



Sheringham Shoal and Dudgeon Offshore Wind Farm Extension Projects

The Applicant's Response to National Highways Serious Detriment and Protective Provision Submissions

Revision A

Deadline 8

July 2023

Document Reference: 22.4.1

Title:	
Sheringham Shoal and Dudgeon Offshore Wind Farm Extension Projects Examination submission The Applicant's Response to National Highways Serious Detriment and Protective Provision Submissions	
PINS document no.: 22.4.1	
Document no.: C282-BS-Z-GA-00043	
Date:	Classification
July 2023	Final
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1 Introduction

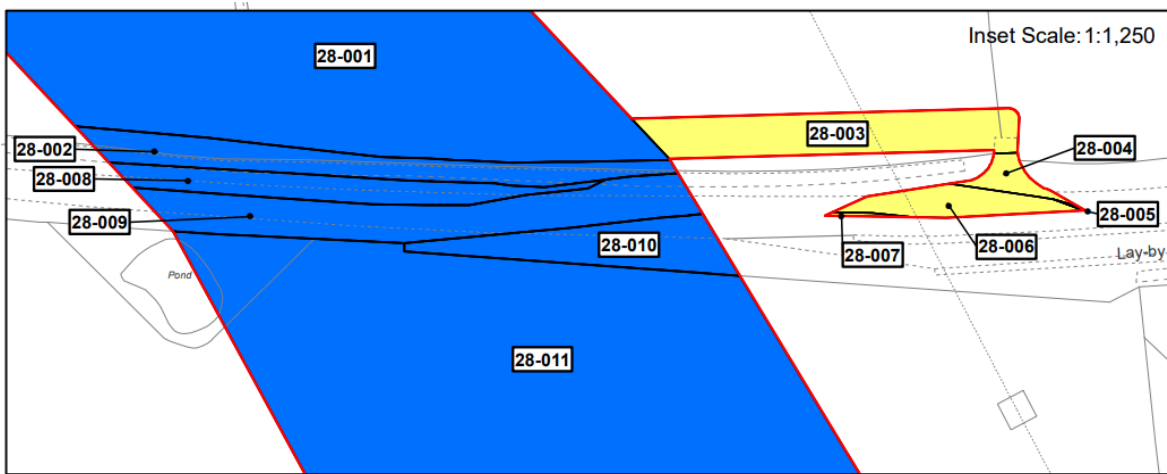
1. The Applicant has prepared this response in light of a number of submissions relating to protective provisions and serious detriment which have been made by National Highways during the Examination. The relevant National highways submissions are:
 - a) National Highway's Deadline 3 submission [REP3-139];
 - b) National Highways response to the Applicant's Deadline 4 submission [REP5-086];
 - c) National Highway's Deadline 5 submission [REP5-046]; and
 - d) National highways Responses to the Examining Authority's Fourth Written Questions (ExQ4) – Protective Provisions for Deadline 7.
2. The **draft DCO (Revision K)** [document 3.1] includes powers to acquire a series of land rights and interests in land which will be required, on a permanent and temporary basis. In the event it has not been possible to acquire the land rights and interests by agreement, it will be necessary to compulsorily acquire these for the purposes of developing the Sheringham Shoal Offshore Wind Farm Extension Project (SEP) and Dudgeon Offshore Wind Farm Extension Project (DEP) and as such, the **draft DCO (revision K)** [document reference 3.1] includes powers to compulsorily acquire land.
3. Compulsory acquisition and temporary possession powers are sought within the DCO in relation to land forming part of the Strategic Road Network (SRN) (in this case being small sections of the A47 and A11). National Highways is the highway authority for these highways.
4. The DCO also includes compulsory acquisition and temporary possession powers in respect of land which has been included within National Highways' The A47 North Tuddenham to Easton Development Consent Order 2022 (the A47 Tuddenham Order).
5. National Highways is a Statutory Undertaker (SU) for the purposes of section 127 of the Planning Act 2008 (PA2008) as it falls within the definition set out in section 8(1) of the Acquisition of Land Act 1981. Where a SU has made a representation about the compulsory acquisition (CA) of land or rights over land which has been acquired for the purpose of their undertaking, and this representation is not withdrawn, s127 of the PA 2008 applies.
6. National Highways has submitted that it believes the CA sought by the Applicant would result in serious detriment to its statutory undertaking. This representation has not been withdrawn and was maintained in National Highway's Deadline 5 submission [REP5-046 at line 4.2]. This submission states "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".

7. National Highways has made a further submission setting out why it considers its version of Protective Provisions included at Appendix 1 of the National Highways Responses to the Examining Authority's Fourth Written Questions (ExQ4) – Protective Provisions for Deadline 7 should be included in the DCO in the event consent is granted.
8. The Applicant does not agree or accept that the CA sought in the DCO would result in serious detriment to National Highways. This submission sets out why the Applicant considers that no serious detriment would arise and why the Secretary of State should accept the Applicant's version of the Protective Provisions for National Highways which are included at Part 14 of Schedule 14 of the **draft DCO (Revision K)** [document reference 3.1].

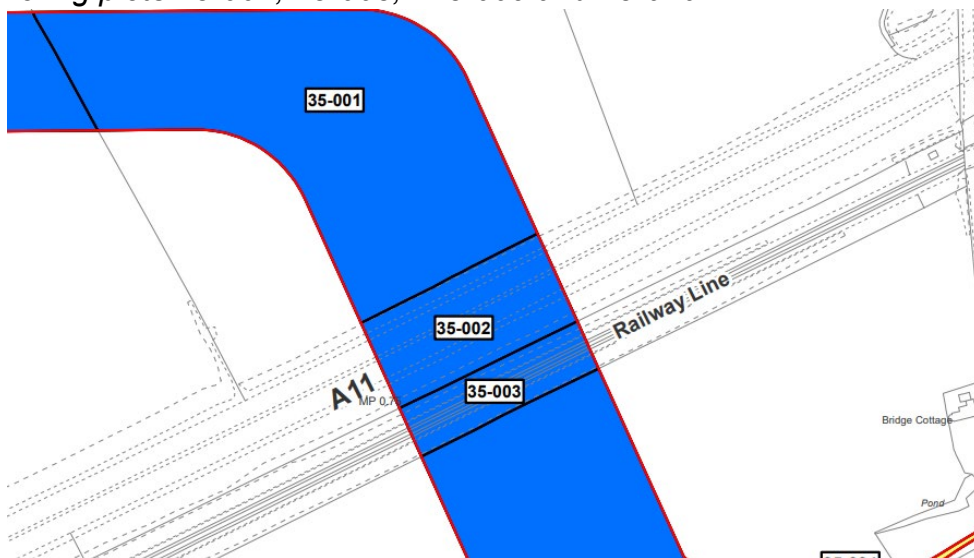
2 Background

9. As set out in the **Book of reference (Revision H)** [document 4.1], CA powers are sought over the following plots within which National Highway has an interest:

Plot	National Highways' interest	CA sought	Other occupiers/rights holders	Works
28-002 highway and verge of A47	Owner and Occupier	Rights D Onshore connection works (Cable Corridor)	Eastern Power Networks PLC	Work Nos. 12A/B or 12C
28-008 highway and verge of A47	Owner and Occupier	Rights D Onshore connection works (Cable Corridor)	Eastern Power Networks PLC Openreach	Work Nos. 12A/B or 12C
28-009 highway and verge of A47	Occupier as Highway Authority	Rights D Onshore connection works (Cable Corridor)	Anglian Water Services Limited Eastern Power Networks PLC Openreach	Work Nos. 12A/B or 12C
28-010 highway and verge of A47	Owner and Occupier	Rights D Onshore connection works (Cable Corridor)	Anglian Water Services Limited	Work Nos. 12A/B or 12C or 12C
35-002 highway and verge of A11	Owner and Occupier	Rights D Onshore connection works (Cable Corridor)	Eastern Power Networks PLC	Work Nos. 12A/B or 12C



Extract of Land Plans (Rev E) [document reference 2.3] showing inset from sheet 28 covering plots 28-002, 28-008, 28-009 and 28-010



Extract of Land Plans (Rev E) [document reference 2.3] showing part of sheet 35 covering plot 35-002

10. The rights sought (Rights D) are set out in full in table 1.1 of the **Book of Reference (Revision H)** [document 4.1]. In summary they include rights to install, operate and maintain the cables and to take access and carry out such works as are required to do that. Restrictive covenants will be imposed over the cable corridor to provide protection to the cables once they are installed. These would prevent buildings or other erections being built over the cables and ensure that they are not damaged. The restrictions would not prevent uses on the surface which do not endanger the cables. The rights and restrictions sought accordingly seek to achieve an appropriate balance between what is required by the applicant and the rights of affected landowners. The full explanation of why this balance is appropriate is set out in the **Statement of Reasons (Revision E)** [document reference 4.3].
11. Temporary possession powers are also sought over plots within which National Highways has an interest, however these powers are not CA as there is no acquisition proposed. Temporary possession is by its nature a measure which is

applied to minimise the need to seek or rely on CA powers where short term occupation for construction is all that is required, rather than acquisition of a permanent right. Section 127 accordingly does not apply to the following plots for which only powers of temporary possession are sought: 27-006, 28-003, 28-004, 28-005, 28-006, 28-007.

2.1 Summary of ownership interactions

2.1.1 A47 and A11 – HDD under SRN, Works 12A/B, 12C, plots 28-002, 28-008, 28-009 and 28-010 (A47 crossing) and 35-002 (A11 crossing) (all acquisition of cable corridor rights)

12. The Applicant is proposing to use a trenchless installation technique to install cabling underneath the SRN without interfering with or interrupting the surface highway use. The crossing of the A47 (number 371 in the **Environmental Statement - App 4.1 - Crossing Schedule (Revision E)** [document reference 6.3.4.1]) has been specified as a trenchless crossing approximately 220m long. The crossing under the A11 (number 475 in the **Environmental Statement - App 4.1 - Crossing Schedule (Revision E)** [document reference 6.3.4.1]) has been specified as a trenchless crossing approximately 180m long.

2.1.2 Temporary construction access ACC46 connecting into A47 new spur, Works No.13A/B, plot 27-006 (temporary possession)

13. Temporary possession of land is sought to provide the undertakers with necessary access to construct the cables and associated infrastructure. Access ACC46 is however only required in the event the A47 Tuddenham scheme is constructed pursuant to the A47 Tuddenham Order ahead of SEP and DEP or there is a period of overlapping construction.

2.1.3 Temporary construction access ACC47 connecting into the existing A47, Works No.13A/B, plots 28-003, 28-004, 28-005, 28-006, and 28-007 (temporary possession)

14. Temporary possession of land is sought to provide the undertakers with necessary access to construct the cables and associated infrastructure. In the event the A47 realignment is constructed, this access would not be required and access ACC46 would be required as set out above.

