

Appendix 1 – National Highways – Comments on Applicant’s comments on Protective Provisions

Paragraph	NH Draft PP	Applicant proposed amendment	Applicant reason for amendment	NH response
2	Definition of “as build information”	Deletion of entire definition	Definition relates to provisions regarding works to the SRN which are not relevant to the authorised development	Inclusion is necessary due to the current drafting of the dDCO which allows the possibility of works to the SRN and whilst it is appreciated such works are not envisaged at this time by the undertaker the possibility for works to the SRN nevertheless remains and would be permitted under the DCO if granted. To alleviate concerns that the undertaker might have these are only applicable in the event works are required on or to the SRN.
2	Definition of “bond sum”	Deletion of entire definition	Definition relates to proposed Paragraph 15 (Security), which is not considered to be proportionate as the undertaker is not proposing or seeking consent for any works to the SRN carriageway	These arrangements are to protect NH financially if the developer defaults on their obligation. Third party works should be nil risk and cost to NH and the public purse. A bond is required to protect NH should the undertaker become insolvent or default on their obligations
2	Definition of “cash surety”	Deletion of entire definition	Committed sums are payable only for maintenance of non-	This term has been misunderstood by the

			<p>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 pipeline, for which only the undertaker will be carrying out maintenance. Payment of a commuted sum to NH for future maintenance is therefore not required</p>	<p>Applicant. It is a cash deposit that can be used in the event National Highways need to step in and act quickly. It ensures that National Highways has funds whilst it waits the calling in of the bond. There is scope for works to be undertaken to the SRN as per the current drafting of the DCO and therefore this should be reinstated in the event such works are required and carried out taking into account that once construction starts the envisaged works might change. Therefore, this should be reinstated or the DCO drafted to make clear that no works will be undertaken to the SRN and limited to local roads.</p>
2	<p>Definition of "commuted sum"</p>	<p>Deletion of entire definition</p>	<p>Committed 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 pipeline, for which only the undertaker will be carrying out</p>	<p>The current DCO drafting is sufficiently wide that works may be carried out to the SRN. In the event that they are, provision is needed for a commuted sum. If it is not, the provision should not be of concern to the undertaker but NH must protect its position in the event it is required which is currently unknown.</p>

			maintenance. 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 works to the SRN which are not relevant to the authorised development	This must be reinstated – please see comments in this table and in previous representations. The definition is sued within the protective provisions.
2	Definition of “detailed design information”	Deletion of subparagraph (q) requiring “stage 1 and stage 2 safety audits and exceptions agreed”	Definition relates to provisions regarding works to the SRN which are not relevant to the authorised development	This must be reinstated – please see the wide wording of Schedule 1 which could encompass works to the SRN as well as Articles 10 and 11 of the DCO.
2	Definition of “final certificate	Deletion of entire definition	Definition relates to provisions regarding works to the SRN which are not relevant to the authorised development	The current version of draft allows the possibility of works to the SRN and therefore adequate safeguards need to be in place to protect NH position. Please see definition of ‘specified works’ which includes ‘under’ (the highway) and previous submissions relating to NRSWA which also captures works under the SRN.
2	Definition of “the health and safety file”	Deletion of entire definition	Definition relates to provisions regarding works to the SRN which are not relevant to the authorised development	Please see other comments with regard to the scope of the DCO and the need for National Highways to be adequately protected.

