

**Deadline 6 submissions of National Highways Limited**

**Application by National Grid Electricity Transmission for an Order granting Development Consent for the Yorkshire Green Energy Enablement (Green) Project**

**Planning Inspectorate Reference Number: EN020024**

## **1 Introduction**

- 1.1 This document sets out the latest submissions of National Highways Limited (National Highways) provided at deadline 6 of the examination.
- 1.2 The Authorised Development will have an impact on the Strategic Road Network (SRN) and as such it is critical to the operation of the SRN, the safety of the travelling public and to ensure the proper and efficient use of public resources that the Authorised Development proceeds in consultation and agreement with National Highways and with appropriate protections in place.
- 1.3 National Highways does not object to the principle of the development subject to the inclusion of adequate protections to manage any potential interface between the Authorised Development and the highway.

## **2 Compulsory Acquisition Hearing 2 – Post-hearing submissions, including written summaries of oral submissions to the hearing. Plus National Highways response to the Applicant’s s127 and s138 case.**

- 2.1 There are 18 plots included in the application that are held by National Highways for the purposes of its statutory undertaking. National Highways holds an interest in 16 further plots for those purposes.
- 2.2 The SRN is a critical piece of national infrastructure which National Highways needs to be able to effectively manage without being encumbered by unnecessary third party interests. All applications for rights over the SRN must not disrupt National Highways’ ability to operate, maintain and amend the network with suitable restrictions as well as protections for the highway authority. Without such restrictions and protections unacceptable risks would be created to the public’s ability to utilise public highways and legacy issues can be created which ultimately could cost the public purse significant sums of money to rectify.
- 2.3 A further 30 plots are owned by National Highways but are no longer held for the purposes of its statutory undertaking. These plots no longer form part of the SRN following de-trunking to the local highway authority.
- 2.4 The following table sets out the status of all relevant plots:

<b>Plots owned by National Highways for the purposes of its statutory undertaking</b>	<b>Plots over which National Highways holds an interest for the purposes of its statutory undertaking</b>	<b>Plots owned by National Highways for purposes unconnected to its statutory undertaking</b>
D1-17, D1-24, D1-60, E7-24, E7-29, E7-33, E7-36, E7-37, E7-38, E7-38a, E7-44, E7-44a, E7-45, E7-47, E7-50, E7-51, E7-52 and F1-39	E6-02, E6-10, E7-04, E7-05, E7-19, E7-27, E7-32, E7-39, E7-43, E7-48, E7-49, E7-53, F1-30, F1-31, F1-34 and F1-37	B2-01, B2-30, B2-35, B2-47, B2-48, B2-52, B2-59, B2-60, B2-65, B2-66, B2-67, B3-01, B3-04, B3-05, B3-06, B3-07, B3-08, B3-09, B3-11, B3-66, B3-74, B3-75, B3-76, E7-07, E7-08, E7-10, E7-11, E7-12, E7-14 and E7-15

- 2.5 If the Undertaker was to acquire National Highways operational land or extinguish any of its operational interests this would cause serious detriment to National Highways' undertaking. Similarly it could cause serious detriment to the local highway network if it acquired those plots which now form part of the de-trunked local highway network.
- 2.6 For permanent acquisition of land, there is a detriment due to loss of ownership of the estate and therefore compliance with regulatory responsibilities. It also becomes an issue with regard to suitable depth of ownership for maintenance purposes and potential for trespass.
- 2.7 Ownership of the subsoil beneath and airspace above the highway also enables the highway authority to grant easements and to properly authorise street works over or under the highway. Should a third party own that land they could potentially benefit from a ransom position should other parties need to place apparatus over or under the highway – whilst the highway authority would still have powers under the New Roads and Street Works Act 1991 (NRSWA) to authorise such works, it would no longer have the proprietary interest to permit what would otherwise be a trespass in the absence of a statutory right. That third party would need to authorise such works. This would not be in the public interest.
- 2.8 Given the Applicant's status as a statutory undertaker it already has a statutory right to place its cables over the highway (pursuant to the Electricity Act 1989) subject to approval of the street authority. The means by which this can be done is governed by NRSWA which ensures the highway authority is adequately protected. There is therefore no need for the DCO to authorise compulsory acquisition powers for these purposes – as a means of last resort it cannot be said that the tests for compulsory acquisition have been met in this regard. There is another, less draconian, way to achieve the same aim.