2.2 Summary of interactions with the A47 Tuddenham Scheme

15. In addition to the above plots where National Highways is owner and/or occupier of land plots identified in the **Book of Reference (Revision H)** [document 4.1], the Applicant acknowledges that there are some additional plots included within the Book of Reference which overlap with National Highways A47 Tuddenham Order. These additional plots are plots where National Highways does not currently have a land interest which can be included in the Book of Reference but the Applicant acknowledges that National Highways could exercise powers of compulsory acquisition or temporary possession powers in relation to these plots pursuant to the A47 Tuddenham Order at some future point. At Deadline 4, the Applicant

included at **Appendix A.1** of **Supporting documents to the Applicant's Comments on Responses to the Examining Authority's Second WQ** [REP4-029] a table showing which plots within the **Book of Reference (Revision H)** [document 4.1], overlap with plots included in National Highways' Book of Reference for the A47 Tuddenham Order.

2.3 Status of negotiations

16. The Applicant and National Highways have agreed to enter into a Cooperation Agreement to cover access arrangements, programming of works, lines of communication, engineering works where relevant (e.g. infrastructure under the A47), ecological mitigation and road closures. As set out in the **Draft Statement of Common Ground with National Highways (Revision C)** [REP5-034], Detailed Heads of Terms for the proposed Co-operation Agreement have been issued to National Highways. Discussions to progress this agreement remain ongoing.
17. The Applicant agrees that Protective Provisions in favour of National Highways are appropriate for this development. The Applicant does not however agree that the form of such provisions put forward by National Highways is proportionate, necessary or reasonable to secure the required protections.
18. Protective Provisions for the benefit of National Highways have been included in Part 14 of Schedule 14 to the **draft DCO (Revision K)** [document 3.1]. The Applicant's position is that these Protective Provisions are suitable to protect National Highways as a statutory undertaker. These provisions are not agreed and the points of disagreement are addressed in section 6 and Appendix A of this submission.
19. The Applicant notes that National Highways on numerous occasions including in its Responses to the Examining Authority's Fourth Written Questions (ExQ4) – Protective Provisions for Deadline 7 refers to its 'standard protective provisions'. However, National Highways has presented the Applicant with four versions of their 'standard' protective provisions since August 2022 including three sets during Examination after extensive efforts had already taken place to reach agreement on the first set provided. Moreover, there is no other DCO which includes the specific drafting now being requested by National Highways. The small number of previous DCOs where there are Protective Provisions for the benefit of National Highways are far less onerous and more proportionate to the development to which they relate. They do not generally seek to unnecessarily duplicate matters which would ordinarily be controlled through the s278 process pursuant to the Highways Act 1980 and which an Applicant is not seeking to disapply through the DCO. The Applicant highlights that it is not seeking to undertake permanent works to the surface of the SRN nor is it seeking disapply s278 of the Highways Act 1980 and as such, considers that there is no justification for including a number of the extensive provisions which National Highways has proposed in its version of the Protective Provisions. This is set out in more detail in Appendix A of this submission.

3 Serious Detriment

20. Section 127 of the PA2008 provides that:

- (1) *This section applies in relation to land (“statutory undertakers' land”) if—*
- (a) *the land has been acquired by statutory undertakers for the purposes of their undertaking,*
 - (b) *a representation has been made about an application for an order granting development consent before the completion of the examination of the application, and the representation has not been withdrawn, and*
 - (c) *as a result of the representation the Secretary of State is satisfied that—*
 - (i) *the land is used for the purposes of carrying on the statutory undertakers' undertaking, or*
 - (ii) *an interest in the land is held for those purposes.*
- (2) *An order granting development consent may include provision authorising the compulsory acquisition of statutory undertakers' land only to the extent that the Secretary of State is satisfied of the matters set out in subsection (3).*
- (3) *The matters are that the nature and situation of the land are such that—*
- (a) *it can be purchased and not replaced without serious detriment to the carrying on of the undertaking, or*
 - (b) *if purchased it can be replaced by other land belonging to, or available for acquisition by, the undertakers without serious detriment to the carrying on of the undertaking.*
- (4) *Subsections (2) and (3) do not apply in a case within subsection (5).*
- (5) *An order granting development consent may include provision authorising the compulsory acquisition of a right over statutory undertakers' land by the creation of a new right over land only to the extent that the Secretary of State is satisfied of the matters set out in subsection (6).*
- (6) *The matters are that the nature and situation of the land are such that—*
- (a) *the right can be purchased without serious detriment to the carrying on of the undertaking, or*
 - (b) *any detriment to the carrying on of the undertaking, in consequence of the acquisition of the right, can be made good by the undertakers by the use of other land belonging to or available for acquisition by them.*

21. The Applicant agrees:

- a) That National Highways is a statutory undertaker for the purposes of the PA2008;
- b) That land held by it and/or forming part of the highway for which it is the highway authority has been acquired by National Highways for the purposes of its undertaking (s127(1)(a));
- c) That National Highways has submitted and prior to the completion of this submission has not withdrawn a representation under s127(1)(b); and
- d) The Secretary of State is therefore required to consider the application of section 127.

22. The Applicant submits that the applicable part of section 127 in this case is subsections (5) and (6). As set out in the background section above, the Applicant is only seeking CA of rights over land for the cable corridor and is not seeking to purchase the freehold of the land.
23. It is clear from previous considerations of section 127 in DCO decisions that what constitutes 'serious detriment' is a high bar. Just because there is any adverse impact or detriment will not mean that serious detriment exists.
24. In the Lake Lothing DCO¹ examination, Associated British Ports ("**ABP**") (the port authority who were a statutory undertaker) argued that the proposals would cause serious detriment to their port undertaking at Port of Lowestoft. The proposals included:
 - a) the permanent compulsory acquisition of 3,000m² of land side and bed of the lake;
 - b) 2,500m² of airspace and rights under bridge decks; and
 - c) 4,500m² of rights over the only access to the port.
25. ABP argued that the implications of the rights sought under the Lake Loathing DCO were that there would be a loss of 165m of berthing and that the proposals would seriously compromise the operational viability of the port by creating a constraint on the retention of existing and the attraction of new business. This would in turn cause damage to the strategic significance and the economic contribution of the port. ABP submitted therefore that the impact on the Lake Loathing DCO on the Port of Lowestoft amounted to serious detriment.
26. The Examining Authority in their recommendation report found that "the Proposed Development would cause material harm to the operational port. However, the extent of this harm, when considered in the context of the port operation as a whole, may be characterised as no more than moderate".²
27. In the decision letter the Secretary of State concluded that the "effect of the Proposed Development on the operation of the port would not justify refusing development consent".³ The Secretary of State determined that "in the context of section 127 of the 2008 Act that the CA and [temporary possession] powers sought would be detrimental to the carrying out of ABP's statutory undertaking but this detriment would not be serious".⁴
28. Similarly, in the consideration of the Great Yarmouth Third Crossing DCO⁵ the Examining Authority also had to consider the impact of the proposal on an operational Port. In that case the ExA accepted that 5 of 97 berths in the river would be permanently lost. Despite that, the ExA was "satisfied that the Scheme would not

¹ Planning Inspectorate reference TR010023.

² Examining Authority Recommendation Report on the Lake Lothing Third Crossing Development Consent Order, paragraph 5.8.156.

³ Secretary of State Decision Letter on the application for the proposed Lake Lothing Third Crossing Development Consent Order dated 30 April 2020, Paragraph 25.

⁴ Ibid, Paragraph 35

⁵ Planning Inspectorate reference TR010043

have a significant detrimental impact on Port capacity”⁶. Further while the construction of a new bridge would result in some “unavoidable inconvenience”⁷ that would not result in serious detriment to local Port businesses. The ExA concluded that the inconvenience to commercial and recreational river traffic had to be weighed against the scheme benefits and found that “these factors do not weigh heavily against the Scheme”⁸. The impacts would be “minor and unavoidable dis-benefits to Port navigation during the construction phase and thereafter to a small number of recreational vessels” and did not amount to serious detriment. The Secretary of State agreed with the ExA and was satisfied that there would be no serious detriment to Port businesses⁹.

29. The Applicant notes that there have been various considerations¹⁰ of the interaction between SU’s over whom CA powers are sought in DCOs and the Protective Provisions which apply to them. In numerous instances it has been decided that some Protective Provisions are required to prevent the CA powers resulting in serious detriment. That does not however mean that the relevant Protective Provisions were granted in the form sought by the SU or that serious detriment is only avoided where SUs have agreed such provisions. Rather it is entirely open to the SoS to determine what provisions are appropriate to prevent serious detriment arising.
30. In the Hinkely Point C DCO¹¹, CA of rights to install, operate and maintain an electricity line over Network Rail infrastructure were sought. Network Rail had objected to the CA of rights (in the form of an easement) over its operational land. The ExA concluded that Network Rail had not demonstrated that the grant of a permanent easement “*would in any way compromise or otherwise adversely affect the safe and efficient operation of the railway*”¹². The ExA concluded with regard to the interface with Network Rail that “*Apart from the construction phase, the only possible interference would be on those occasions when maintenance or emergency works were being carried out to the Applicant's equipment. The Panel is satisfied that rights required by the Applicant over the operational land in question could be taken without serious detriment to the carrying on of the undertaking*”¹³. This was subject to appropriate Protective Provisions being agreed.
31. Network Rail submitted that its preferred drafting of Protective Provisions was required to “ensure the safe operation of the railway and compliance with its Network

⁶ Examining Authority Recommendation Report on the Great Yarmouth Third River Crossing Development Consent Order, paragraph 4.5.55

⁷ Ibid, paragraph 4.5.58

⁸ Ibid, paragraph 4.5.59

⁹ Secretary of State Decision Letter on the application for the Great Yarmouth Third River Crossing Development Consent Order dated 24 September 2020, Paragraph 26.

¹⁰ The following are given as indicative examples only and are not an exhaustive list: Hinkley Point C Connection Project Development Consent Order, Richborough Connection Development Consent Order, Thurrock Flexible Generation Plant Development Consent Order, M25 Junction 28 Improvement Project Development Consent Order

¹¹ Planning Inspectorate reference EN020001

¹² Examining Authority Recommendation Report on the Hinkley Point C Connection Project Development Consent Order paragraph 8.5.227

¹³ Ibid, paragraph 8.5.224

Licence”¹⁴. However the Applicant did not agree that the Network Rail drafting was appropriate. Therefore, while it was appropriate that Network Rail’s approval for the physical works was secured by Protective Provisions, there was no justification for a restriction on use of CA powers to require Network Rail’s consent. The ExA concluded “The Panel considers that it is not necessary, nor would it be reasonable, to include paragraph 4 of [Network Rail’s] preferred form of the protective provisions and that it could compromise the Applicant’s ability to deliver the proposed development.”¹⁵

32. In the same recommendation report, it was also found to be disproportionate to require various consents from RWE to the exercises of CA and temporary possession powers despite these being argued to be necessary “to protect the ongoing safe operation of its undertaking”¹⁶ on an operational generating site.

4 Impact Of Compulsory Acquisition on The Undertaking

33. The National Highways objection to the CA powers also refers traffic impacts, construction accesses, temporary possession and interaction with the A47 Tuddenham Order 2022. The Applicant notes that these other issues, while they fall to be considered under other tests, cannot form part of any serious detriment argument and consideration under section 127 as they do not relate to the CA powers sought, which are only for the cable rights.

