The Applicant requires the inclusion of its preferred form of protective provisions within the DCO to adequately protect the SRN, which is a critical national asset. The form of protective provisions is not yet agreed between the Applicant and NH, and until this has been resolved, NH's position is that its assets are not adequately protected. NH will continue to work with the Applicant in order to agree a suitable form of protection but until agreement is reached, the works are likely to cause serious detriment to the carrying on of the undertaking.● Interactions with The A47 North Tuddenham to Easton Development Consent Order 2022 (A47 TUD DCO). National Highways has previously made a number of detailed submissions in respect of the interaction between the A47 TUD DCO and the proposed authorised
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		<p>development. Notwithstanding ongoing judicial review proceedings, the A47 TUD DCO for which NH is the undertaker remains a made Order for the nationally significant infrastructure project, to which substantial weight should be attributed to in the consideration of whether there is any serious detriment to National Highways. In particular:</p> <ul style="list-style-type: none">○ NH has compulsory acquisition rights over a number of parcels of land that fall within the Order Limits for the proposed authorised development. The relevant land is subject to compulsory acquisition powers because in the consideration of the application for the A47 TUD DCO the Secretary of State agreed that such land was necessary for the purposes of the carrying out of the development under the A47 TUD DCO, and that it was in the public interest to do so. In determining the A47 TUD DCO the Secretary of State will have had regard to any alternatives that NH as applicant had considered and in making their decision, agreed that the relevant land was required because there were no other alternatives. As such there is no alternative means of replacing the land that NH requires for its Order, and to enable it to carry on its undertaking.○ The overlapping nature of the A47 TUD DCO and the proposed authorised development should also be highlighted in the context of the serious detriment to NH. In particular, the construction access corridor proposed by the Applicant from Taverham Road (see submissions at page 7 of REP3-138) which also overlaps with land required by Orsted Hornsea Project Three (UK) Limited in relation to the Hornsea Three Offshore Wind Farm Order 2020 (Hornsea 3). Whilst NH notes that the land in question is required on a temporary basis only, the temporary possession powers sought by the Applicant pursuant to Article 26 are wide-ranging and in particular under Article 26(1)(b) can remove any vegetation from the land. NH under the A47 TUD DCO is under an obligation to include environmental mitigation within this area, including landscape planting, as part the requirements of the A47 TUD DCO. The works to be carried out under the A47 TUD DCO are set out in the REAC, contained within the Second Iteration Environmental Management Plan (Second Iteration EMP). The Second Iteration EMP is to be submitted in accordance with the approved First Iteration EMP which is listed as a certified
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		<p>document under the A47 TUD DCO. The Second Iteration EMP is in an agreed form ready to be submitted to the Secretary of State for approval. This document has been through consultation with the required bodies and it is not capable of being amended in order to fit around the Applicant's proposed development for the above mentioned reasons. Therefore NH's view is that the access proposed in this location cannot be approved as NH cannot be in a position whereby it is in breach of the A47 TUD DCO by virtue of the Applicant carrying out its own authorised development. The Applicant has agreed to enter into a co-operation agreement in relation to the interactions between the two schemes, which will have regard to the mutual obligations as between NH and Orsted in relation to the Hornsea Three DCO. As such any co-operation agreement will need to be subordinate to existing obligations or Orsted is included as a party. However until this agreement has been finalised, NH must reserve its position in relation to this point, because of the serious detriment it would cause NH in granting the compulsory acquisition powers applied for.</p> <ul style="list-style-type: none">○ In addition to the above, and the Applicant's proposals to mitigate the effects on the SRN by virtue of the traffic management proposals, including in paragraph 122 of the OCTMP (Rev C) the parties "<i>committing to a programme of works that ensure peak traffic movements do not overlap</i>". The Applicant would like to make clear that the traffic management plan required by the A47 TUD DCO has been approved by the Secretary of State as part of the discharge of the requirements of the A47 TUD DCO. As such, NH will be under an obligation to carry out its development pursuant to the approved traffic management plan, and is under no obligation to amend this. Any deviation from this approved plan could put NH in breach of its own Order which it is not willing to risk. NH would be happy to share the approved plan with the Applicant in order for the Applicant to update its own OCTMP and subsequent traffic management plans. The Applicant has agreed to enter into a co-operation agreement in relation to the interactions between the two schemes. However until this agreement has been finalised, NH must reserve its position in relation to this point,
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		because of the serious detriment it would cause NH in granting the compulsory acquisition powers applied for.