- 2.9 Any acquisition of a right is only likely to cause detriment to National Highways undertaking if it cannot co-exist with the interest that National Highways holds. If that was the case National Highways' interest would be extinguished under the current draft DCO. This could make it impossible for National Highways to carry out its statutory functions. National Highways' Protective Provisions are written in a way to ensure this does not happen.
- 2.10 It is worth noting that powers under the Highways Act 1980 for highway authorities accessing third party land are not as extensive as one might expect. Whilst many powers are included; some of these are only permissible following an application to the magistrates and some situations are not covered at all. As such National Highways has negotiated private interests in land adjoining its network. If these rights were to be extinguished it could cause serious detriment to National Highways undertaking as it may no longer be possible for National Highways to carry out its statutory duties and maintenance responsibilities. This could create significant public safety issues and /or additional expense for the public purse.
- 2.11 Interests of National Highways in third party land that could be extinguished under current proposals include rights of way and access, rights to build and maintain, rights to install and maintain service apparatus, and rights of maintenance access. All of these are necessary to ensure that National Highways is able to carryout its undertaking and serious detriment would result should those interests be lost.
- 2.12 The Applicant has stated that their rights can co-exist and that they do not propose to extinguish National Highways' rights or interests. Whilst this is welcomed by National Highways there is no commitment in the DCO to this and so the significant concern of National Highways remains. The power exists in the draft DCO and the Applicant has not accepted National Highways' preferred set of protective provisions which would deal with this point.
- 2.13 In summary; compulsory acquisition powers are not necessary in respect of National Highways operational land (plus local authority highway) as statutory rights already exist for the Applicant to carry out the works necessary for the Authorised Development. As such it would be wholly inappropriate to grant powers of compulsory acquisition over statutory undertakers' land that would result in serious detriment. For third party land over which National Highways holds an interest, granting compulsory acquisition powers would cause serious detriment to National Highways' undertaking unless the Applicant commits to not extinguishing National Highways' interests and this is included in the DCO.
- 3 Issue Specific Hearing 4 – Post-hearing submissions, including written summaries of oral submissions to the hearing.**

- 3.1 In this section National Highways predominantly addresses concerns with the draft DCO Articles with some information on the protective provisions which is covered further in section 4.
- 3.2 National Highways has noted the Applicant's commentary in respect of points made by National Highways following the previous DCO hearing. As the draft DCO does now include protective provisions for National Highways' benefit then it does address some of National Highways' initial concerns regarding the articles of the DCO and powers being sought, but not all. If National Highways' full set of unaltered protective provisions was accepted then National Highways would be able to fully withdraw its objection.
- 3.3 In its submissions the Applicant is of the view that the protective provisions included in the draft DCO at D5 address many of National Highways' concerns. This is not correct as the protective provisions included by the Applicant only cover 'works' and so there remain a number of Articles that would not be covered. National Highways' objection to these Articles therefore remains. National Highways' version of the protective provisions is required in order to address this.
- 3.4 Given the inclusion of a version of protective provisions for National Highways' benefit, with the exception of the above, National Highways' remaining concerns relate mainly to the compulsory acquisition and land access provisions. The Applicant, in their response document, believe the protective provisions that have been included in the draft DCO at D5 would address National Highways' safety concerns around being denied access to operational land but this is not correct. The provisions referred to by the Applicant relate to National Highways being permitted access for 'supervision of works'. The provisions do not however address the exclusion of National Highways for all other purposes. Should National Highways be excluded from access to its operational land then this would be of serious detriment to its undertaking and result in significant safety concerns.
- 3.5 Paragraph 7(3) of National Highways' Protective Provisions is required to address this. Post hearing National Highways has had discussions with the Applicant and has reached common ground on many areas however the protective provisions put forward by the Applicant do not address many of National Highways' concerns with the draft DCO Articles.
- 3.6 Paragraph 7(3) requires the Applicant to seek the consent of National Highways before exercising certain powers over the SRN. By including this in the Protective Provisions the deemed consent provisions included in the draft DCO Articles would not apply. National Highways' objections in this regard are well documented and the Applicant has now accepted that *"Due to the potential safety implications acknowledged regarding working over the strategic road network, no deemed approval*

