

APPLICANT'S FINAL POSITION STATEMENT

HyNet Carbon Dioxide Pipeline DCO

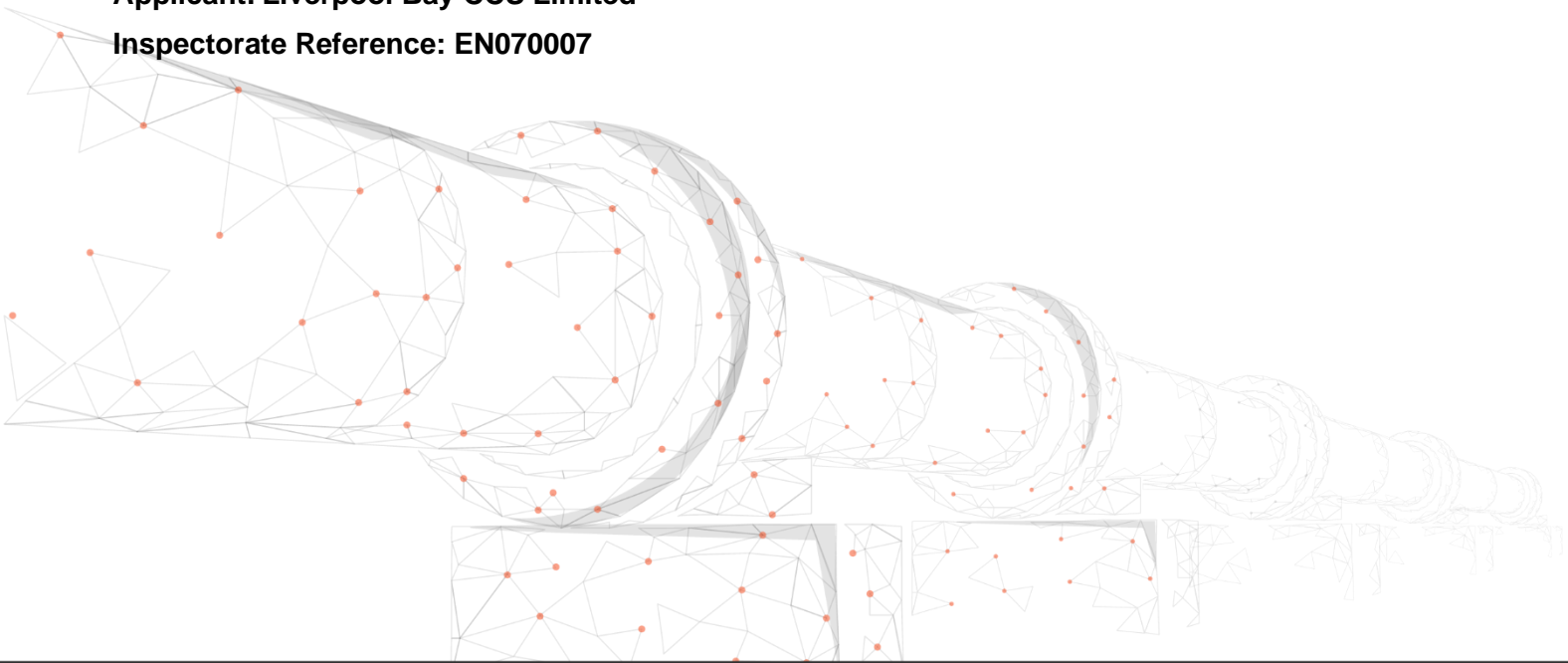
Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010 Rule 8(1)(c)