2	Definition of "provisional certificate"	Deletion of entire definition		Reinstate - see paragraph 10 of the protective provisions which includes the provisional certificate provisions which is to be reinstated.
2	Definition of "road safety audit"	Deletion of entire definition	Definition relates to provisions regarding works to the SRN which are not relevant to the authorised development	Reinstate – definition used in substantive provisions of protective provisions.
2	Definition of "road safety audit standard"	Deletion of entire definition	Definition relates to provisions regarding works to the SRN which are not relevant to the authorised development	Reinstate - definition used in substantive provisions of protective provisions.
2	Definition of "specified works"	Amendment of definition to remove inclusion of highway works and signalisation	Wording refers to works to the SRN which are not relevant to the authorised development	Reinstate - definition used in substantive provisions of protective provisions.
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	Reinstate - definition used in substantive provisions of protective provisions.
3	General - insertion	Insertion of "...and National Highways acknowledges that the undertaker will not carry out works to the strategic road network itself	Confirms that the authorised development does not include any consent for any works to the SRN carriageway, including no new accesses and no elements that require highway design or road safety audit	This is not correct - works are proposed under the SRN (Please see Schedule 1 Part 1 under Works no 12 & 16). The current drafting of the DCO allows for potential wider works to the SRN even if these are not currently envisaged – please see Articles 10, 11 and Schedule 1. Please see for example the table of trenchless crossings which is included

				within the ES which includes the SRN at two points.
6	Works outside the Order limits	Deletion of entire paragraph	Undertaker is not seeking consent for and has not assessed carrying out works to the SRN	<p>Please see Article 10 and Article 11 of the current draft DCO which includes the wording “...<i>whether or not within the Order limits.</i>”</p> <p>This is just an acknowledgement of the legal position. The Order authorises works within the Order Limits (including any limits of deviation which are set out in the Order).</p> <p>Works under or over the highway could result in damage or loss to the highway and danger to its users, so it is critical to NH that, as highway authority and landowner, we are satisfied with the technical surveys, works programme, detailed design, appointed contractor, financial security in the event damage is caused.</p>
7(1) (new 6(1))	Prior approvals and security	<p>Deletion of prior approval provisions regarding works to the SRN, which are not relevant to the authorised development.</p> <p>Deletion of: -</p>	Undertaker does not intend to carry out works to the SRN and extraneous provisions have therefore been deleted.	See comment above - works under or over the highway could result in damage or loss to the highway and danger to its users, so it is critical to National Highways

		<p>requirement not to commence specified works until a stage 1 and stage 2 road safety audit has been carried out;</p> <p>And in terms of the detailed design works to be submitted to and approved by National Highways, deletion of:-</p> <ul style="list-style-type: none"> - information relating to stage 1 and stage 2 safety audits; - details of the proposed road space bookings; - process for stakeholder liaison; - information regarding walking, cycling and horse riding assessment; - scheme of traffic management; - road safety audits; - commuted sum estimate; - maintenance operations; - collateral warranties 		<p>that, as highway authority and landowner, NH is satisfied with the technical surveys, works programme, detailed design, appointed contractor, financial security for damage caused etc.</p>
7(2) (new 6(2))	Exercise of DCO articles	Holding point that wording cannot be accepted until voluntary land agreement is reached		<p>It is also noted that the undertaker contends that the PPs are the undertaker attempting to agree rights etc outside of CA and so if these provisions are not agreed, we cannot see how the</p>

				<p>undertaker has attempted to negotiate alternative terms and thus how the case for compulsory acquisition has been made out.</p> <p>This drafting is required to ensure open dialogue between the parties so that NH has control over the operations being carried out on its network. This is critical from a safety perspective and to maintain the integrity of the asset. As a public body, NH is under a duty to act reasonably and this is expressly provided in subparagraph 4 below.</p>
7(2) (new 6(2))	Ability for NH to require the undertaker to provide details of proposed road space books and/or submit a scheme of traffic management	National Highways may where such exercise involves abnormal indivisible loads require the undertaker to provide details of any proposed road space bookings	Undertaker is not carrying out works to the SRN or any surface works requiring a road space or traffic management scheme for those works. Where the Applicant requires to move AILs or other large or slow moving vehicles the normal consents will be required as set out in the other consents and licences statement. Deletion of the provisions is suggested, or retention subject to the	This has been qualified and consent cannot be unreasonably withheld or delayed which is not acceptable to NH.

