

Sent 14/11/12 to RWE

COMMENTS ON DRAFT DCO

Article 2 Interpretation

We suggest you insert definitions of "local highway authority" and "relevant planning authority"

Article 3

We suggest that the first phrase of Article 3 "subject to the modifications set out in paragraphs (a) and (b)" is removed for clarity. We suggest that you explain fully in the Explanatory Memorandum (EM) the purpose of this provision and how it is intended to work in practice.

We also suggest that you provide a full explanation of the meaning and necessity of including Article 3(2) (d) and 3(2) (e).

Article 7

We suggest a definition of linear works is included. The reference to the maximum heights of works at the AGI site (no. 3?) no.4, no.5 and no.6 currently set out in Schedule A Part 1 should be stated in Article 7 instead of being within the Schedule.

Article 9

We suggest that the EM provides an explanation of what the statutory rights referred to in 1(a) and 1(b) might be.

Article 11

We suggest defining "the previous right of way" in Article 11(2) as the Yoxall 59 footpath.

Articles 16,19,20 – Compulsory Acquisition of Land

Under Article 16 as presently drafted, all rights etc are automatically extinguished if compulsory acquisition powers are exercised. Article 20, however, provides for private rights of way to be extinguished at different timescales from those set out in Article 16 and their extinguishment is subject to *any notice or agreement to the contrary (20(6))*. Articles 16 and 20 therefore appear to be inconsistent in their treatment of the extinguishment of rights. Article 19 provides for a power to interfere with all rights and easements, relying on statutory authority under s158 of the 2008 Act. However, if powers of compulsory acquisition are exercised under Article 16, these rights etc will have already been extinguished. The approach taken will need to be clarified and fully explained. You may find it helpful to look at the Ipswich DCO where the approach taken was to omit Article 16(2) and rely on Article 20(1) for the extinguishment of any

rights (not just rights of way) subject to notice or agreement. Article 19 can then be included to deal with any rights not extinguished but which are to be interfered with.

Article 19(4)

We would suggest that you consider replacing references to s10 of the 1965 Act with references to s152 of the 2008 Act. The 2008 Act specifically disapplies s10 of the 1965 Act in relation to DCOs and instead applies a duty to pay compensation under s152 .

Article 18

We note that this article provides for the imposition of restrictive covenants. We would draw your attention to the decisions of the SoS for Transport in respect of Ipswich and Doncaster, where he decided that it was not appropriate to authorise the imposition of restrictive covenants in those particular cases. If you wish to include this provision, we suggest that you ensure you are able to set out the exact nature of the restrictive covenant and its location and provide full justification for seeking such powers.

Schedule A Part 1

We suggest moving the references to the limits of deviation of the works into Article 7, rather than including them within the description of the works in this Schedule (see comment above).

On page 22, after the words "Additionally, the authorised development comprises, the following associated development-", we suggest including the words "which falls within the scope of the environmental impact assessment recorded in the Environmental Statement";

On page 27, after "comply with the requirements" (the last sentence at the end of Part 1): we suggest including the words "and which fall within the scope of the environmental impact assessment recorded in the Environmental Statement";

Works no.4 - the EM should explain the reference to "additional structures".

Requirement 8

The approval of the alternative right of way should be sought from the highway authority rather than the relevant planning authority.

Miscellaneous drafting points

Please note that the Schedules should be numbered rather than lettered.

From our experience of the Ipswich and Doncaster DCOs, the preference of the Secretary of State is for modern drafting. The following examples from Ipswich and Doncaster should assist:

Addition to the definition of "undertaker" : the company's registered office

"Do not apply" not "shall not apply"

"Must" not "shall"

"Is deemed" not "shall be deemed"

"Except that" not "save that"

"Prevent" not "shall prevent"

"Is" not "shall be"

"Without limitation on the scope of paragraph 2" not "without prejudice to the generality of paragraph 2"

Also, the Article dealing with the certification of plans lists the plans and drawings.

Book of Reference

Interest/Right to be acquired Column

We suggest you consider the need to include such rights as "a right to construct" or "a right to take temporary possession" or any other rights which are in effect powers when these are already contained within the provisions of the draft DCO. The Book of Reference should refer to the interests in land (which includes rights over land) which are held by all persons other than the applicant or to the interests in land held by all persons which will be affected by any new rights which the applicant may wish to create. Operative powers which are contained within the draft DCO will give the applicant the right to construct the pipeline or the right to take temporary possession and do not need to be set out in the Book of Reference.

Part 4 - Crown interest

Under s135 of the 2008 Act, a DCO may not contain any provisions which authorise the compulsory acquisition of Crown interests in land. Any other provisions in a draft DCO which apply to Crown land or rights benefiting the Crown can only be included if the Crown consents.

Sent 19/11/12 to RWE

With regard to s127 applications I can now confirm that in cases where a recommendation on a s127 application needs to be submitted to the DfT SoS, this would be done at the same time as submitting the recommendation report to the relevant SoS for a decision on the DCO application - ie in the case of Willington the DECC SoS. The DfT have sent us a letter how they wish us to deal with transport related s127 applications which you may find useful:

http://infrastructure.planningportal.gov.uk/wp-content/uploads/2012/11/120508_Advice-to-PINS-from-Martin-Woods-DfT-re-s127-certificates.pdf

Furthermore, applicants don't have to submit an application for a s127 certificate at the same time as submitting the DCO application, eg if they are expecting to reach agreement with the relevant statutory undertaker. In other words applicants could wait until after the relevant representation period has passed or the responses to the first written questions have been received before submitting a s127 application. However, the later an applicant leaves the submission of a s127 application the higher the risk that the person appointed to examine the s127 application may run out of time adequately to examine the issues raised by the s127 application. It is for the applicant to manage this risk and decide how late to leave a s127 application bearing in mind that the examination of the application has to close 6 months from the day after the preliminary meeting at the latest.

I trust that this is helpful.

Simone Wilding
Principal Case Manager