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1 SCOPE OF APPLICATION

- 1.1 As set out in the planning statement [APP-048, as updated during Examination, latest version REP4-022] and in response to first written questions [REP1-044] and third written questions [REP7-291], the Applicant considers that both the Above Ground Installations (AGIs) and Block Valve Stations (BVSs) are properly part of the Nationally Significant Infrastructure Project (NSIP), do not form associated development, and can be included in the order within Wales.
- 1.2 What falls within the definition of a 'pipeline', and is therefore the NSIP, needs to be considered with reference to s65 of the Pipe-lines Act 1962 which provides the definition which is incorporated into the Planning Act 2008. This definition include vales and valve chambers which are the core of the BVSs and AGIs and which accordingly fall within the definition of 'pipeline'. Section 31 of the PA 2008 states that "Consent under this Act ... is required for development to the extent that the development is or forms part of a nationally significant infrastructure project." Accordingly, all elements which form part of the pipeline itself are part of the NSIP and should be included in the DCO.
- 1.3 The Application is only for the pipeline and does not include the works to the Point of Ayr terminal or works to further transport the carbon dioxide offshore. The Point of Ayr Terminal marks the termination of the cross-country pipeline and its purpose is to compress the CO2 to a higher pressure suitable for transport along the offshore pipeline and injection into the storage reservoirs. It is considered that the Point of Ayr Terminal cannot be said to be part of the NSIP itself. To do so would stretch the definition of "pipeline" too far. Whilst the Point of Ayr Terminal and the foreshore works constitute a linked project, it is not the same project and not part of the NSIP.

2 COMPULSORY ACQUISITION

- 2.1 As the Applicant set out in the hearings [REP4-264 part 2 and REP7-292 (in relation to the change requests)] the Applicant submits that the compulsory powers sought are necessary to deliver the proposed development, are proportionate and are sufficient to justify the interference with landowners' rights.
- 2.2 The Applicant maintains that there is a compelling case in the public interest for the granting of the CA powers. Paragraphs 12 and 13 of the Department of Communities and Local Government (DCLG) (2013) guidance expand on this as requiring compelling evidence that the public benefits outweigh private loss. The case for the development is set out in the Need Case [APP-049]. While the project does not fall within the scope of the current Energy National Policy Statements (NPSs), it is firmly rooted in national policy as required by paragraph 19 of the DCLG guidance. This includes the Net Zero Strategy published in October 2021 and the energy security strategy published in April 2022. The selection as a track 1 cluster and strong policy support for the proposed development, and importantly the contribution it would make towards achieving Net Zero and decarbonising industry in the north west of England and north Wales, demonstrate the clear public benefit of the project being granted the powers necessary to ensure its delivery.
- 2.3 The Applicant is seeking powers over land required for mitigation (primarily landscape and mitigation planting). DCLG guidance paragraph 11 sets out that powers should not be sought over more land than is 'reasonably required' The guidance is clear that land necessary for works to make the development acceptable such as landscaping may be acquired compulsorily, that is set out in paragraph 12. The Applicant accordingly submits that these areas are therefore reasonably required and meet the statutory tests and the guidance.
- 2.4 As required, reasonable alternatives have been explored and whether the rights sought are legitimate, proportionate and necessary. As set out in response to WQ1.2.1 [REP1-044], ES Chapter 4: Consideration of Alternatives [APP-056 as updated during Examination, latest version REP7-038] provides details of the alternative route and design options considered for the DCO Proposed Development and indicates how environmental factors have inherently informed the preferred option selection.