			Applicant's proposed amendment	
7(4)(c) (new 6(4)(c))	Automatic deeming of approval	Amendment so if no response within 2 months approval is deemed to be accepted, rather than automatically deeming to be refused	The Undertaker cannot accept a position whereby due to the delay of NH the undertaker could experience serious construction delays. It is within NH's control to prevent the deeming provisions being triggered.	<p>The SRN is a highway of national importance and the right to pass and repass on highways is a critical public right that should not be subverted for commercial purposes without appropriate safeguards. Therefore, a supervening provision, overriding the protection of NH is not acceptable as a starting point.</p> <p>Deemed refusal is the baseline position and this is the market standard for other statutory undertakers with safety-critical undertakings. Interest in public safety should supersede financial loss to the undertaker.</p> <p>There may be circumstances where technical approval is not given in time because the specific details require involvement from multiple experts or because of absence, exigent or unforeseen circumstances and the position should not be an automatic approval.</p>

<p>8(3) (new 7(3))</p>	<p>Construction of the specified works</p>	<p>Deletion of subparagraph (3)(b) regarding DMRB</p>	<p>Undertaker does not intend to carry out works to the SRN, and so this is not considered relevant.</p>	<p>This is required to ensure the works are designed to an acceptable standard of highway design/safety and to ensure the integrity of the SRN. This does not solely relate to works to the carriageway. The provision applies equally to underground works and anything within the definition of SRN. Any works which have the potential to damage or interface with the SRN need to be approved by NH. This is market standard for other infrastructure operators.</p>
<p>8(6) and (7) (new 7(6) and (7))</p>	<p>Process for remedying damage</p>	<p>Amendment to provide that any damage to the SRN is to be remedied by NH, who may recover costs through the indemnity provisions.</p>	<p>The undertaker will not be doing any works to the SRN, and so this provision should not be necessary. If any damage should be caused, the undertaker is not a highways designer or constructor, would not be in occupation of the SRN, and would not have any power to carry out these works without NH's authority. Any damage caused by the undertaker's works under the SRN would be remedied at the undertaker's expense under paragraph 11. The Applicant</p>	<p>NH does not have a budget to carry out third party works to the highway, so in circumstances where the undertaker deviates from the agreed specification of works (either to the highway or to the SRN, as defined) then the undertaker should be required to put right the works and comply with the agreed specification at its own cost. Any damage to the SRN which takes place as a result of the undertakers works should be remedied at the undertakers expense.</p>

			considers that, in that very unlikely circumstance, NH would be better placed to instruct the work required in what would be most likely an urgent or emergency situation.	NH has a statutory duty to have regard to safety (s.5(2) of the Infrastructure Act 2015). It has, when exercising its functions, a duty to have regard to the need to protect and improve the safety of the network as a whole for all road users. Where safety is compromised or there is a real and present threat that it could be, NH needs the necessary power to prevent risk of harm or damage to road users or the SRN.
8(10) (new 7(10))	Provision for maintenance during construction of the specified works	Deletion of entire sub-paragraph	Undertaker does not intend to carry out works to the SRN or occupy the carriageway, and this is therefore not relevant	This may not be currently anticipated but may be at a later date which is why NH must protect its position.
8 (new 7)	New provision	Insertion of new subparagraph: "Powers granted to National Highways to undertake any works under this paragraph include works to make safe an area but do not include powers to undertake any works to, or that may affect, the pipeline."	To clarify that NH's powers under paragraph 7 do not include powers to undertake works to, or that may affect, the pipeline.	NH does not see the need for the inclusion of this paragraph.
10	Provisional Certificate	Deletion of entire clause	No closure or partial closure of any of the SRN is proposed and no powers are included in the draft DCO to do this because there is no part of the English SRN listed in the	This needs to be reinstated. The DCO includes wide powers which could mean such provision are required as currently drafted and NH must protect its position.