*has been included within the protective provisions*<sup>1</sup>. The Articles that National Highways requests this is applied to, and its reason for such, are detailed in the following table. It should be noted that whilst the Protective Provisions would be triggered should any ‘works’ be carried out, the following Articles provide powers to the Applicant which may not require ‘works’ as such and therefore would bypass National Highways’ protection.

Article	Reason
14	<p>This article would allow any street within the order limits (including the SRN) to be temporarily stopped up. The protective provisions only cover ‘works’ and so the Applicant would still have a power to temporarily stop up the SRN (by which it is assumed means to close /restrict its use) for which National Highways would not have the benefit of its protective provisions unless there were associated works to the SRN which may not be the case.</p>
19	<p>Article 19 would permit the Applicant to discharge water into the highway drainage system of the SRN. National Highways strongly objects to this given the clear policy position of the Secretary of State for Transport set out in <i>Strategic Road Network and the delivery of sustainable development</i> [Dec 2022] which states at paragraph 59:</p> <p style="text-align: center;"><i>To ensure the integrity of the highway drainage systems, no new connections into those systems from third party development and proposed drainage schemes will be accepted.</i></p> <p>Whilst the protective provisions would catch any physical works, it would not cover any indirect discharge into the SRN drains and as such National Highways must insist that either (i) explicit reference is added to Article 19 to make clear that it does not apply to the SRN drainage system or (ii) this provision is included in the protective provisions.</p>
20	<p>This Article authorises entry onto any land within the Order limits (and any other land which may be affected by the Authorised Development) which would include land owned by National Highways, including parts of the SRN. The protective provisions only cover ‘works’ so would not be triggered if, for example, the Applicant merely entered the land or left equipment on the land without carrying out physical works. Under this Article no consent is required and only 14 days’ notice needs to be given.</p>

<sup>1</sup> *Document 8.30.2 Proposed Protective Provisions to benefit National Highways*’.

	<p>This would not be acceptable to National Highways given it could interfere with National Highways carrying out its own statutory or Licence obligations and pose significant safety issues. Including this in the protective provisions would require the Applicant to obtain National Highways consent.</p>
21	<p>This Article authorises entry onto any land within the Order limits which would include land owned by National Highways, including parts of the SRN. The protective provisions only cover 'works' so would not be triggered. Under Article 21 no consent is required and only 14 days' notice needs to be given. This would not be acceptable to National Highways given it could interfere with National Highways carrying out its own statutory or Licence obligations and pose significant safety issues. Including this in the protective provisions would require the Applicant to obtain National Highways consent.</p>
22	<p>This Article enables the Applicant to compulsory acquire National Highways land and interests. For reasons already stated this would cause serious detriment to National Highways' undertaking. Including this in the protective provisions would require the Applicant to obtain National Highways consent and therefore ensure that appropriate protections were in place so that serious detriment did not occur.</p>
25	<p>This Article enables the Applicant to compulsory acquire rights and impose restrictions over National Highways land, and that which it has an interest. For reasons already stated this would cause serious detriment to National Highways' undertaking. Including this in the protective provisions would require the Applicant to obtain National Highways consent and therefore ensure that appropriate protections were in place so that serious detriment did not occur.</p>
26	<p>Article 26 could result in the extinguishment of National Highways interests. Given National Highways role as the strategic highways company responsible for the SRN in England it is not appropriate for its interests to be extinguished in such manner which could make it impossible for National Highways to fulfil its statutory and Licence obligations.</p> <p>Of further concern is Article 26(3) which renders all rights '<i>suspended and unenforceable</i>' in respect of any land which the applicant takes temporary possession of. This could apply to any land within the order limits and so could result in National Highways' interests being suspended and therefore for a potentially lengthy period National Highways could lose the ability to access its land. There is no</p>