- 2.5 The Need Case for DCO Proposed Development [APP-049] outlines the needs case for the DCO Proposed Development in the context of the UK Government's objectives for a more resilient energy network and greenhouse gas emission reductions. Chapter 1 provides an overview of the DCO Proposed Development and purpose of the report. Chapter 2 of the Need Case [APP-049] sets out the need for the CO₂ pipeline in the context of the need for new energy infrastructure and need for Carbon Capture and Storage technology. Chapter 3 of the Need Case [APP-049] gives an overview of the relevant planning policy and legislation relating to the Project covering the UK and Welsh Government policy, as well as other Government support and other policy considerations. There are clear international, national and local policies, ambitions and statements that support the transition to a low carbon economy and to act on climate change including legally binding legislation.
- 2.6 There is demonstrable support for the use of CCS to support the transition to a low carbon economy, to meet the Net-Zero target and help decarbonise industrial clusters in the North West of England and North Wales. Furthermore, the DCO Proposed Development enables further elements of the wider HyNet Project to be developed which includes the production of low carbon hydrogen and a hydrogen distribution network. Without the Carbon Dioxide Pipeline, the wider Project and cluster, cannot be delivered. The DCO Proposed Development will enable the Project to deliver many benefits for the local area, region and the country. The timing of the DCO Proposed Development will help the Government meet its targets for carbon capture and low carbon hydrogen production and will lead more rapidly to a decarbonised economy. No other feasible alternative to CCS technology has been identified or assessed given the scenario of Government support for this approach.
- 2.7 As demonstrated in the schedule of negotiations [REP7-025], the Applicant has undertaken meaningful negotiations with affected persons to seek to reach voluntary agreement. The attempts made by the Applicant to reach agreement include amending the commercial terms offered as the market position evolved, agreeing accommodation works where possible and extend to making changes to the application to seek to minimise impacts on landowners where possible. Those changes include:
- (a) Relocation of Cornist Lane BVS (Work No. 51) (change request 1, change no. 1, proposed in response to a request from the affected landowner.
 - (b) Adding to the order limits and preparing a package of mitigation measures for intrusion into ancient woodland root protection area to seek to avoid the need to relocate a slurry tank (change request 1, change no. 2).
 - (c) Relocation of Northop Hall AGI (Work No. 45) (change request 1, change no. 3). proposed in response to a request from the affected landowner,
 - (d) Extension of the Order Limits to include a new private access track at Work No. 32A. Reduction of the Order Limits to remove an access track from the B5129 at Work No. 33 (change request 1, change no. 11), proposed in response to a request from the affected landowner.
 - (e) Reduction of the Order Limits at Work No. 18 to remove a section of the Shropshire Union Canal (change request 1, change no. 14), proposed following engagement with Canal & River Trust.
 - (f) Extension of Order Limits to include existing access from Bridleway (Picton PR4) at Work No. 16a (change request 1, change no. 17), proposed in response to a request from the affected landowner.
 - (g) Addition and removal of land to the Order Limits at Work No. 34 to optimise temporary construction access near Chester Road East so as to minimise impacts on 2 Sisters Food Group (change request 2, change no. 2).

- (h) Removal of Shotton Lane Centralised Compound (Work No 41A) and temporary working area (Work No 41D), (change request 3, change no. 1), proposed in response to a direct request from the landowner.
 - (i) Reduction of order limits at Ince AGI to remove plot 1-07 (change request 3, change no. 2), proposed in response to a request from the affected landowners of plot 1-07 and the adjoining land (in separate ownership).
 - (j) Reduction of order limits at Picton Lane to minimise land take required for construction and operational access at Work No. 16A and Work No. 16B, (change request 3, change no. 3), proposed in response to a request from the affected landowner.
 - (k) Change to application of compulsory powers for Encirc land access downgrading part of Plot 1-06 (now plot 1-06d) from permanent acquisition of rights to temporary possession of land (change request 3, change no. 4), to address landowner concerns.
- 2.8 The Applicant has considered the need for other consents to be obtained to deliver and operate the project and has set these out in the Other Consents and Licences document [REP7-028]. That identifies no known impediment to the Delivery of the scheme. A full Property Cost Estimate has been carried out by the Applicant which provides a breakdown of the anticipated CA costs to all plots identified within the Order Limits. As demonstrated by the Funding Statement [APP-029] financing for the use of powers and for the delivery of the project is available. The Applicant has therefore taken all prudent steps to properly manage potential risks to the project as required by the DCLG guidance in paragraph 19.
- 2.9 As set out in the Statement of Reasons [REP7-021] the project will only take what it needs in terms of land and is not seeking to acquire the full 100m corridor. The Applicant has a vested commercial interest in not taking more than is needed. The Applicant is confident it has struck the same balance as on precedent linear projects, which balance has been endorsed by the Secretary of State.

Statutory undertakers

- 2.10 The Applicant has not yet been able to reach agreement with all affected statutory undertakers on the relevant protective provisions.

Canal and River Trust

- 2.11 The position remains as set out at Deadline 7 [REP7-294], section 6. The only unagreed point in the protective provisions is regarding the restriction of use of DCO powers. The Applicant cannot agree to the disapplication of the compulsory powers and other powers in the absence of a suitable voluntary land rights agreement. That a voluntary agreement has not yet been concluded demonstrates why these powers are required to ensure delivery of the NSIP.

National Gas Transmission and National Grid Electricity Transmission

- 2.12 The position remains as set out at Deadline 7 [REP7-294], section 11. The provisions are mostly agreed subject to two exceptions. The parties have been working to agree a side agreement to resolve these points, but this has not been completed ahead of finalisation of this submission.