34. National Highways has submitted that: *“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. 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 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. From the above proposed compulsory acquisition of rights*

¹⁴ Ibid, paragraph 8.5.225

¹⁵ Examining Authority Recommendation Report on the Hinkley Point C Connection Project Development Consent Order, paragraph 8.5.230

¹⁶ Ibid, paragraphs 8.5.250, 8.5.252, 8.5.253, 8.5.255, 8.5.259

and extinguishment of rights, the following consequential impacts may arise, which also have the potential to cause serious detriment to National Highways.”¹⁷

35. For the prohibition on authorisation of CA powers to apply, the serious detriment must be to the ‘carrying on’ of the undertaking. The Applicant does not accept that the acquisition of rights in the current circumstances causes any serious detriment to the ‘carrying on’ of the National Highways undertaking. The Applicant is seeking the acquisition of a right under the highway in 2 locations covering 5 plots. In both locations, the cables will be installed using trenchless techniques in order to prevent interference with the highway use. The acquisition of an easement for infrastructure under an operational highway, where such easement does not prevent, restrict or interfere with the use of that highway, cannot meet the high test of being serious detriment. There is nothing in the CA proposed which would any way fetter National Highway’s ability to operate this part of the SRN.
36. The Applicant entirely accepts that some adjustment of the restrictive covenants sought to be imposed in the wording of Rights D would be necessary for the plots under the operational highway if CA were relied on. In particular, the Applicant would consider that the restriction on hard surfacing without its consent is inappropriate in that situation, and it would be unreasonable for the Applicant to interfere with the maintenance or replacement of that surfacing. To address such points, the Applicant has demonstrated its willingness to put in place reasonable and proportionate Protective Provisions for the protection of National Highways throughout the DCO Examination. It does not however accept that the drafting of provisions sought by National Highways is necessary or reasonable in the circumstances of this development.
37. National Highways allege, but do not clearly explain how, the CA sought would “prevent” it from complying with its statutory duties and its licence. Given that, as set out in the Book of Reference, other infrastructure is already in place under the affected highway it is unclear to the Applicant how a cable under the highway could act to interfere with such obligations when existing infrastructure does not. Further, given that National Highways submit that the acquisition of an easement could have such serious legal consequences, it is incumbent upon them to make the case as to how that effect would arise and provide an objective evidence base to support such a strong submission. National Highways have not provided a single example as to how that serious outcome would be created through reliance on CA. The National Highways objection does not set out any objective argument as to how and why the CA of a cable right under a highway would have the effect claimed.

5 Alternatives

38. National Highways have submitted that:¹⁸ “Compulsory acquisition is intended to be a measure of last resort once all efforts to negotiate have failed. National Highways would welcome the opportunity to discuss the Applicant’s requirements rather than it simply relying on compulsory acquisition. It is critical to the operation of the SRN,

¹⁷ National Highways response to the Applicant’s deadline 4 submission, [REP5-086] Line 4.2

¹⁸ National Highway’s Deadline 3 submission [REP3-139].

the safety of the travelling public and to ensure the proper efficient use of public money and resources that the Authorised Development proceeds in consultation and agreement with National Highways and with the appropriate protections in place.”

39. National Highways legal department was contacted (in the same way as all other statutory undertakers potentially affected by the Scheme) 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.
40. As set out in **Statutory Undertakers' Position Statement (Revision E)** [document reference 12.46], the Applicant has been seeking to progress voluntary agreements with National Highways throughout Examination. While discussion is ongoing, agreement has not been reached. That lack of agreement does not mean that the efforts to negotiate are inadequate. Negotiation requires agreement and is not a matter solely in the gift or control of the Applicant. During that negotiation National Highways provided changed documents in March and April and it is reasonable that the Applicant should be allowed to consider and respond to those. CA is being sought as a last resort as demonstrated by the ongoing work to seek to reach voluntary agreements.
41. The Applicant has set out clearly in its **Statement of Reasons (Revision E)** [document reference 4.3] 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 H)** [document reference 4.1]. Interactions with the existing A47 and A11 will be appropriately managed through the Protective Provisions for National Highways (including, as appropriate, compliance with established National Highways' certification and approval processes for the use of directional drilling under the SRN).
42. 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 Tuddenham Order. 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 can or does present a serious detriment to National Highways carrying out its statutory duties.
43. In the event National Highways A47 Tuddenham scheme is constructed, the potential interactions between the A47 scheme can and will be appropriately managed. In recognition of this, the Applicant has included protections for the A47 Tuddenham scheme within the Protective Provisions included for National Highways at Part 14 of Schedule 15 of the **draft DCO (Revision K)** [document 3.1] which will be supplemented by the co-operation agreement to be entered into by the parties. Moreover, the Applicant highlights that, despite not having reached agreement on the protective provisions before the end of the Examination, it is

already collaborating with National Highways with regards to the A47 Tuddenham scheme through its ongoing discussions and negotiations. For example:

- a) The Applicant has removed parts of Plot 27-006 from the **Land Plans (Revision E)** [document reference 2.3] and therefore the ability to exercise temporary possession powers over that area where National Highways has highlighted that the area overlaps with a permanent fence line and ecological mitigation measures required pursuant to the A47 Tuddenham Order; and
- b) The Applicant has also included amendments to Article 5 of the **draft DCO (revision K)** [document reference 3.1] to provide that works to install ducts under the strategic road network can be transferred to National Highways without obtaining consent from the SoS. This has been included to facilitate, if possible, the potential option for National Highways to install ducts under the re-aligned A47 during construction of the A47 Tuddenham scheme. See further **The Applicant's Comments on National Highways Deadline 7 Submission** [document reference 22.4].

5.1 Alternatives – National Highways' position on NRSWA

44. National Highways has submitted that:¹⁹ “the installation of the cabling under the highway could be achieved via the New Roads and Street Works Act 1991 (NRSWA) therefore negating the need for compulsory acquisition. NRSWA specifically refers to tunnelling/boring under the highway. National Highway contends that parliament intended for street works to be undertaken pursuant to this Act. Its provisions are comprehensive and well established and seek to protect both the undertaker and the street works authority. It is also supported by a code of practice. National Highways notes the draft DCO does not appear to include the SRN in its provisions concerning the exercise of street works but rather seeks compulsory acquisition of rights to undertake and maintain the works. The draft DCO also doesn't appear to include the provision in NRSWA which provides the benefit of an indemnity to the street works authority. As NRSWA contains the provisions referred to above, National Highways contends that the Applicant has not made out the case for compulsory acquisition concerning these works.”
45. The Applicant's view is that the works proposed for 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 PA2008. 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

¹⁹ National Highway's Deadline 3 submission [REP3-139].

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.

46. 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 law²⁰ 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 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.
47. The Applicant has made clear that all reasonable alternatives to CA have been properly explored and intended use of the land subject to CA powers is entirely clear.
48. The Applicant has demonstrated that funds are available to meet the compensation liabilities that might flow from the exercise of CA powers in the **Funding Statement (Revision B)** [REP3-017].

6 Protective Provisions

49. The Applicant also notes that National Highways Responses to the Examining Authority's Fourth Written Questions (ExQ4) – Protective Provisions for Deadline 7 refers to Network Rail Infrastructure Limited's protective provisions and asserts that the Applicant does not appear to be questioning the proportionality of those provisions. The Applicant notes the following:
- a) National Highways is commenting on the set of Protective Provisions at Part 3 of Schedule 14 included within the **draft DCO (Revision I)** [REP6-003] which were still subject to ongoing discussions and negotiations with Network Rail.
 - b) The Applicant and Network Rail have been in a productive dialogue with regards to the Network Rail's protective provisions for more than a year.
 - c) Network Rail has not sought to provide the Applicant with multiple versions of its 'standard' provisions.
 - d) The Applicant does not consider that the protections sought by Network Rail are more onerous than the protections sought by National Highways because they are not seeking to place controls which are disproportionate to the development which would be authorised by the DCO.

²⁰ Including being considered most recently in *Southwark LBC v TfL* [2018] UKSC 63.

50. As set out above, the consideration of serious detriment only applies to plots where CA powers are sought. There are no highway works (in this case meaning works to or on the highway, to create new highway or to form accesses to highway) to be secured or delivered through CA. The CA would only deliver the easement for the cables under the A47 and A11. The consideration of the Protective Provisions under the s127 test must therefore be predicated on the relationship of that to the CA powers. The Protective Provisions sought by National Highways and the Protective Provisions included by the Applicant within the **draft DCO (Revision K)** [document 3.1] are, however, considerably wider than just CA powers. The Applicant therefore notes that while the following section considers all of the drafting, **this does not mean that the Applicant accepts that any serious detriment argument can be made on any other locations than the two crossings where acquisition is sought, and in particular that this test cannot apply to the interaction with the A47 Tuddenham Order.**
51. The Applicant submits that it is necessary when considering protective provisions to have regard to the actual works and interactions for which consent is sought in the DCO. In this case those are:
- a) A47 – HDD under SRN, Work Nos. 12A/B, 12C, plots 28-002, 28-008, 228-009 and 28-010 (A47 crossing) (acquisition of cable corridor rights)
 - b) A11 - HDD under SRN, Work Nos. 12A/B, 12C, plot 35-002 (acquisition of cable corridor rights)
 - c) Temporary construction access ACC46 connecting into A47 new spur, Work No.13A/B, plot 27-006 (temporary possession)
 - d) Temporary construction access ACC47 connecting into the existing A47, Work No. 13A/B, plots 28-003, 28-004, 28-005, 28-006, and 28-007 (temporary possession)
52. There are no works for which consent is sought that would create a new or altered highway layout, new permanent junctions or new carriageway. No operational phase design elements are included nor are ancillary operational highway works (for example highway signage and lighting).
53. The Applicant acknowledges National Highways' position as a highway authority, traffic authority and street authority for the SRN. The Applicant also acknowledges National Highways' statutory obligations. For this reason, Protective Provisions are included within Part 14, Schedule 14 of the **draft DCO (Revision K)** [document 3.1] for the benefit of National Highways
54. The Applicant has noted that the original Protective Provisions provided to the Applicant in August 2022, and in relation to which the Applicant engaged with National Highways in negotiations for a period of almost 6 months were less onerous than the Protective Provisions now being sought by National Highways.
55. The Applicant fully accepts that Protective Provisions in favour of National Highways are appropriate but submits that these must be relevant and proportionate to the works which the DCO would consent. The Applicant submits that National Highways' current drafting of its preferred provisions (by which we refer to those most recently put forward within Appendix 1 to National Highways Responses to the

Examining Authority's Fourth Written Questions (ExQ4) – Protective Provisions for Deadline 7) go considerably beyond this and are drafted as if the Applicant were undertaking permanent alterations to the operational carriageway of the SRN or building new SRN. That drafting is inapplicable to the circumstances of the consent sought, is not reasonable with regards to the works to be controlled and unnecessarily risks creating confusion and disagreement at a later stage when it has to be argued by the Applicant's construction contractor that various insertions are not applicable.