	<p>need to obtain consent and no need to consider the implications of such other than to pay compensation however this would not be sufficient to address National Highways' concerns over such a wide power and the impact it could have on the SRN.</p> <p>Including this in the protective provisions would require the Applicant to obtain National Highways consent and therefore ensure that appropriate protections were in place so that serious detriment did not occur.</p>
36	<p>This Article provides a very wide power to enter any land within the order limits to take temporary possession and so for a potentially lengthy period National Highways could lose the ability to access its land. This includes the SRN. No consent is required and only 14 days notice must be given. Such a wide power has the potential to cause National Highways significant concerns and could make it impossible for National Highways to fulfil its statutory and Licence obligations.</p> <p>Including this in the protective provisions would require the Applicant to obtain National Highways consent and therefore ensure that appropriate protections were in place so that National Highways is not impeded in the carrying out of its undertaking.</p>
37	<p>This Article provides a very wide power to enter any land within the order limits to take temporary possession and so for a potentially lengthy period National Highways could lose the ability to access its land. This includes the SRN. No consent is required and only 14 days notice must be given. Such a wide power has the potential to cause National Highways significant concerns and could make it impossible for National Highways to fulfil its statutory and Licence obligations.</p> <p>Including this in the protective provisions would require the Applicant to obtain National Highways consent and therefore ensure that appropriate protections were in place so that National Highways is not impeded in the carrying out of its undertaking.</p>
38	<p>This Article provides a very wide power to enter any land within the order limits to take temporary possession and so for a potentially lengthy period National Highways could lose the ability to access its land. This includes the SRN. No consent is required and only 14 days notice must be given. Such a wide power has the potential to cause National Highways significant concerns and could make it impossible for National Highways to fulfil its statutory and Licence obligations.</p>



	<p>Including this in the protective provisions would require the Applicant to obtain National Highways consent and therefore ensure that appropriate protections were in place so that National Highways is not impeded in the carrying out of its undertaking.</p>
39	<p>This Article provides a very wide power to enter any land within the order limits to take temporary possession and so for a potentially lengthy period National Highways could lose the ability to access its land. This includes the SRN. No consent is required and only 14 days notice must be given. Such a wide power has the potential to cause National Highways significant concerns and could make it impossible for National Highways to fulfil its statutory and Licence obligations.</p> <p>Including this in the protective provisions would require the Applicant to obtain National Highways consent and therefore ensure that appropriate protections were in place so that National Highways is not impeded in the carrying out of its undertaking.</p>
45	<p>This Article gives the undertaker very wide traffic regulation powers. Whilst articles 45(1) and 45(2) provide that the consent of the traffic authority is required, article 45(8) makes this subject to a 28 day deemed consent provision. National Highways, as the strategic highway company appointed by the Secretary of State for Transport, should be the only body permitted to have such powers in respect of the SRN.</p> <p>Permitting a non-highway authority such wide traffic regulation powers would not be in the public interest. Including this in the protective provisions would require the Applicant to obtain National Highways consent and remove the deemed consent provision. It would also ensure that any traffic regulation had appropriate oversight from the highway authority and cannot be bypassed.</p>

#### 4 Protective Provisions

- 4.1 It is understood that the Applicant is submitting a document at D6 called '*Document 8.30.2 Proposed Protective Provisions to benefit National Highways*'. This document contains commentary on the latest position and differences between National

Highways and the Applicant with regards the protective provisions for National Highways' benefit. National Highways has provided input into this document and it is hoped this assists the ExA in understanding the differences between the parties.

- 4.2 The protective provisions to be included by the Applicant at D6 have moved the parties closer to the position that National Highways has been seeking since the start of the Examination. Nevertheless there are still areas of concern for National Highways' which have not been addressed.
- 4.3 Included at Appendix 1 is a version of the protective provisions that National Highways understands the Applicant will be submitting at D6. This includes National Highways' required amends shown tracked together with commentary.

**National Highways Limited**

**28 July 2023**

## **APPENDIX 1**

**The Applicant's D6 Protective Provisions with National Highways amends and commentary**

**PART 6**  
**FOR THE PROTECTION OF NATIONAL HIGHWAYS LIMITED**

**Application etc.,**

1. —(1) 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.