National Highways

- 2.13 In summary, there are no construction, engineering or related concerns in relation to the proposal to construct the pipeline under the Strategic Road Network. This type of crossing is very common. The only issues relate to the appropriate protections for National Highways and a legal issue (in which National Highways has recently revised its own positions) as regards the legally correct approach to whether the pipeline constitute street works and the operation of the NRSWA.

- 2.14 The Applicant has added plots 5-12 and 6-03 to paragraph 234 of its draft protective provisions in schedule 10 the draft DCO submitted at Deadline 8 as requested by National Highways in their Deadline 7 submission. The Applicant notes however that National Highways is not recorded as having any interest in plot 6-03 in the book of reference, and that this is still listed in SoCG as awaiting confirmation from National Highways as to any interest they have [REP7-263, line 3.1.3]. The Deadline 7 submission is the first instance in which National Highways has asserted that they have drainage apparatus in this plot.
- 2.15 The Applicant has set out a response to National Highways' deadline 7 submission at sections 6 and 7 below. Given the continuing differences between the parties, the opinion of King's Counsel has been sought on National Highway's stance on 'unknown' works under the DCO, serious detriment and the need for and extent of protective provisions. A copy of that opinion has been submitted to the Examination at Deadline 8. The conclusions of that opinion are referenced in section 7 below.
- 2.16 In terms of its overall CA case, the Applicant maintains its position as set out in previous submissions that it has satisfied the relevant legal tests and that no credible case has been made that the powers sought by the Applicant will result in serious detriment to National Highway's statutory undertaking, when taking into account the protective provisions proposed by the Applicant [REP6-035, appendix A section 4].

Network Rail

- 2.17 The agreement with Network Rail and the technical approvals for the project are progressing and, as set out in the SoCG submitted at Deadline 8, no impediment to concluding those has been identified. Network Rail cannot formally withdraw their objection until the agreement under negotiation is completed, however, the protective provisions have been included in the dDCO in agreed form and the Applicant accordingly submits that, with those provisions in place, there can be no serious detriment to Network Rail.

Wales & West Utilities

- 2.18 The position remains as set out at Deadline 7 [REP7-294], section 20.

3 OPEN SPACE (PLOT 17-02)

- 3.1 Throughout the course of the Examination, the Applicant has made its case that the acquisition of sub-strata of land only should not fall within the definition of 'open space' within section 131 of the Planning Act 2008. The Applicant considers that trenchless installation of a pipeline under a play area which will remain open and available for use as open space is clearly not the mischief section 131 is intended to prevent.
- 3.2 However, given the Examining Authority has noted some concern on this point, and in order to ensure that the DCO falls within the SPP exception in section 131(5)(a) i.e. that the "order land does not exceed 200 square metres in extent", the Applicant proposed a change at Deadline 7 to limit land take in this plot [REP7-291, table 2-6, responses to questions 3.6.1, 3.6.3, 3.6.4 3.6.5 and 3.6.6]. The Applicant has amended the Statement of Reasons at new paragraph 6.2.11 to specify that the width of the substratum taken by way of freehold acquisition can be no more than 8 metres to ensure that the provisions of section 131(5) apply to the DCO in any event. This width restriction will mean that the total freehold substratum area to be acquired will not exceed 200 square metres.
- 3.3 The second limb of this exception, under section 131(5)(b), is that "the giving in exchange of other land is unnecessary, whether in the interests of the persons, if any, entitled to rights of common or other rights or in the interests of the public". The Applicant considers that this test is manifestly satisfied in this case. The land to be acquired will be beneath the surface, to a minimum depth of 1.2 metres, though in practice the trenchless crossing to be used is likely to mean it is deeper. The taking of an 8 metre freehold substratum with a 24.4m restrictive covenant (being a right not acquisition of land) will have no practical effect for the users of the open space. There can be no impact on the use of the

surface of the open space in its current form as the pipeline will be underground and all current and conceivable operational uses of the open space are on the surface or the near surface.