56. The Applicant submits that all the Protective Provisions need to address in this case are:

- a) To require the Applicant to undertake the trenchless cable installations under the highway in accordance with National Highways' specifications, in this case the Design Manual for Roads and Bridges standard CD622, Managing Geotechnical Risk. The Applicant agrees it is necessary and reasonable for National Highway's approval of the trenchless works, including the methodology to be required to be obtained before works under the SRN are commenced. An indemnity for any failure in these works is considered reasonable.
- b) Approval by National Highways of the design and operation of the temporary accesses before these are formed and brought into use.
- c) Approval of any traffic management measures for the temporary accesses and to require reasonable amendments to these where necessary during the construction period.
- d) Approval by National Highways of the works to reinstate the highway following the removal of the temporary accesses.

57. Protective Provisions for the benefit of National Highways have been included in Part 14 of Schedule 14 to the **draft DCO (Revision K)** [document 3.1] to cover these points. The Applicant highlights that its provisions are based on National Highways' preferred drafting²¹

58. National Highways have submitted that:²²

"National Highways has specific requirements where works are proposed to the highway (including street furniture) and on land owned, controlled or temporarily acquired by National Highways under the A47 Tuddenham Scheme.

These include securing:

- Bonds, cash deposits and commuted sums to ensure that National Highways is not exposed financially as a result of the Applicant's works;*
- Road space booking procedures to ensure that network occupancy requirements are managed effectively for the safety of the public and contractors;*
- Detailed design information to appropriately consider and approve the specification of works in accordance with technical standards;*

²¹ Contained within Appendix 1 to National Highways Deadline 3 submission [REP3-139]

²² National Highway's Deadline 3 submission [REP3-139].

- *Appropriate maintenance obligations and defects liability periods;*
- *Collateral warranties from contractors and designers in respect of works undertaken on behalf of the Applicant;*
- *Restrictions on the commencement of works and the use of powers until detailed design specifications are agreed and safety implications have been satisfactorily addressed;*
- *Handover of maintenance responsibilities;*
- *Payment of all reasonable fees incurred by National Highways in respect of the Authorised Development;*
- *Indemnities for any loss incurred by National Highways in respect of the Authorised Development;*
- *Dispute resolution provisions.*

59. The Applicant notes that the many of these provisions are inapplicable to the works for which consent is sought and it accordingly objects to their inclusion. The Applicant understands why National Highways would prefer standard protective provisions across DCOs affecting its network but submits that seeking to impose drafting clearly designed to address significant highway works where new SRN will be created to projects of this type where no such works are proposed is unreasonable. For example:

- Bonding provides a financial guarantee to allow National Highways to complete highway works not finished or inadequately finished. However, the Applicant does not propose any works which would become SRN highway for which National Highways would be liable.
- Commuted sums are normally only agreed to address increased costs of maintenance for non-standard structures, no such structures are proposed.
- There are no permanent works to the highway to which a defects period would apply, once the temporary accesses are removed to the reasonable satisfaction of National Highways the only works in place would be cables under the highway, there are no works to the operational SRN itself that could be found to be defective and which National Highways would be liable to repair (any damage arising from the cable installation being covered by the indemnity not this provision).
- Collateral warranties would only relate to the design of highway elements, they will not be provided for the design of the cable corridor.
- There will be no handover for maintenance as no new SRN is to be constructed.

60. The Applicant notes that the remaining elements of National Highways' submission have already been addressed within Part 14 of Schedule 14 as follows:

- a) There are "*Restrictions on the commencement of works and the use of powers until detailed design specifications are agreed and safety implications have been satisfactorily addressed*" included in paragraph 4 with an extensive list of matters for National Highways to approve and the ability for the undertaker to exercise a large number of powers is restricted before National Highways give

their consent. Under paragraph 5, works can then only be built in accordance with the approvals given and if National Highways, on inspection of those works, considers in their sole discretion that the works have not been affected in this way, they can serve a notice requiring the undertaker to remedy any issues;

- b) *Road space bookings procedures* are provided for within paragraphs 4.1 and 5.2 of the protective provisions for National Highways included in Part 14 of Schedule 14 of the **draft DCO (Revision K)** [document 3.1].
- c) Provisions for the "*Payment of all reasonable fees incurred by National Highways in respect of the Authorised Development*" are included in paragraph 6 with detailed provisions setting out a mechanism whereby National Highways' costs and expenses, as detailed in paragraph 6(1), will be paid up front by the undertaker;
- d) "*Indemnities for any loss incurred by National Highways in respect of the Authorised Development*" are included in paragraph 8; and
- e) National Highways' preferred "*Dispute resolution provisions*" are included in paragraph 10.

61. In addition the Applicant has also included the following provisions:

- a) Provisions for a condition survey to be undertaken before works are commenced (see paragraph 4(1)(a)) and again after works are completed along with detailed provisions to cover repairs if the works are shown to have caused damage to any National Highways' structures and assets (see paragraph 7);
- b) Provisions for the undertaker to give notice to National Highways' prior to maintenance works being undertaken, in this case maintenance of the cable under the SRN, together with an obligation to comply with any reasonable requirements of National Highways' for that maintenance; and
- c) For all of these provisions to apply not only to the existing SRN but also to works undertaken in, on, under or over the A47 Tuddenham Order land.

62. 6.13 The detailed approvals process, restrictions on exercising certain powers and need to comply with National Highways specifications and requirements when undertaking the specified works ensures National Highways retains control over the SRN and any works undertaken to it. In addition, the protective provisions included by the Applicant at Part 14 of Schedule 14 of the draft DCO (Revision K) [document reference 3.1] also provide significant protections to National Highways in relation to the land included within the A47 Tuddenham Order.

6.1 Consideration of the detailed drafting

63. The Applicant has included at Appendix A, a detailed comparison of National Highways proposed Protective Provisions and the Protective Provisions included at Part 14 of Schedule 14 of the **draft DCO (Revision K)** [document 3.1]. The Applicant has also included at Appendix B a redline comparison of National Highways' version of its Protective Provisions (included in its Responses to the Examining Authority's Fourth Written Questions (ExQ4) – Protective Provisions for Deadline 7) and the Applicant's version of Protective Provisions for the benefit of

National Highways' (included in the **draft DCO (Revision K)** [document reference 3.1]).

6.2 Other controls within the DCO and Interaction with the A47 Tuddenham Order

64. The Applicant considers that the **Outline Construction Traffic Management Plan (Revision D)** ("OCTMP") [REP5-027] contains adequate provisions for the management of cumulative impacts between the respective projects to enable more detailed proposals to be developed post DCO determination in consultation with stakeholders. This is secured through Requirement 15 of the **draft DCO (Revision K)** [document 3.1] which provides for submission and approval in consultation with National Highways of a Construction Traffic Management Plan (CTMP) which must be in accordance with the OCTMP.
65. The Applicant considers that it has been reasonable in its approach acknowledging interaction with the A47 Tuddenham Order and has included controls within the protective provisions in respect of the A47 Tuddenham scheme. Paragraph 4 of the Applicant's draft protective provisions provides for an approvals process for 'specified works' which includes works undertaken on, in, under or over the SRN or on, in, under or over the A47 Tuddenham Order land. This process also places restrictions on the undertaker exercising certain powers within the DCO in relation to both the SRN and any land owned, controlled or temporarily acquired by National Highways pursuant to the A47 Tuddenham Order without National Highways' consent (not to be unreasonably withheld). This includes restrictions on powers of compulsory acquisition and temporary possession.
66. In addition, the Applicant will continue to progress the cooperation agreement with National Highways to help manage the interactions between SEP and DEP and the A47 Tuddenham scheme.
67. The Applicant also highlights that it is already collaborating with National Highways with regards to the A47 Tuddenham scheme as part of its ongoing discussions with National Highways. As set out in paragraph 5.6 above, the Applicant has removed part of Plot 27-006 from the Land Plans and has amended Article 5 of the **draft DCO (Revision K)** [document 3.1].

7 Conclusions

68. The test for serious detriment is a high bar. The Applicant does not consider that the acquisition of rights under an operational highway which is not proposed to be stopped up presents a serious detriment to National Highways carrying out its statutory duties.
69. The Applicant therefore considers that although it is acknowledged that the acquisition of rights sought under the DCO will result in an impact on National Highways' undertaking, this impact does not meet the test of 'serious detriment'. For this reason, the Secretary of State should include the version of the Protective Provisions of the made Order as set out within Part 14 of Schedule 14 of the **draft DCO (Revision K)** [document reference 3.1] submitted at Deadline 8.

70. Interactions with the existing A47 will be appropriately managed through the protective provisions for the protection of National Highways (including, as appropriate, compliance with established National Highways' certification and approval processes for the use of HDD under the SRN).
71. In light of the above, despite the present lack of agreement of the precise terms of the protective provisions, the Applicant's view is that there is no risk of serious detriment being caused to National Highways' undertaking due to the Scheme with the inclusion of the protective provisions for National Highways within Part 14 of Schedule 14 of the **draft DCO (Revision K)** [document reference 3.1]. The draft DCO and associated plans, along with the protective provisions submitted by the Applicant, would ensure that National Highways' undertaking would be adequately protected.
72. The Applicant highlights that it has included protections for the A47 Tuddenham scheme within the Protective Provisions within the **draft DCO (Revision K)** [document 3.1] which demonstrate that in the event National Highways A47 Tuddenham scheme is constructed, the potential interactions between the A47 Tuddenham scheme can and will be appropriately managed. Moreover, the Applicant is also currently negotiating a cooperation agreement with National Highways to manage the interaction with the A47 Tuddenham scheme.
73. In the event National Highways A47 Tuddenham scheme is constructed, the potential interactions between the A47 scheme can and will be appropriately managed. In recognition of this, the Applicant has included protections for the A47 Tuddenham scheme within the Protective Provisions included for National Highways at Part 14 of Schedule 15 of the **draft DCO (Revision K)** [document 3.1] which will be supplemented by the co-operation agreement to be entered into by the parties.
74. In the event that protective provisions are subsequently completed and agreed with National Highways, the Applicant will immediately write to the Secretary of State.

Appendix A Protective Provisions Table Comparison

This Appendix sets out the principal differences between National Highways' (NH) Protective Provisions (PPs) as submitted at Deadline 7 and the Applicant's PPs which are included in the draft DCO at Part 14 of Schedule 14. There are also some minor differences between the two sets of PPs which are not set out in this Appendix as they are self-explanatory or relate to other drafting changes.