(2) 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.

**Commented [PB1]:** Should be deleted, grammatically incorrect insertion.

**Interpretation**

2. —(1) Where the terms defined in article 2 (*interpretation*) of this Order are inconsistent with subparagraph (2) the latter prevail.

(2) In this Part of this Schedule—

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

- (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) list of suppliers and materials used, as well as any relevant test results and CCTV surveys (if required to comply with DMRB standards);
- (c) product data sheets and technical specifications for all materials used;
- (d) as constructed information for any utilities discovered or moved during the works;
- (e) method statements for the works carried out;
- (f) 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) organisation and methods manuals for all products used;
- (h) as constructed programme;
- (i) test results and records as required by the highway detailed design information and during construction phase of the project;
- (j) a stage 3 road safety audit subject to any exceptions to the road safety audit standard as agreed by the undertaker and National Highways;
- (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;

“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;

“the cash surety” means the sum agreed between the undertaker and National Highways;

“commuted sum” means such sum calculated in accordance with FS Guidance S278 Commuted Lump Sum Calculation Method dated 18 January 2010 or any successor guidance, for which an estimate is to be provided prior to the commencement of the specified works, to be used to fund the future cost of maintaining the specified works;

“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;  
“reconducting detailed design information” means such of the following drawings specifications and calculations as are relevant to the development—

- (a) site clearance details;
- (b) boundary, environmental and mitigation fencing;
- ~~(b)~~(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
- ~~(e)~~(f) landscaping;
- ~~(d)~~(g) traffic signs and road markings;
- ~~(e)~~(h) stage 1 and stage 2 road safety audits and exceptions agreed;
- ~~(f)~~(i) topographical survey;
- ~~(g)~~(j) maintenance and repair strategy in accordance with DMRB GD304 Designing health and safety into maintenance or any replacement or modification of it;
- ~~(h)~~(k) health and safety information including any asbestos survey required by GG105 or any successor document; and
- ~~(i)~~(l) other such information that may be required by National Highways to be used to inform the detailed design of the specified works;

“highway detailed design information” means such of the following drawings specifications and calculations as are relevant to the development—

- (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) highway structures and any required structural approval in principle;
- (n) landscaping;
- (o) proposed departures from DMRB standards;
- (p) walking, cycling and horse riding assessment and review report;
- (q) stage 1 and stage 2 road safety audits and exceptions agreed;
- (r) utilities diversions;
- (s) topographical survey;
- (t) maintenance and repair strategy in accordance with DMRB GD304 Designing health and safety into maintenance or any replacement or modification of it;
- (u) health and safety information including any asbestos survey required by GG105 or any successor document; and
- (v) other such information that may be required by National Highways to be used to inform the detailed design of the specified works;

**Commented [PB2]:** The addition of these three items is necessary as all are potentially relevant to the reconstructing works and therefore must be subject to National Highways oversight.

“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 14;

“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 10 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;

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

“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; “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

(3) 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 of Schedule 15 but for the purposes of any approvals required under this Part of Schedule 15 the undertaker shall liaise directly with National Highways.

4. Notwithstanding the limits of deviation permitted pursuant to article 5 (limits of deviation) of this Order, no works in carrying out, maintaining or diverting the authorised development may be carried out on, under or over the strategic road network at a distance ~~when constructed,~~ within 5.5 metres vertically of the lowest point of the ground unless with the express consent of National Highways.

5. 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

6. 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.

#### Prior approvals and security

7. — (1) (1) In respect of any specified works being at least ~~when constructed,~~ 5.5 metres above the surface of the strategic road network, such works must not commence until—

- (a) Evidence that 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 reconditioning 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, including scaffolding to oversail the strategic road network, 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 suitability 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;
  - (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) where necessary, 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, unless otherwise agreed by National Highways.

(2) In respect of specified works save for those which fall under sub-paragraph (1), such 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

**Commented [PB3]:** The addition of this wording by the Applicant creates ambiguity over when the provision would apply and could result in works that should be captured not being captured causing unnecessary risks to National Highways and the SRN. It is unnecessary and should be deleted.