- 3.4 The only impact arising from the loss of a freehold substratum could be in the context of a future construction of facilities forming part of the open space use. This would be caught expressly by the controls imposed by the new rights to control tree planting and construction in the 24.4 metres on the surface, which are considered in the context of section 132.
- 3.5 The same arguments which are made out in relation to those controls would apply to any impact arising from the loss of the freehold substratum itself. In essence, that this is a large area of open space and that any constraint arising from the taking of the pipeline freehold substratum is readily avoidable when selecting the location for works (presumably for new play facilities or possibly for changing facilities).
- 3.6 The application of the test in section 132(3) must be looked at in the context of the inherent nature of open space in a case like this. It is normally the case that open space for recreational purposes will mostly consist of open land (i.e. without trees or structures) and that the precise location of any new trees or structures is a matter of choice i.e. that there will be a range of options available. That is certainly the case here. The impact of the restrictive covenant in this case will only affect a part of the overall plot – which is currently almost entirely open. This means that any future decision over new trees or structures (e.g. a new playground or changing facilities) will be able to select a location which satisfies the need of that proposal whilst also respecting the restrictive covenant. It is hard to see how this limit on such a future decision can be said to disadvantage those with the relevant rights in relation to plot 17-02 in any meaningful way. On that basis it can be concluded that the land, when burdened with the order right, will be no less advantageous than before.

Drainage pipe

- 3.7 As set out [REP7-292], with respect to section 132 of the Planning Act 2008, the Applicant notes that powers of temporary possession are not powers of compulsory acquisition. The powers under articles 34 and 35 of the dDCO (numbering as per revision 1, [REP7-013]) do not fall within the scope of that section as they do not authorise the compulsory acquisition of a right over land.
- 3.8 The Applicant notes that the primary purpose of the power of temporary possession is to allow use of land required to deliver the authorised development without requiring the compulsory acquisition of such land (or rights) where all of the land is not needed in operation. Powers of temporary possession accordingly allow the minimisation of land subject to compulsory acquisition by providing a means for construction activities to be carried out on land without it being compulsorily acquired. Temporary possession also allows construction to be commenced ahead of land being compulsorily acquired.
- 3.9 In the case of the drainage pipeline, installation would be carried out under temporary possession powers not compulsorily acquired rights. Once the drain has been installed there will be no ongoing impact on the current, open space use and the acquisition of the rights sought will not render the open space less advantageous than it is at present to its owner or the public. The Applicant accordingly considers that the test set out in section 132(3) of the Planning Act 2008 is met and the powers of compulsory acquisition of rights sought can be granted.

4 BIODIVERSITY NET GAIN

- 4.1 Nationally Significant Infrastructure Projects (NSIP) are not currently statutorily required to assess or implement BNG in England or deliver a set level of quantified benefit in Wales. BNG is often used in Wales to demonstrate compliance with the Environment (Wales) Act 2016 by showing that there is an overall benefit to biodiversity and, in particular, to priority habitat. The Natural Environment and Rural Communities Act 2006 (NERC) s40 which

requires public bodies (including planning decision makers) to exercise their functions so as to further the biodiversity objective. The biodiversity objective is the conservation and enhancement of biodiversity. Compliance with that Act is partially demonstrated by delivering BNG on the priority habitats which demonstrates enhancement.