Paragraph of NH PPs	Drafting in NH PPs	Applicant's NH PPs	Extracts of NH's D7 response (where relevant)	Applicant reason for amendment
2	n/a	Definitions in relation to the "A47 Order" and "A47 Tuddenham Order land"	See paragraph 2.12	The Applicant considers this is a suitable drafting solution for dealing with interactions with the A47 Scheme. This definition has not replaced the definition of "strategic road network" which is retained
2	Definition of "as built information"	Deletion of sub-paragraphs (b), (f) and (l)	See paragraph 2.9	Definition relates to provisions which are not relevant to the authorised development as no permanent works to the SRN carriageway are proposed. Even with the proposed tailpiece drafting, provisions which are clearly irrelevant to a scheme should not be included in protective provisions as a point of principle
2	Definition of "bond sum"	Deletion of entire definition	See paragraphs 2.6, 2.7 and 2.9	Definition relates to proposed Paragraph 15 (Security), which is not proportionate as the undertaker is not proposing or seeking consent for any permanent works to the SRN carriageway
2	Definition of "cash surety"	Deletion of entire definition		
2	Definition of "commuted sum"	Deletion of entire definition		Commuted sums are payable only for maintenance of non-standard road works. No such works are proposed or required and the Applicant is not creating any new highway asset that NH would be liable to maintain. Relevant works and maintenance relate to the cable, for which only the undertaker will be carrying out maintenance for the period in which the works

Paragraph of NH PPs	Drafting in NH PPs	Applicant's NH PPs	Extracts of NH's D7 response (where relevant)	Applicant reason for amendment
				will be present. Payment of a commuted sum to NH for future maintenance is therefore not required
2	Definition of "defects period"	Deletion of entire definition		Definition relates to provisions regarding permanent works to the SRN which are not relevant to the authorised development
2	Definition of "detailed design information"	Deletion of sub-paragraphs (f) to (m) and (r)		Definition relates to provisions regarding works to the SRN which are not relevant to the authorised development
2	Definition of "DBFO contract"	Deletion of entire definition	See paragraph 2.10	NH previously confirmed to the Applicant that this would not apply and that it could be deleted. Given the A47 and A11 are not managed by a DBFO contractor the Applicant's position remains that this is not necessary to include seeing as it does not apply. It is for NH to manage their internal processes effectively to ensure contractual matters around the application of protective provisions are sufficiently dealt with
2	Definition of "final certificate"	Deletion of entire definition		Definition relates to provisions regarding permanent works to the SRN which are not relevant to the authorised development
2	Definition of "highway operations and maintenance contractor"	Deletion of entire definition		NH previously confirmed to the Applicant that the DBFO contract does not apply and that it could be deleted

Paragraph of NH PPs	Drafting in NH PPs	Applicant's NH PPs	Extracts of NH's D7 response (where relevant)	Applicant reason for amendment
2	Definition of "provisional certificate"	Deletion of entire definition		Definition relates to provisions regarding permanent works to the SRN which are not relevant to the Authorised development
2	Definition of "specified works"	Amendment of definition to remove inclusion of signalisation		Wording refers to signalisation works to the SRN which are not relevant to the authorised development
2	Definition of "utilities"	Deletion of entire definition		Paragraph 8(9) is deleted so this definition is not required
2	Definition of "winter maintenance"	Deletion of entire definition		Definition relates to provisions regarding works to the SRN which are not relevant to the authorised development
3	Drafting in respect of the DBFO contract	Deletion of paragraph	See paragraph 2.10	NH previously confirmed to the Applicant that the DBFO contract would not apply and that it could be deleted
4	Paragraph in relation to depth of works	Reference to the limits of deviation deleted	See paragraph 2.11	This drafting has been reinstated in response to NH's submissions save for the reference to ' <i>services and/or drainage apparatus</i> ' has been retained rather than reference to 'the ground' which NH have included in their preferred PPs and which the Applicant considers is imprecise. Further, there are no limits of deviation in the DCO so this is deleted.
6	Works outside the Order limits	Deletion of entire paragraph	See paragraph 2.12	NH would retain control over any works to the SRN through the normal highways works consenting processes and this is therefore unnecessary duplication. In addition, the undertaker is committed to negotiating a cooperation agreement with NH and that is the

Paragraph of NH PPs	Drafting in NH PPs	Applicant's NH PPs	Extracts of NH's D7 response (where relevant)	Applicant reason for amendment
				<p>most suitable place for dealing with additional works which are required in relation to ACC46. This requirement should not form part of the protective provisions and place a statutory obligation on the undertaker.</p>
7(1) (Applicant's paragraph 4(1))	Prior approvals and security	Deletion of sub-paragraphs (f) to (i)	See paragraph 2.13	<p>NH will already approve the road safety audits and it is an unnecessary additional administrative burden (with associated costs) for the undertaker to provide CVs of auditors in addition to this.</p> <p>There are no permanent works to the SRN so the other obligations are deleted on the basis that they are not relevant to the authorised development.</p>
7 (Applicant's paragraph 4(4) and 4(5))	Automatic deeming of refusal	New sub-paragraphs (4) and (5) which provide for a period of 56 days in which NH must intimate their approval or refusal (with reasons) or request more time. The undertaker is to decide whether the request of more time is acceptable or may escalate the approval within NH and within the undertaker to find an agreed position.	See paragraph 2.14	<p>The Applicant has updated the drafting in light of NH's submissions to remove deemed approval provisions. However, the undertaker cannot accept a position whereby due to the delay of NH giving approval the undertaker could experience serious construction delays due to deeming provisions kicking in. The updated drafting offers a reasonable compromise position whereby deemed approvals will not apply but the undertaker can ensure that NH will deal with applications for approval in a timely manner to avoid construction delays. Further provisions are also added in Applicant's paragraph 12 (see further comments below).</p> <p>The Applicant further notes that NH have pointed to Network Rail's protective provisions</p>

Paragraph of NH PPs	Drafting in NH PPs	Applicant's NH PPs	Extracts of NH's D7 response (where relevant)	Applicant reason for amendment
				as a marker of what the Applicant has considered acceptable terms. The Applicant also notes that the Network Rail provisions include deemed approval and the Applicant had included the same wording previously in its protective provisions for NH. The current drafting in paragraph 4 of the Applicant's set of protective provisions is therefore a substantial concession on the Applicant's behalf in order to bring the parties closer together
7(4) (Applicant's paragraph 4(6))	Automatic deeming of refusal	NH may only place conditions on the approval as is <i>reasonably</i> necessary	See paragraph 2.14	It is acceptable for NH to be required to act reasonably to avoid the undertaker being required to comply with unnecessary conditions.
7(5) (Applicant's paragraph 4(7))	Identity of new contractors/ designers to be notified to NH immediately along with details of suitability	Change to the notice period to 'within 7 days' Change to 'qualifications'		It is not reasonable for any undertaker to be required to give notice of a change 'immediately'. This is not possible to comply with. We note NH have agreed to the reference to 'qualifications' in paragraph 7(1)(c)(iii) and this should be reflected in 7(5). 'Suitability' is not clearly interpreted and could be challenging for the undertaker to comply with.
7(7)	Requirement to enter a cooperation agreement	Deletion of entire paragraph	See paragraph 2.15	The undertaker is already negotiating a cooperation agreement with NH to supplement the protective provisions in relation to the potential interactions with the A47 Tuddenham Scheme (which give NH more than adequate protection). It is therefore unnecessary and unreasonable for this obligation to apply. Furthermore, it is not appropriate to include this

Paragraph of NH PPs	Drafting in NH PPs	Applicant's NH PPs	Extracts of NH's D7 response (where relevant)	Applicant reason for amendment
				obligation on the undertaker when compliance with it is not entirely within the undertaker's sole control. This requirement should not form part of the protective provisions. Placing a one sided statutory obligation on the undertaker to enter into a commercial agreement is overly onerous and would be unprecedented.
8(3) (Applicant's paragraph 5(1))	Reference to the Traffic Signs Manual and the Traffic Signs Regulations and General Directions 2016	Deletion of reference		Wording refers to guidance for works to the SRN which are not relevant to the authorised development.
8(5)(b) (Applicant's paragraph 5(5)(b))	Reference to 'any other land of National Highways'	Reference deleted		The definition of specified works already covers the SRN and the A47 Tuddenham Order land so reference to other NH land is not necessary to include. Furthermore, it is too broadly drafted such that it is uncertain on its face what land this might relate to and is therefore imprecise. New wording to refer to the A47 Tuddenham Order land also included in 8(6).
8(6) and 8(8) (Applicant's paragraphs 5(6) and 5(8))	Reference to 'authorised development'	Reference changed to 'specified works'		The undertaker should not be liable for damage/expenses of NH repairing damage to the SRN otherwise than as a result of the 'specified works'. NH's reference to authorised development is unreasonably broad; in particular in relation to 8(8) where the drafting does not even refer to the SRN and it could be interpreted as any damage at all which in NH's opinion needs remedying.

Paragraph of NH PPs	Drafting in NH PPs	Applicant's NH PPs	Extracts of NH's D7 response (where relevant)	Applicant reason for amendment
8(9)	Drafting relating to diversion of utilities	Deletion of entire sub-paragraph	See paragraph 2.16	Protective provisions, including control over diversions (as required), are included in the DCO under Parts 1-13 of Schedule 14 for utilities. It would not be appropriate for NH to assert additional controls over this.
8(10)	Provision for maintenance during construction of the specified works	Deletion of entire sub-paragraph	See paragraph 2.16	Undertaker does not intend to carry out permanent works to the SRN or occupy the carriageway. These provisions are unnecessary and would be overly burdensome for the nature of the works proposed.
9 (Applicant's paragraph 6)	Payments	Various amendments to the drafting	See paragraph 2.17	Amendments have been made for clarification and legal drafting purposes only as the Applicant considers there is not a clear mechanism for the costs and balancing process to work. The provisions otherwise operate as NH intend.
9(1) (Applicant's paragraph 6(1))	Reference to costs of approvals under the Order	Deletion of sub-paragraph (c)	See paragraph 2.19	Costs should only be limited to those relating to the protective provisions as otherwise the remit for recovering costs is unreasonably broad. The Applicant notes that the costs of technical consultants are recoverable under Applicant's paragraph 6(1).
9(1) (Applicant's paragraph 6(1))	Reference to costs of the transfer of land	Deletion of entire sub-paragraph	See paragraph 2.19	No such transfer is proposed and as a matter of principle costs of such a transfer should not be payable
9(6) (Applicant's paragraph 6(6))	Reference to issuing of the provisional certificate	Change to when the specified works are complete		Undertaker does not intend to carry out permanent works to the SRN carriageway. These provisions are unnecessary and would be

Paragraph of NH PPs	Drafting in NH PPs	Applicant's NH PPs	Extracts of NH's D7 response (where relevant)	Applicant reason for amendment
				overly burdensome for the nature of the works proposed.
10	Provisional Certificate	Deletion of entire paragraph		Undertaker does not intend to carry out permanent works to the SRN. These provisions are unnecessary and would be overly burdensome for the nature of the works proposed.
11	Opening	Deletion of entire paragraph		No new SRN is being consented or proposed; no opening of any of the SRN is proposed, and therefore these provisions are not relevant to the nature of the works proposed.
12 (Applicant's paragraph 7(1))	Final condition survey	Amendment of trigger from applying for provisional certificate to being the completion of specified works.		Amendments required to detach this paragraph from the deleted provisional certificate paragraph.
Applicant's paragraph 7(6)	n/a	Reference to as built information being provided within 28 days of completion		The Applicant recognises that as built information will need to be provided to NH pursuant to DMRB CD622 in relation to the HDD works so this obligation is included to reflect that.
13	Defects Period	Deletion of entire paragraph	See paragraph 2.20	This provision follows on from the provisional certificate provisions, see above comment.
14	Final Certificate	Deletion of entire paragraph	See paragraph 2.21	This provision follows on from the provisional certificate provisions, see above comment.
15	Security	Deletion of entire paragraph		The requirement to provide security is not proportionate given the nature of the works

Paragraph of NH PPs	Drafting in NH PPs	Applicant's NH PPs	Extracts of NH's D7 response (where relevant)	Applicant reason for amendment
				proposed and the undertaker is not carrying out works to the SRN carriageway.
16	Commuted sums	Deletion of entire paragraph		This provision follows on from the security provisions, see above comment.
17	Insurance	Deletion of entire paragraph		NH already has the benefit of an indemnity in their favour so insurance is not required. Given the nature of the works proposed insurance would not be proportionate in any case and would be costly for the undertaker to obtain.
19(4) (Applicant's paragraph 9(4))	Reference to opening of the SRN	Deletion of entire sub-paragraph		As above – there will be no new SRN.
Applicant's paragraph 12 and amendments throughout	Cooperation	Addition of general cooperation clauses and other general additions of the requirement for NH to not unreasonably withhold or delay their consent or otherwise act reasonably		To ensure the undertaker does not suffer construction delays as a result of NH's slow response to approvals required or unreasonable demands. Sub-paragraph (1) also recognises that the undertaker and NH will use best endeavours to resolve matters with regards to safety.