**Commented [PB4]:** This wording should be deleted for the same reasons as stated above.

Highways—

- (i) the highway 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 suitability 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;
  - (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) 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) 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
- (j) 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,
- unless otherwise agreed by National Highways.

(3) The undertaker must not exercise—

- (a) article 14 (temporary stopping up of streets, cycle tracks and public rights of way);
- (b) article 19 (discharge of water);
- (c) article 20 (protective works to buildings);
- (d) article 21 (authority to survey and investigate the land);
- (e) article 22 (compulsory acquisition of land);
- (f) article 25 (compulsory acquisition of rights);
- (g) article 26 (Extinguishment and suspension of private rights);
- (h) article 36 (temporary use of land by National Grid);
- (i) article 37 (temporary use of land by NPG);
- (j) article 38 (temporary use of land by NGN);
- (k) article 39 (temporary use of land for maintaining the authorised development); or
- (l) article 45 (Traffic regulation) of this Order.

**Commented [PB5]:** The addition of paragraph 7(3) is necessary to remove all of National Highways objections to the DCO articles. Without the inclusion of 7(3) then National Highways maintains its previously stated objections in that regard. Whilst the acceptance of National Highways' protective provisions has now addressed some of those initial concerns, a number still remain and the list included at 7(3) reflects that, noting that this list has now reduced significantly from the original set.



over any part of the strategic road network without the consent of National Highways, and National Highways may in connection with any such exercise require the undertaker to provide details of any proposed road space bookings and/or submit a scheme of traffic management for National Highways' approval.

~~(3)~~(4) 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), ~~(2)~~ or ~~(3)~~.

**Commented [PB6]:** The amendments to this paragraph are necessary due to the addition of new paragraph 7(3).

~~(4)~~(5) Any approval of National Highways required under this paragraph-

- (a) must not be unreasonably withheld;
- (b) must be given in writing;
- (c) may be subject to any conditions as National Highways considers necessary; and
- ~~(d) in respect of any approval under sub-paragraph (1), must be given by the end of the period of 28 days, beginning with the date on which any request for approval has been made and if National Highways has not intimated disapproval of those works and the grounds of disapproval within that period, the undertaker may serve upon National Highways written notice requiring National Highways to intimate approval or disapproval within a further period of 28 days beginning with the date upon which National Highways receives written notice from the undertaker; and~~

**Commented [PB7]:** 7(5)(d) and 7(5)(e) are similar with slight differences that may cause confusion. National Highways consider it to be unnecessary to differentiate approvals under 7(1) and 7(2) in this way and given that both relate to a 56 day approval period it is suggested that 7(5)(d) should be deleted.

~~(e)~~(d) in respect of any approval under sub-paragraph (2), shall be deemed to have been refused if neither given nor refused within 56 days of receipt of the information for approval or, where further particulars are requested by National Highways within 56 days of receipt of the information to which the request for further particulars relate.

~~(5)~~(6) Any change to the identity of the contractor and/or designer of the specified works will be notified to National Highways immediately and 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.

**Commented [PB8]:** It is a requirement of paragraph 7(2) (i) for collateral warranties to be procured for National Highways. This has been accepted by the Applicant. This needs to remain the case if the contractor changes.

~~(6)~~(7) Any change to the detailed design of the specified works must be approved by National Highways in accordance with this paragraph.

### Construction of the specified works

- 8.—(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 of 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.
- (3) The specified works must be carried out by the undertaker to the satisfaction of National Highways in accordance with—
- (a) the relevant detailed design information and programme of works approved pursuant to paragraph 7(1) or (2) as appropriate or as subsequently varied by agreement between the undertaker and National Highways;
  - (b) the DMRB, the Manual of Contract Documents for Highway Works, including the Specification for Highway 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 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 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 strategic road network for any other land of National Highways;
- (c) National Highways acting properly and reasonably may by notice in writing require the undertaker, at the undertaker's own expense, to comply promptly 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 the undertaker or its appointed contractors or agents causes damage to the strategic road network then National Highways acting properly and reasonably 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 (6) or sub-paragraph (7) 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 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 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 reasonable satisfaction of National Highways.