- 4.2 The Applicant notes that there is no statutory obligation under the Environment Act 2021 to provide BNG as part of this Application. Therefore, while the Applicant considers that delivery of BNG is desirable, the 10% provision threshold (mandated by the Environment Act 2021 for non-DCO schemes) does not apply and any positive gain is a benefit and accords with policy.
- 4.3 The Applicant has considered what level of BNG is both feasible and proportionate in the context of the nature of the DCO Proposed Development and has chosen to provide gains of a minimum of 1% in Priority Habitats. This target and approach have been discussed with and accepted by relevant stakeholders (Natural England, Natural Resources Wales, Flintshire County Council, and Cheshire West and Chester Council). This target has been chosen on the basis of the effects on biodiversity resulting from the DCO Proposed Development, which are predominantly associated with the construction phase and are broadly temporary, short term, and localised in nature. Given the constraints of the Order Limits, opportunities to achieve net gain within that area are limited. This is particularly the case given that the majority of the land used in construction will be reinstated to agricultural use. As affected land predominantly comprises discrete sections of arable and grazing pasture fields, it is not appropriate to create BNG provision within these areas. This is because to do so would result in 'islands' of habitat sporadically located within working arable fields, with reduced value for connectivity, difficulties in on-going management and adverse effects on farming businesses post construction.
- 4.4 The Applicant and CWCC have agreed that CWCC will provide the biodiversity net gain for Priority Habitats in England. Negotiation of a S111 Agreement in which the Applicant agrees to pay the agreed contribution to CWCC for these services, and CWCC agrees to provide the BNG and maintain and monitor it for a 30-year period, is well-advanced. While negotiation is still on-going, the principles are agreed, and the Applicant anticipates entering into the Agreement shortly.
- 4.5 The Applicant and FCC have agreed that FCC will provide biodiversity net benefit for Pond and Hedgerow Priority Habitats in Wales. Negotiation of a S111 Agreement in which (a) the Applicant agrees to pay the agreed contribution to FCC for these services, and (b) FCC agrees to provide the BNB and maintain and monitor it for a 30-year period, is still on-going. The locations of the BNB, and on-going principles around management and monitoring are agreed, and the Applicant anticipates entering into the Agreement soon.
- 4.6 The Applicant and FCC have agreed that the Applicant will provide biodiversity net benefit for Woodland Priority Habitat in Wales. While the applicant is in discussion with a third party landowner to acquire land, the land will not be acquired prior to the end of examination. The Applicant has therefore provided FCC with a S111 Agreement in which the Applicant would commit to providing a S106 Agreement securing delivery of the Welsh woodland as soon as LBCCS has acquired a legal interest in land which can accommodate the required Woodland Habitat creation. Again, negotiation is on-going.
- 4.7 Given that the Applicant has made good progress but not concluded the BNG agreements, the Applicant suggests that, should the ExA consider it to be necessary, a pre-commencement requirement in the following terms could be imposed;

No development may commence until a scheme (which may comprise of up to 2 parts being one for within England and one for within Wales) securing the provision of biodiversity net gain of 1% or greater for the priority habitats affected by the authorised development (as calculated using Natural England Biodiversity Metric 3.1), has been submitted to and approved in writing by the relevant planning authority. The scheme must set out measures to deliver and secure the maintenance for 30 years of the biodiversity net gain provision.

4.8 This follows a recent precedent in the deemed planning permission granted in relation to the Transport and Works Act Order for the Morlais Demonstration Zone Order 2021 (SI 2021/1478) (Welsh Government reference DNS/3234121) as condition 23. That condition provided for a landscape compensation scheme which was proposed to be delivered through a contractual agreement where that agreement was not in place at the end of the inquiry period.

5 WATER FRAMEWORK DIRECTIVE

5.1 The purpose of the WFD is to ensure that development does not cause deterioration and does not prevent the future improvement in ecological status for watercourses. As set out in ISH3 and summarised in the summary of oral submissions [REP7-292] the Applicant, as per the WFD assessment [REP4-174], submits that the Alltami Brook trenched crossing is compliant with the WFD and that consent can be granted.

5.2 The Applicant's position is:

- The trenched crossing applied for is WFD compliant; and
- Derogation is not required and consent can be granted for the DCO as applied for.

5.3 However: if the ExA and Secretary of State disagree, then an embedded pipe-bridge option has been assessed as an alternative and the requisite information put before the Examination [REP5-016]. This without prejudice derogation case for the trenched crossing has been submitted to facilitate determination should it be found that this is required. The Applicant considers that the EIA for the embedded pipe bridge option demonstrates it is not significantly better in environmental terms, and therefore derogation for the trenched crossing should be granted.

5.4 The Applicant does not consider WFD article 4(7) is engaged as it is not the case that the environmental objectives of the WFD cannot be met due to the carrying out of works for the proposed trenched crossing. The Applicant is confident that the conclusion reached in the WFD assessment that the proposal is compliant is correct. The Applicant considers that the WFD assessment sets out, to an appropriate level of certainty, that the crossing proposed will not cause deterioration in the status of quality elements or overall status at the Wepre Brook water body scale. The core of Natural Resources Wales's (NRW) concern is that a trenched installation could create a pathway for water to be lost from the Alltami Brook. The evidence produced to date shows that the watercourse is gaining, not losing, water. Additionally, it shows that fracture flow conditions within the aquifer are laterally discontinuous. Therefore, the Applicant maintains that there is no clear mechanism present which would allow for a loss of flow from the Alltami Brook to bedrock as a result of the proposed works.