Appendix B Protective Provisions Comparison

PART 14

FOR THE PROTECTION OF NATIONAL HIGHWAYS LIMITED

Application etc.,

1. ~~(1)a~~ The provisions of this Part of this Schedule apply for the protection of National Highways and have effect unless otherwise agreed in writing between the undertaker and National Highways.

(1) Except where expressly amended by the Order the operation of the powers and duties of National Highways or the Secretary of State under the 1980 Act, the 1984 Act, the 1991 Act, the Transport Act 2000, or Town and Country Planning (General Permitted Development) (England) Order 2015 which shall continue to apply in respect of the exercise of all National Highways' statutory functions.

Interpretation

2. ~~(1)b~~ Where the terms defined in article 2 (*interpretation*) of this Order are inconsistent with sub-paragraph (2) the latter prevail.

~~(2)~~ In this Part of this Schedule:—

~~“A47 Order” means the A47 North Tuddenham to Easton Development Consent Order 2022; “A47 Tuddenham Order Land” means the Order land as defined in the A47 Order;~~

~~“as built information” means one electronic copy of the following information as applicable:—~~

~~(a)~~ as constructed drawings in both PDF and AutoCAD DWG formats for anything designed by the undertaker; in compliance with Interim Advice Note 184 or any successor document;

~~(b)(a)~~ list of suppliers and materials used, as well as any relevant test results and CCTV surveys (if required to comply with DMRB standards);

~~(e)(b)~~ product data sheets and technical specifications for all materials used;

~~(d)(c)~~ as constructed information for any utilities discovered or moved during the works;

~~(e)~~ method statements for the works carried out;

~~(f)(d)~~ in relation to road lighting, signs, and traffic signals any information required by Series 1300 and 1400 of the Specification for Highway Works or any replacement or modification of it;

~~(g)(e)~~ organisation and methods manuals for all products used;

~~(h)(f)~~ as constructed programme;

~~(i)(g)~~ test results and records as required by the detailed design information and during construction phase of the project;

~~(j)(h)~~ a stage 3 road safety audit subject to any exceptions to the road safety audit standard as agreed by the undertaker and National Highways; and

~~(k)~~ the health and safety file; ~~and~~

~~(l)~~ such other information as is required by National Highways to be used to update all relevant databases and to ensure compliance with National Highway's Asset Data Management Manual as is in operation at the relevant time.

~~(m)~~ “the bond sum” means the sum equal to 200% of the cost of the carrying out the specified works (to include all costs plus any commuted sum) or such other sum agreed between the undertaker and National Highways;

~~(n)~~ “the cash surety” means the sum agreed between the undertaker and National Highways;

~~(o)(i)~~ “commuted sum” means such sum calculated as provided for in paragraph 9 of this Part of this Schedule to be used to fund the future cost of maintaining the specified works;

“A47 Order” means the A47 North Tuddenham to Easton Development Consent Order 2022;

“A47 Tuddenham Order land” means the Order land as defined in the A47 Order;

“condition survey” means a survey of the condition of National Highways structures and assets within the Order limits that may be affected by the specified works;

“contractor” means any contractor or subcontractor appointed by the undertaker to carry out the specified works;

~~“defects period” means the period from the date of the provisional certificate to the date of the final certificate which shall be no less than 12 months from the date of the provisional certificate;~~

“detailed design information” means such of the following drawings specifications and calculations as are relevant to the specified works:—

- (a) site clearance details;
- (b) boundary, environmental and mitigation fencing;
- (c) road restraints systems and supporting road restraint risk appraisal process assessment;
- (d) drainage and ducting as required by DMRB CD 535 Drainage asset data and risk management and DMRB CS551 Drainage surveys – standards for Highways;
- ~~(e) earthworks including supporting geotechnical assessments required by DMRB CD622 Managing geotechnical risk and any required strengthened earthworks appraisal form certification;~~
- ~~(f) pavement, pavement foundations, kerbs, footways and paved areas;~~
- ~~(g) traffic signs and road markings;~~
- ~~(h) traffic signal equipment and associated signal phasing and timing detail;~~
- ~~(i) road lighting (including columns and brackets);~~
- ~~(j) regime of California Bearing Ratio testing;~~
- ~~(k) electrical work for road lighting, traffic signs and signals;~~
- ~~(l) motorway communications as required by DMRB;~~
- ~~(m)(e) highway structures and any required structural approval in principle;~~
- ~~(p)(j) landscaping;~~
- ~~(q)(k) proposed departures from DMRB standards;~~
- ~~(r)(l) walking, cycling and horse riding assessment and review report;~~
- ~~(s) stage 1 and stage 2 road safety audits and exceptions agreed;~~
- ~~(t)(m) utilities diversions;~~
- ~~(u)(n) topographical survey;~~
- ~~(v)(o) maintenance and repair strategy in accordance with DMRB GD304 Designing health and safety into maintenance or any replacement or modification of it;~~
- ~~(w)(p) health and safety information including any asbestos survey required by GG105 or any successor document; and~~
- ~~(x) other such information that may be reasonably required by National Highways to be used to inform the detailed design of the specified works;~~
- ~~(y)(q) “DBFO contract” means the contract between National Highways and the highway operations and maintenance contractor for the maintenance and operation of parts of the strategic road network which are within the Order Limits or any successor or replacement contract that may be current at the relevant time;~~

“DMRB” means the Design Manual for Roads and Bridges or any replacement or modification of it;

~~“final certificate” means the certificate relating to those aspects of the specified works that have resulted in any alteration to the strategic road network to be issued by National Highways pursuant to paragraph 9;~~

“the health and safety file” means the file or other permanent record containing the relevant health and safety information for the authorised development required by the Construction Design and Management Regulations 2015 (or such updated or revised regulations as may come into force from

time to time);

~~“highway operations and maintenance contractor” means the contractor appointed by National Highways under the DBFO contract;~~

“nominated persons” means the undertaker’s representatives or the contractor’s representatives on site during the carrying out of the specified works as notified to National Highways from time to time;

“programme of works” means a document setting out the sequence and timetabling of the specified works;

~~“provisional certificate” means the certificate of provisional completion relating to those aspects of the specified works that have resulted in any alteration to the strategic road network to be issued by National Highways in accordance with paragraph 7 when it considers the specified works are substantially complete and may be opened for traffic;~~

“road safety audit” means an audit carried out in accordance with the road safety audit standard;

“road safety audit standard” means DMRB Standard HD GG119 or any replacement or modification of it;

“road space booking” means road space bookings in accordance with National Highways’ Asset Management Operational Requirements (AMOR) including Network Occupancy Management System (NOMS) used to manage road space bookings and network occupancy;

“specified works” means so much of any work, including highway works, authorised by this Order including any maintenance of that work, as is undertaken—

(a) on, in, under or over the strategic road network for which National Highways is the highway authority; or

~~(a)(b) on, in, under or over the A47 Tuddenham Order land; and~~

“Specification for Highways Works” means the specification for highways works forming part of the manual of contract documents for highway works published by National Highways and setting out the requirements and approvals procedures for work, goods or materials used in the construction, improvement or maintenance of the strategic road network;

~~“specified works” means so much of any work, including highway works and signalisation, authorised by this Order including any maintenance of that work, as is undertaken:~~

~~on, in, under or over the strategic road network for which National Highways is the highway authority; and~~

~~on, in, under or over the A47 Tuddenham Order Land;~~

“strategic road network” means any part of the road network including trunk roads, special roads or streets for which National Highways is the highway authority including drainage infrastructure, street furniture, verges and vegetation and all other land, apparatus and rights located in, on, over or under the highway for which National Highways is the highway authority;

~~“utilities” means any pipes wires cables or equipment belonging to any person or body having power or consent to undertake street works under the New Roads and Street Works Act 1991; and~~

~~“winter maintenance” means maintenance of the road surface to deal with snow and ice.~~

~~References to any standards, manuals, contracts, Regulations and Directives including to specific standards forming part of the DMRB are, for the purposes of this Part of this Schedule, to be construed as a reference to the same as amended, substituted or replaced, and with such modifications as are required in those circumstances.~~

General

~~3. In respect of any part of the strategic road network that is managed under a DBFO contract both National Highways and the highway operations and maintenance contractor shall have the benefit of this Part 14 of Schedule 14 but for the purposes of any approvals required under this Part of Schedule 14 the undertaker shall liaise directly with National Highways.~~

~~4. Notwithstanding any limits of deviation permitted pursuant to the Order, no works in carrying out,~~

~~maintaining or diverting the authorised development may be carried out under the strategic road network at a distance within 4 metres of the lowest point of the ground.~~

3.-(1)References to any standards, manuals, contracts, regulations and directives including to specific standards forming part of the DMRB are, for the purposes of this Part of this Schedule, to be construed as a reference to the same as amended, substituted or replaced, and with such modifications as are required in those circumstances.

~~Works outside the Order limits~~

~~—If the undertaker proposes to carry out works to the strategic road network that are outside of the Order limits in connection with the authorised development, the undertaker must enter into an agreement with National Highways in respect of the carrying out of those works prior to the commencement of those works.~~

(2) No works in carrying out, maintaining or diverting the authorised development may be carried out under the strategic road network at a distance within 4 metres of the lowest point of any services and/or drainage under the highway.