(10) During the construction of the specified works approved under paragraph 7(2), 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(2)(h) and the undertaker must carry out such maintenance at its own cost.

(11) 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(1)(b) or 7(2)(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

9.—(1) The undertaker must pay to National Highways a sum equal to the whole of any reasonable and proper costs and expenses which National Highways 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;
- (b) the supervision of the specified works;
- (c) the checking and approval of the information required to determine approvals under this Order;
- (d) all costs in relation to the transfer of any land required for the specified works; and
- (e) all legal and administrative costs and disbursements incurred by National Highways in connection with the Order and sub-paragraphs (a)-(d); and

**Commented [PB9]:** There is land within the order limits that is owned by National Highways but does not form part of its operational network. This includes known works to cross a balancing pond. The Applicant should be required to put right any damage caused to National Highways' interests, not just the SRN.

**Commented [PB10]:** The Applicant has deleted the requirement to pay within 28 days of demand. In line with other changes proposed in these protective provisions National Highways has changed this to 30 days in keeping with the Applicant's own requirements. This is a reasonable provision that has been removed without justification. A public body should not be out of funds for any longer than is strictly necessary.

- (f) any value added tax which is payable by National Highways in respect of such costs and expenses and for which it cannot obtain reinstatement from HM Revenue and Customs,

together comprising “the NH costs”.

(2) The undertaker must pay to National Highways upon demand 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 authorised development.

(3) National Highways must provide the undertaker with a schedule showing its estimate of the NH costs prior to the commencement of the specified works and the undertaker must pay to National Highways the estimate of the NH costs prior to commencing the specified works and in any event prior to National Highways incurring any cost but the absence of such estimate will not inhibit the commencement of the specified works by the undertaker.

- (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 it may give notice to the undertaker of the amount that it believes the NH costs will exceed the estimate of the NH costs (the excess) and the undertaker must pay to National Highways within ~~42~~<sup>30</sup> days of the date of the notice a sum equal to the excess.
- (5) National Highways must give the undertaker a final account of the NH costs referred to in sub- paragraph (1) above within 91 days of the issue of the provisional certificate issued pursuant to paragraph 10(4).
- (6) Within ~~42~~<sup>30</sup> 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;
  - (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.
- (7) If any payment due under any of the provisions of this Part of this Schedule is not made on or before the date on which it falls due the party from whom it was due must at the same time as making the payment pay to the other party interest at 3% above the Bank of England base lending rate from time to time being in force for the period starting on the date upon which the payment fell due and ending with the date of payment of the sum on which interest is payable together with that interest.

**Commented [PB11]:** The Applicant is seeking to change this from 28 days to 42. Noting that the Applicant requires payment itself within 30 days when roles are reversed National Highways considers it reasonable for that same period to apply here. A public body should not be without funds for any longer than is strictly necessary.

### Provisional Certificate

**10.**—(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.

- (2) As soon as the undertaker considers that the provisional certificate may be properly issued it must apply to National Highways for the provisional certificate.
- (3) Following an application for a provisional certificate, National Highways must as soon as reasonably practicable:
- (a) inspect the specified works; and
  - (b) 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.
- (4) When—
- (a) 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;
  - (b) 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;
  - (c) the as built information has been provided to National Highways; and
  - (d) in respect of any specified works captured by paragraph 7(2), the undertaker has paid the commuted sum to National Highways,
- National Highways must issue the provisional certificate.
- (5) On the issue of the provisional certificate the bond sum (if applicable) 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.
  - (6) The undertaker must submit a stage 4 road safety audit 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

11. 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

12. In respect of any specified works approved under paragraph 7(1) or 7(2)—

- (1) The undertaker must, as soon as reasonably practicable after making its application for a provisional certificate pursuant to paragraph 10(2), 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 a renewed geotechnical assessment required by DMRB CD622 if the specified works include any works beneath the strategic road network.
- (2) If the re-survey carried out pursuant to paragraph 12(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 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-survey pursuant to paragraph 12(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.

**Commented [PB12]:** There would still be a requirement for a *Final Condition Survey* following the reconditioning works and so this paragraph needs to be apply to works approved pursuant to both 7(1) and 7(2). Whilst this requirement may be less onerous for these types of works, nevertheless National Highways must still have the ability to require such where it considers it necessary to ensure that the SRN is safe for public use and that any costs are met by the Applicant and not the public purse.