4.3	<p>The Applicant notes National Highways comments regarding the use of the NRSWA as an alternative. However, the works proposed as part of SEP and DEP which include using HDD to install cabling under the SRN are an integral part of delivering two Nationally Significant Infrastructure Projects and it is entirely appropriate that those works are included within the development consent order, as associated development, in the way intended by Parliament under the Planning Act 2008. Indeed, the Applicant notes that when promoting its own DCOs National Highways routinely includes the same or substantially similar provisions as the Applicant in its own DCOs relating to streets and the application of NRSWA. The Applicant refers to, amongst many recent examples, the A47 North Tuddenham to Easton Development Consent Order 2022 article 14, the A47 Wansford to Sutton Development Consent Order 2023, article 11, A417 Missing Link Development Consent Order 2022 article 12, and A428 Black Cat to Caxton Gibbet Development Consent Order 2022 article 11. National Highways also often seek compulsory powers to acquire subsoil interests despite the surface of affected land having highway status and street works being applicable including for example in the A47 North Tuddenham to Easton Development Consent Order 2022. The Applicant does not accept NH's position on this point which is inconsistent with its own actions. For reference, the Applicant has appended a copy of the A47 North Tuddenham to Easton Development Consent Order 2022 at Appendix B.</p> <p>In addition, the Applicant notes that the NRSWA is only applicable where works are undertaken 'in' a street and there is a wealth of established case law (including being considered most recently in Southwark LBC v TfL [2018] UKSC 63) which confirms that the depth of a street (as a public highway) has a limit in law (including being considered most recently in Southwark LBC v TfL [2018] UKSC 63). Street status does not allow the street authority to interfere with the rights of the owner of the subsoil just because works are under a street, even where the owner of the subsoil is the same as the street authority. The precise depth of the installation of the SEP and DEP cables</p>	Noted. National Highways is unable to respond to this at this stage but reserves its position and will submit a written response before Deadline 7.

	<p>under the SRN will be determined post consent and it may be the case that the cables will be installed at a depth that falls within the remit of the subsoil owner and not within the street itself, in which case the NRSWA would not be applicable and it is therefore entirely necessary and appropriate for the relevant compulsory acquisition powers to be sought within the draft DCO.</p> <p>With regards to concerns raised about indemnities, the Applicant notes that National Highways protective provisions include an appropriate indemnity for the benefit of National Highways within paragraph (9) of Part 14 of Schedule 14.</p>	
4.5	<p>The Applicant welcomes the opportunity to continue to negotiate with National Highways. National Highways legal department was contacted (in the same way as all other statutory undertakers potentially affected by SEP and DEP) early in 2022 to commence formal discussion regarding the protections it would require as a consequence of land in which it has an interest being identified within the book of reference. Through this contact the Applicant considers that it has sought to engage with National Highways in order to put in place mechanisms to avoid having to rely on compulsory acquisition of any of National Highways' interests. The Applicant remains committed to pursuing the ongoing discussions and negotiations with National Highways for the benefit of both parties.</p>	<p>Noted. National Highways is not aware of any other attempts by the Applicant to negotiate land acquisition by agreement but welcomes the opportunity to discuss this with the Applicant.</p>
<p>5. A47 Tuddenham Scheme</p>		
5.1	<p>The Applicant has provided its response within The Applicant's Comments on Responses to the Examining Authority's Second Written Questions [document reference 18.2] submitted at Deadline 4.</p>	<p>The Applicant has responded to these comments in Appendix 2 of its Deadline 5 submissions.</p>
5.2	<p>The Applicant notes that National Highways has now included a further revised set of protective provisions within Appendix 1 of its further written representation [REP3- 139]. As noted above, the Applicant is committed to continuing negotiations of the protective provisions and will enter into a co-operation agreement with National Highways in order to co-ordinate, as</p>	<p>NH welcomes the Applicant's willingness to enter into a co-operation agreement and will continue to progress discussions with a view to finalising agreement as soon as possible.</p>

	appropriate, the construction of SEP and DEP and National Highways' A47 Tuddenham Scheme.	
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