~~Prior approvals and security~~

4.—(1) The specified works must not commence until:—

- (a) a stage 1 and stage 2 road safety audit has been carried out and all recommendations raised by them or any exceptions are approved by National Highways;
- (b) the programme of works has been approved by National Highways;
- (c) the detailed design of the specified works comprising of the following details, insofar as considered relevant by National Highways, has been submitted to and approved by National Highways:—
 - (i) the detailed design information, incorporating all recommendations and any exceptions approved by National Highways under sub-paragraph (a);
 - (ii) details of the proposed road space bookings;
 - (iii) the identity and ~~qualification~~qualifications of the contractor and nominated persons;
 - (iv) a process for stakeholder liaison, with key stakeholders to be identified and agreed between National Highways and the undertaker; and
 - (v) information demonstrating that the walking, cycling and horse riding assessment and review process undertaken by the undertaker in relation to the specified works has been adhered to in accordance with DMRB GG142 – Designing for walking, cycling and horse riding; ~~and~~
- (d) a scheme of traffic management has been submitted by the undertaker and approved by National Highways such scheme to be capable of amendment by agreement between the undertaker and National Highways from time to time;
- ~~(e) stakeholder liaison has taken place in accordance with the process for such liaison agreed between the undertaker and National Highways under sub-paragraph (c)(~~v~~iv) above;~~
- ~~(f) National Highways has approved the audit brief and CVs for all road safety audits and exceptions to items raised in accordance with the road safety audit standard;~~
- ~~(g) the undertaker has agreed the estimate of the commuted sum with National Highways;~~
- ~~(h) the scope of all maintenance operations (routine inspections, incident management, reactive and third party damage) to be carried out by the undertaker during the construction of the specified works (which must include winter maintenance) has been agreed in writing by National Highways;~~
- ~~(i)(c) the undertaker has procured to National Highways collateral warranties in a form approved by National Highways from the contractor and designer of the specified works in favour of National Highways to include covenants requiring the contractor and designer to exercise all reasonable skill care and diligence in designing and constructing the specified works, including in the selection of materials, goods, equipment and plant; and~~

~~(f)~~ a condition survey and regime of monitoring of any National Highways assets or structures that National Highways considers will be affected by the specified works, has been agreed in writing by National Highways.

(2) Except where an approval has otherwise been provided under this Part, the undertaker must not exercise:—

- (a) article 4 (*maintenance of authorised development*);
- (b) article 8 (*street works*);
- (c) article 10 (*temporary stopping up of streets*);
- (d) article 11 (*temporary stopping up of public rights of way*);
- (e) article 14 (*discharge of water*);
- (f) article 15 (*protective works to buildings*);
- (g) article 16 (*authority to survey and investigate ~~the~~ land*);
- (h) article 18 (*compulsory acquisition of land*);
- (i) article 20 (*compulsory acquisition of rights*);
- (j) article 25 (*rights under or over streets*);
- (k) article 26 (*temporary use of land for carrying out the authorised project*);
- (l) article 27 (*temporary use of land for maintaining the authorised project*); or
- (m) article 34 (*felling or lopping trees or removal of hedgerows*) of this Order,

over any part of the strategic road network or ~~in respect of any land owned, controlled or temporarily acquired by National Highways under~~ the A47 ~~Tuddenham Order Land~~ without the consent of National Highways, such consent not to be unreasonably withheld or delayed, and National Highways may in connection with any such exercise require the undertaker to provide details of any proposed road space bookings and submit a scheme of traffic management as required for National Highways' approval.

(3) National Highways must prior to the commencement of the specified works or the exercise of any power referenced in sub-paragraph (2) inform the undertaker of the identity of the person who will act as a point of contact on behalf of National Highways for consideration of the information required under sub-paragraphs (1) or (2).

(2) National Highways must within 56 days of the undertaker requesting National Highways' approval pursuant to sub-paragraphs (1) and (2):—

(a) intimate their approval;

(b) intimate their refusal together with reasons for refusal; or

(c) request more time to intimate approval or refusal pursuant to sub-paragraphs (a) or (b).

(3) In the event National Highways requests more time pursuant to sub-paragraph ~~(1) or (2)~~ (c), the undertaker may:—

(a) approve that request; or

~~(z)~~(b) require that the person identified to the undertaker pursuant to sub-paragraph (3) meets with the undertaker's project director to discuss the request for approval.

~~(2)~~ Any approval of National Highways required under this paragraph ~~4~~:-

~~(3)~~ ~~(4) must not be unreasonably withheld;~~

~~(a)~~—must be given in writing;

~~(b)~~ ~~(a) shall be deemed to have been refused if neither given nor refused within 2 months of the receipt of the information for approval or, where further particulars are requested by National Highways within 2 months of receipt of the information to which the request for further particulars relates;~~
and

~~(e)~~ ~~(b)~~ may be subject to any conditions as National Highways considers reasonably necessary.

~~(4)~~ ~~(5)~~ Any change to the identity of the contractor and/or designer of the specified works will be notified

to National Highways ~~immediately and~~ within 7 days along with details of their ~~suitability to deliver the specified works will be provided on request along with collateral warranties in a form agreed by National Highways~~ qualifications.

~~(5)~~ Any change to the detailed design of the specified works must be approved by National Highways in accordance with sub-paragraph 7(4)(4) of this Part.

~~(6) The undertaker and National Highways must have agreed and completed a co-operation agreement before the specified works can commence.~~

Construction of the specified works

5.—(1) The undertaker must give National Highways 28 days' notice in writing of the date on which the specified works will start unless otherwise agreed by National Highways.

(2) The undertaker must comply with National Highways' road space booking procedures prior to and during the carrying out the specified works and no specified works for which a road space booking is required shall commence without a road space booking having first been secured from National Highways not to be unreasonably withheld or delayed.

(3) The specified works must be carried out by the undertaker to the reasonable satisfaction of National Highways in accordance with:—

- (a) the relevant detailed design information and programme of works approved pursuant to sub-paragraph 7(4)(1) above or as subsequently varied by agreement between the undertaker and National Highways;
- (b) where relevant, the DMRB, the Manual of Contract Documents for Highway Works, including the Specification for Highway ~~Highways~~ Works, together with all other relevant standards as required by National Highways to include, inter alia; all relevant interim advice notes, ~~the Traffic Signs Manual and the Traffic Signs Regulations and General Directions 2016~~ save to the extent that any departures or exceptions from those standards apply which have been approved by National Highways; and
- (c) all aspects of the Construction (Design and Management) Regulations 2015 or any statutory amendment or variation of the same and in particular the undertaker, as client, must ensure that all client duties (as defined in the said regulations) are undertaken to the reasonable satisfaction of National Highways.

(4) The undertaker must permit and must require the contractor to permit at all reasonable times persons authorised by National Highways (whose identity must have been previously notified to the undertaker by National Highways) to gain access to the specified works for the purposes of inspection and supervision of the specified works.

(5) If any part of the specified works is constructed:—

- (a) other than in accordance with the requirements of this Part of this Schedule; or
- (b) in a way that causes damage to the highway, highway structure or asset ~~or any other land of National Highways~~,

National Highways may by notice in writing require the undertaker, at the undertaker's own expense, to comply ~~promptly~~ as soon as reasonably practicable with the requirements of this Part of this Schedule or remedy any damage notified to the undertaker under this Part of this Schedule, to the reasonable satisfaction of National Highways.

(6) If during the carrying out of the ~~authorised development~~ specified works the undertaker or its appointed contractors or agents causes damage to the strategic road network or to any land owned, controlled or temporarily acquired by National Highways pursuant to the A47 Order, then National Highways may by notice in writing require the undertaker, at its own expense, to remedy the damage.

(7) If within 28 days on which a notice under ~~sub-paragraph~~ paragraphs (56) or ~~sub-paragraph (67)~~ is served on the undertaker (or in the event of there being, in the opinion of National Highways, a danger to road users, within such lesser period as National Highways may stipulate), the undertaker has failed to take the steps required by that notice, National Highways may carry out the steps required of the undertaker and may recover any expenditure reasonably incurred by National Highways in so doing, such

sum to be payable within 30 days of demand.

~~(8)~~ Nothing in this Part of this Schedule prevents National Highways from carrying out any work or taking any such action as it reasonably believes to be necessary as a result of or in connection with the carrying out or maintenance of the ~~authorised development~~ specified works without prior notice to the undertaker in the event of an emergency or to prevent the occurrence of danger to the public and National Highways may recover any expenditure it reasonably incurs in so doing.

~~(9) In constructing the specified works, the undertaker must at its own expense divert or protect all utilities and all agreed alterations and reinstatement of highway over existing utilities must be constructed to the satisfaction of National Highways.~~

~~(10)(8) During the construction of the specified works the undertaker must carry out all maintenance (including winter maintenance) in accordance with the scope of maintenance operations agreed by National Highways pursuant to paragraph 7(1)(h) and the undertaker must carry out such maintenance at its own cost.~~

~~(11)(9)~~ The undertaker must notify National Highways if it fails to complete the specified works in accordance with the agreed programme pursuant to sub-paragraph 7(14)(1)(b) of this Part or suspends the carrying out of any specified work beyond a reasonable period of time and National Highways reserves the right to withdraw any road space booking granted to the undertaker to ensure compliance with its network occupancy requirements.

Payments

6.—(1) The undertaker must pay to National Highways a sum equal to the whole of any costs and expenses which National Highways reasonably incurs (including costs and expenses for using internal or external staff and costs relating to any work which becomes abortive) in relation to the specified works ~~and in relation to any approvals sought under this Order, or otherwise incurred under this Part,~~ including:—

- (a) the checking and approval of the information required under ~~paragraph 7(1)~~ this Part;
- ~~(b)~~ the supervision of the specified works;
- ~~(c) the checking and approval of the information required to determine approvals under this Order;~~
- ~~(d)(b) all costs in relation to the transfer of any land required for the specified works; and~~
- (c) all legal and administrative costs and disbursements incurred by National Highways in connection with the specified works and sub-paragraphs (a)- and (e); and
- (d) any value added tax which is payable by National Highways ~~only~~ in respect of such costs and expenses ~~arising under this paragraph~~ and for which it cannot obtain reinstatement from HM Revenue and Customs;

together comprising “the NH costs”.

(2) National Highways must within 14 days of receipt of the information pursuant to sub- paragraph ~~5(14)(1)~~ provide the undertaker with a schedule showing its estimate of the NH costs.

(3) The undertaker must within 30 days of receipt of the notice pursuant to sub-paragraph (2) pay to National Highways the estimate of the NH costs.

(4) If at any time after the payment referred to in sub-paragraph (3) has become payable, National Highways reasonably believes that the NH costs will exceed the estimated NH costs notified pursuant to sub-paragraph (2) it may give notice to the undertaker of the amount that it believes the NH costs will exceed the estimate (the “excess”).

(5) The undertaker must within 30 days of receipt of the notification pursuant to sub-paragraph (4) pay to National Highways an amount equal to the excess.

(6) National Highways must give the undertaker a final account of the NH costs referred to in sub-paragraph (1) above as a fully itemised invoice within 30 days of the ~~issue of the provisional certificate issued pursuant to paragraph 10(4)~~ undertaker notifying to National Highways that a specified work has been completed.