			street works schedules where the Applicant can close the road without further consent, and therefore these provisions are not relevant.	
11	Opening	Deletion of entire clause	No new SRN is being consented or proposed; no opening of any of the SRN is proposed, and therefore these provisions are not relevant.	Please see our previous comments in this respect. All works to the SRN (including over and under the highway) need to be appropriately authorised.
12 (new 9)	Final condition survey	<p>Amendment of trigger from applying for provisional certificate to being the completion of specified works.</p> <p>Deletion of subparagraphs (2), (3) and (4) with amendment to clarify: "If the re-surveys carried out pursuant to paragraph 10(1) indicate that any damage has been caused to a structure or asset, National Highways may carry out the steps required to reasonably remedy such damage and may recover any expenditure it reasonably incurs in so doing."</p>	<p>Amendments required to detach this paragraph from the deleted provisional certificate paragraph.</p> <p>Amendments also required to provide that any remedial works will be carried out by NH. The undertaker is not a highways designer or constructor, would not be in occupation of the SRN, and it is not appropriate to mandate it to carry out remedial works to the SRN.</p>	The condition survey includes a CD622 geotechnical assessment, which is specifically approved by the third party works team as the appropriate assessment by which subsurface works are surveyed. In the event the scheme includes any aspect of underground works beneath the road or works to the carriageway, the final condition survey is necessary.
13	Defects Period	Deletion of entire clause	This provision follows on from the provisional certificate provisions, and is therefore not required.	This just applies to works to the highway. The defects period applies once the provisional certificate is issued. This is issued when the specified works are completed. The specified works are works authorised by the Order in respect of the

				SRN. The specified works include land underneath the carriageway. Hence, the defects period applies in respect of works under and over the carriageway. If HDD works are carried out beneath the carriageway and during the defects period, and the works cause sinkage in the carriageway beyond acceptable tolerances, it will be the responsibility of the undertaker to correct this.
14	Final Certificate	Deletion of entire clause	This provision follows on from the provisional certificate provisions, and is therefore not required.	<p>The provisional certificate provisions are to be reinstated.</p> <p>As a bond is required, the issue of the final certificate is the trigger for release of the final portion of the bond sum. It is also required to ensure that a sufficient period of time has passed since the specified works were completed to establish whether any residual long term effects have been identified on the SRN.</p>
15	Security	Deletion of entire clause	The requirement to provide security is not proportionate given the undertaker is not carrying out works to the SRN.	<p>This should be reinstated.</p> <p>Any works to the SRN (as defined in the Schedule) could, if commenced but not</p>

				finished, result in financial liability to NH and a safety risk to the public. NH does not have a budget to restore parts of the SRN that are interfered with by third party development. Any work carried out to the SRN must be supported by a bond to ensure that if the works were ceased as a result of default by or the insolvency of the promoter, NH has appropriate access to funds to secure the restoration of the SRN that had been subject to works.
16	Commuted Sums	Deletion of entire clause	This provision follows on from the security provisions, and is therefore not required.	The current DCO drafting is sufficiently wide that works may be carried out to the SRN. In the event that they are, provision is needed for a commuted sum. If it is not, the provision should not be of concern to the undertaker but NH must protect its position in the event it is required which is currently unknown.
20	Land	Deletion of provisions regarding transfer of land within the SRN boundary.	Undertaker is not seeking consent to carry out works to the SRN, and this is therefore not relevant.	Reinstate: this would include land within the extent of SRN boundary which might be relevant. This provision is to ensure compliance with NH role as

				<p>strategic highway authority, its licence requirements and other regulatory obligations.</p> <p>The SRN is a nationally significant asset in public ownership. As an undertaking in its own right, it acts as a vital economic arterial network that must be maintained. As a regulated entity, NH is charged with ensuring the integrity of this undertaking and fragmentation of ownership would lead to an inability to carry out its statutory functions and regulatory requirements.</p>
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