### Defects Period

13. In respect of any specified works approved under paragraph 7(2)—

- (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—
- (a) 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);
- (b) in respect of matters which National Highways considers to be serious defects or faults, within 14 days of receiving notification of the same; and

(c) 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

**14.** (1) In respect of any specified works approved under paragraph 7(2)—

(a) The undertaker must apply to National Highways for the final certificate no sooner than 12 months from the date of the provisional certificate.

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

(i) inspect the strategic road network; and

(ii) 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.

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

(d) When National Highways is satisfied that:

(i) 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

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

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

(e) The undertaker must pay to National Highways within 42~~30~~ 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.

(2) In respect of any specified works approved under paragraph 7(1), the undertaker may apply for a final certificate at any time following issue of the provisional certificate, whereupon National Highways must issue a final certificate forthwith.

**Commented [PB13]:** For the reasons stated National Highways requires this to be amended to 30 days.

### Security

**15.** —In respect of any specified works approved under paragraph 7(2), the works must not commence until—

(1) 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

(2) 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.

### Insurance

**16.** 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.

## Indemnity

17. —(1) The undertaker fully indemnifies National Highways from and against all costs, claims, expenses, damages, losses and liabilities suffered by National Highways ~~directly~~ arising from the construction, maintenance or use of the specified works or exercise of or failure to exercise any power under this Order ~~within 14 days of demand~~ save for any loss arising out of or in consequence of any negligent act or default of National Highways.

~~(2) Any indemnity under this part of Schedule 15 shall be limited to a maximum aggregate liability of the Undertaker to National Highways for all claims to a sum of €30,000,000 (thirty million pounds sterling).~~

## Maintenance of the specified works

18. —(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 (save for in the event of an emergency situation).

(3) The undertaker must comply with any 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.

## Land

19. —(1) Following the issue of a final certificate pursuant to paragraph 14(4) National Highways may serve notice on the undertaker that it wishes to take a freehold transfer of land within the extent of strategic road network boundary which is not in the ownership of National Highways but has been acquired by the undertaker for the purposes of carrying out the specified works approved under paragraph 7(2).

(2) If the undertaker receives notice under sub-paragraph (1) then the undertaker must effect a freehold transfer of the land which is the subject of the notice and complete such transfer as soon as reasonably practicable at no cost to National Highways.

(3) 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 by written request to [legalservicesinbox@nationalhighways.co.uk](mailto:legalservicesinbox@nationalhighways.co.uk).~~

(4) Where any land or interest is proposed to be acquired for the benefit of National Highways, the undertaker must, unless otherwise agreed by National Highways, exercise article 22 (compulsory acquisition of land) and article 25 (compulsory acquisition of rights) as applied by articles 32 (modification of Part I of the 1965 Act) and article 33 (application of the 1981 Act) of this Order to directly vest in National Highways any such land or interest.

## Arbitration

20. Any dispute under this Part of this Schedule shall be settled by arbitration in accordance with article 53 (arbitration).

**Commented [PB14]:** To ensure adequate protection to the public purse the indemnity should not be qualified in such a manner and the Applicant should be responsible for any liabilities etc suffered by National Highways as a result of its works. Given the nature of the proposed works there is the possibility of damage being caused indirectly to National Highways which would not have occurred had the works not taken place.

**Commented [PB15]:** Given the potential costs incurred by a public body that may need to be recovered under this paragraph, National Highways requires this to be done expeditiously and so asks that its original wording here is reinserted.

**Commented [PB16]:** National Highways does not agree to the indemnity being capped. This exposes National Highways, as a public body, to unacceptable financial risk. The position taken by National Highways in this regard is no different to that taken by the Applicant itself who does not agree to caps on indemnities.

**Commented [PB17]:** The Applicant's compulsory acquisition proposals will cause serious detriment to National Highways undertaking if approved without protections being afforded to National Highways. The reinsertion of paragraph 19(3) in full will address those concerns and enable National Highways to remove its objection in this regard.