(7) Within 30 days of the issue of the final account:

- (a) if the final account shows a further sum as due to National Highways the undertaker must pay to National Highways the sum shown due to it; and
- (b) if the account shows that the payment or payments previously made by the undertaker have exceeded the costs incurred by National Highways, National Highways must refund the difference to the undertaker.

(8) The undertaker must pay to National Highways within 30 days of receipt and prior to such costs being incurred the total costs that National Highways believe will be properly and necessarily incurred by National Highways in undertaking any statutory procedure or preparing and bringing into force any traffic regulation order or orders necessary to carry out or for effectively implementing the specified works.

Provisional Certificate

~~—(1) Following any closure or partial closure of any of the strategic road network for the purposes of carrying out the specified works, National Highways will carry out a site inspection to satisfy itself that the strategic road network is, in its opinion, safe for traffic and the undertaker must comply with any requirements of National Highways prior to reopening the strategic road network. As soon as the undertaker considers that the provisional certificate may be properly issued it must apply to National Highways for the provisional certificate.~~

~~Following an application for a provisional certificate, National Highways must as soon as reasonably practicable:~~

~~inspect the [Completion of a specified works](#); and [work](#)~~

~~provide the undertaker with a written list of works that are required for the provisional certificate to be issued or confirmation that no further works are required for this purpose.~~

~~When—~~

~~a stage 3 road safety audit for the specified works has been carried out and all recommendations raised including remedial works have (subject to any exceptions agreed) been approved by National Highways;~~

~~the specified works incorporating the approved remedial works under sub paragraph (4)(a) and any further works notified to the undertaker pursuant to sub paragraph 10(3)(b) have been completed to the satisfaction of National Highways;~~

~~the as built information has been provided to National Highways; and~~

~~the undertaker has paid the commuted sum to National Highways, National Highways must issue the provisional certificate.~~

~~On the issue of the provisional certificate the bond sum shall be reduced to 20% of the total bond sum save insofar as any claim or claims have been made against the bond before that date in which case National Highways will retain a sufficient sum to ensure it does not have to meet any costs for or arising from the specified works.~~

~~The undertaker must submit a stage 4 road safety audits as required by and in line with the timescales stipulated in the road safety audit standard. The undertaker must comply with the findings of the stage 4 road safety audit and must pay all costs of and incidental to such and provide updated as-built information to National Highways.~~

Opening

~~The undertaker must notify National Highways not less than 56 days in advance of the intended date of opening to the public of the strategic road network and the undertaker must notify National Highways of the actual date the strategic road network will be opened to the public within 14 days of that date.~~

Final condition survey

7.—(1) The undertaker must, ~~as soon as reasonably practicable after making its application for a provisional certificate pursuant to paragraph 10(2),~~ [within 28 days of completion of a specified work](#) arrange for the highways structures and assets that were the subject of the condition survey to be re-surveyed ~~and must submit the re-survey to National Highways for its approval. The re-survey will include~~ [including](#) a renewed geotechnical assessment required by DMRB CD622 ~~if~~ [and must submit](#) the

~~specified works include any works beneath the strategic road network~~ re-survey to National Highways for its approval.

(2) If the re-surveys carried out pursuant to sub-paragraph 12(4)(7)(1) indicates that any damage has been caused to a structure or asset, the undertaker must submit a scheme for remedial works in writing to National Highways for its approval in writing, which must not be unreasonably withheld or delayed, and the undertaker must carry out the remedial works at its own cost and in accordance with the scheme submitted.

(3) If the undertaker fails to carry out the remedial work in accordance with the approved scheme, National Highways may carry out the steps required of the undertaker and may recover any expenditure it reasonably incurs in so doing.

(4) National Highways may, at its discretion, at the same time as giving its approval to the re-surveys pursuant to sub-paragraph 12(4)(7)(1) give notice in writing that National Highways will remedy any damage identified in the re-surveys and National Highways may recover any expenditure it reasonably incurs in so doing.

(5) The undertaker must make available to National Highways upon request copies of any survey or inspection reports produced pursuant to any inspection or survey of any specified work following its completion that the undertaker may from time to time carry out.

Defects Period

~~—(1) The undertaker must at its own expense remedy any defects in the strategic road network as are reasonably required by National Highways to be remedied during the defects period. All identified defects must be remedied in accordance with the following timescales—~~

~~in respect of matters of urgency, within 24 hours of receiving notification for the same (urgency to be determined at the absolute discretion of National Highways);~~

~~in respect of matters which National Highways considers to be serious defects or faults, within 14 days of receiving notification of the same; and~~

~~in respect of all other defects notified to the undertaker, within 4 weeks of receiving notification of the same.~~

~~(2) Following the expiry of the defects period National Highways has responsibility for routine maintenance of the strategic road network save for any soft landscaping works which must be established and which must thereafter be maintained for a period of 3 years by and at the expense of the undertaker.~~

Final Certificate

~~—(1) The undertaker must apply~~

~~(7) The undertaker must within 28 days of completion of any HDD works submit to National Highways for the final certificate no sooner than 12 months from the date of the provisional certificate.~~

~~(8) Following receipt of the application for the final certificate, National Highways must as soon as reasonably practicable:~~

~~(9) inspect the strategic road network; and~~

~~(10) provide the undertaker with a written list of any further works required to remedy or make good any defect or damage in the strategic road network or confirmation that no such works are required for this purpose.~~

~~(11) The undertaker must carry out such works notified to it pursuant to sub-paragraph 14(2).~~

~~(12) When National Highways is satisfied that:~~

~~(13) any defects or damage arising from defects during the defects period and any defects notified to the undertaker pursuant to sub-paragraph 14(2) and any remedial works required as a result of the stage 4 road safety audit have been made good to the satisfaction of National Highways; and~~

~~(14) the NH costs have been paid to National Highways in full;~~

~~(15) National Highways must issue the final certificate after which the bond shall be released in full.~~

~~(16) (7) The undertaker must pay to National Highways within 28 days of demand the costs reasonably incurred by National Highways in identifying the defects and supervising and inspecting the undertaker's work to remedy the defects that it is required to remedy pursuant to these provisions.~~

~~—(1) The specified works must not commence until—~~

~~the undertaker procures that the specified works are secured by a bond from a bondsman first approved by National Highways in the agreed form between the undertaker and National Highways to indemnify National Highways against all losses, damages, costs or expenses arising from any breach of any one or more of the obligations of the undertaker in respect of the exercise of the powers under this Order and the specified works under the provisions of this Part of this Schedule provided that the maximum liability of the bond must not exceed the bond sum; and the undertaker has provided the cash surety which may be utilised by National Highways in the event of the undertaker failing to meet its obligations to make payments under paragraph 9 or to carry out works the need for which arises from a breach of one or more of the obligations of the undertaker under the provisions of this Part of this Schedule.~~

Commuted sums

~~—(1) National Highways must provide to the undertaker an estimate of the commuted sum, calculated in accordance with FS Guidance S278 Commuted Lump Sum Calculation Method dated 18 January 2010 or any successor guidance, prior to the commencement of the specified works.~~

~~(2) The undertaker must pay to National Highways the commuted sum prior to the issue of the provisional certificate.~~

Insurance

~~Prior to the commencement of the specified works the undertaker must effect public liability insurance with an insurer in the minimum sum of £10,000,000.00 (ten million pounds) in respect of any one claim against any legal liability for damage loss or injury to any property or any person as a direct result of the execution of specified works or use of the strategic road network by the undertaker~~[as built information in relation to those works.](#)

Indemnity

8.—~~(1)~~ The undertaker fully indemnifies National Highways from and against all costs, claims, expenses, damages, losses and liabilities suffered by National Highways arising from the construction, maintenance or use of the specified works or exercise of or failure to exercise any power under this Order within 30 days of demand save for any loss arising out of or in consequence of any negligent act or default of National Highways [or its officers servants agents or contractors or any person or body for which it is responsible.](#)

Maintenance of the specified works

9.—(1) The undertaker must, prior to the commencement of any works of maintenance to the specified works, give National Highways 28 days' notice in writing of the date on which those works will start unless otherwise agreed by National Highways, acting reasonably.

(2) If, for the purposes of maintaining the specified works, the undertaker needs to occupy any road space, the undertaker must comply with National Highways' road space booking requirements and no maintenance of the specified works for which a road space booking is required shall commence without a road space booking having first been secured.

~~(3)~~ The undertaker must comply with any [reasonable](#) requirements that National Highways may notify to the undertaker, such requirements to be notified to the undertaker not less than 7 days' in advance of the planned commencement date of the maintenance works.

~~(4) The provisions of paragraph 11 shall apply to the opening of any part of the strategic road network following occupation of any road space under this paragraph.~~

~~(5)~~[\(3\)](#)

Land

10.—(1) The undertaker must not under the powers of this Order:

- (a) acquire or use land forming part of;
- (b) acquire new or existing rights over; or
- (c) seek to impose or extinguish any restrictive covenants over;

any of the strategic road network, or extinguish any existing rights of National Highways in respect of any third party property, except with the consent of National Highways [such not to be unreasonably withheld or delayed](mailto:legalservicesteam@nationalhighways.co.uk) by written request to legalservicesteam@nationalhighways.co.uk.

Expert Determination

11. —(1) Article [Subject to the provisions of this paragraph, article 43](#) (*arbitration*) of the Order does not apply to this Part of this Schedule.
- (2) Any difference under this Part of this Schedule may be referred to and settled by a single independent and suitable person who holds appropriate professional qualifications and is a member of a professional body relevant to the matter in dispute acting as an expert, such person to be agreed by the differing parties or, in the absence of agreement, identified by the President of the Institution of Civil Engineers.
- (3) On notification by either party of a dispute, the parties must jointly instruct an expert within 14 days of notification of the dispute.
- (4) All parties involved in settling any difference must use best endeavours to do so within 21 days from the date that an expert is appointed.
- (5) The expert must—
- (a) invite the parties to make submission to the expert in writing and copied to the other party to be received by the expert within 7 days of the expert's appointment;
 - (b) permit a party to comment on the submissions made by the other party within 7 days of receipt of the submission;
 - (c) issue a decision within 7 days of receipt of the submissions under sub-paragraph (b); and
 - (d) give reasons for the decision.
- (6) Any determination by the expert is final and binding, except in the case of manifest error in which case the difference that has been subject to expert determination may be referred to and settled by arbitration under article 43 (*arbitration*).
- (7) The fees of the expert are payable by the parties in such proportions as the expert may determine or, in the absence of such determination, equally.

Co-operation

- 12.—(1) [Where in consequence of the proposed construction of any part of the authorised development, National Highways makes requirements for the of the SRN under paragraph 9, the undertaker must use its best endeavours to co-ordinate the execution of the works in the interests of safety of the authorised development and taking into account the need to ensure the safety National Highways' undertaking and National Highways must use its best endeavours to co-operate with the undertaker for that purpose.](#)
- (2) [For the avoidance of doubt whenever National Highways' consent, agreement or approval is required in relation to plans, documents or other information submitted by the undertaker or the taking of action by the undertaker, it must not be unreasonably withheld or delayed.](#)