5.5 NRW has stated that their objection is based on a worst-case scenario [REP-071]. The WFD requires an objective assessment, and under the WFD there is no requirement to demonstrate absolute certainty in the WFD Assessment. The Applicant notes that all decisions under Directives must be made on a reasoned objective basis.

5.6 The Applicant notes that NRW has provided no competing evidence for their view, which lacks an objective basis and appears to be seeking a degree of absolute certainty, which the Courts have made clear is not required in the interpretation of Directives. The Court in *Mynydd [R. (on the application of Mynydd y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2017] Env. L.R. 14) determined that for a competent authority under the Habitats Directive to "have made certain that [the project] will not adversely affect the integrity of the [European] site", it must be satisfied that there is **no real (as opposed to merely hypothetical) risk** to the integrity of the site" (emphasis added). The Courts in considering the standard required have stated that "the conclusion to be reached **cannot realistically require ascertainment of absolute certainty** that there will be no adverse effects" [*Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, as quoted and affirmed in *Mynydd*] (emphasis added)

- 5.7 The fracture flows are discontinuous at the Alltami Brook. Therefore, even if an unsaturated fracture was encountered, once that fracture became full, then the continuous flow of the stream would resume. Accordingly, even in a worst-case scenario, there would only be a short term and temporary impact to the Alltami Brook, and therefore the Wepre Brook waterbody. Under the WFD short term temporary impacts would not constitute deterioration in the permanent sense. This is a low risk, in a very worst-case scenario where several things must happen which the evidence weighs against being likely to occur.
- 5.8 The Applicant therefore continues to submit that the WFD assessment sets out, to an appropriate level of certainty, that the crossing proposed will not cause deterioration in the status of quality elements or overall status at the Wepre Brook water body scale, with the mitigation identified in place [REP4-174].

6 STREET WORKS

- 6.1 The Applicant has submitted that the pipeline is below the 'zone of influence' of street status per the consideration of the Supreme Court in *Thames Water Utilities Ltd v London Underground Ltd*, and accordingly is not 'in' the street. This position is consistent with other granted DCOs, including the Southampton to London Pipeline DCO 2020, relevant excerpts of which were included in the Applicant's deadline 6 submission [REP6-035 appendix A]. It is noted that in that case the installation of that pipeline under the M25 motorway was not shown as street works within the plans. This was accepted by the ExA for that application and the Secretary of State.
- 6.2 The Applicant notes that CWCC have, for the first time, adopted the National Highways interpretation in their Deadline 7 submission [REP7-306]. The only reason given for this is that the author of the legal opinion provided by National Highways [REP5-051] is an expert in highways law. The Applicant does not dispute that or seek to challenge the King's Counsel's credentials, but notes that whether the particular facts and circumstances of this case were put before her have not been explained. There is no discussion of the particulars of this case in that opinion. Counsel is also out of alignment with the determination of the Supreme Court which affirmed that highway (or street status) has a limit to the zone of influence of that highway.
- 6.3 The Applicant remains concerned that the National Highways' interpretation goes too far, does not properly apply the zone of influence principle and that this will set an erroneous precedent that contradicts made DCOs without a change in circumstances (as is acknowledged by National Highways).
- 6.4 National Highways has previously submitted that no CA is justified as the pipeline could be installed and maintained under the New Roads and Street Works Act (NRSWA) and CA is accordingly not necessary [REP2-046 at 3.1]. National Highways have made the same argument in other DCOs stating that combination of NRSWA and the developer's rights as a statutory undertaker mean CA is not necessary (in, for example submissions to the Yorkshire Green DCO Examination). The Applicant is not however a statutory undertaker in this case. The Applicant welcomes National Highways acceptance of this in its Deadline 7 submission. This does, of course, mean that the argument it was previously running on use of the NRSWA as an alternative to CA can no longer stand. The Applicant notes that it is actively negotiating an option for lease with National Highways, though this will not be concluded by the end of the Examination.
- 6.5 The question of whether the tunnelling works are street works is a matter of seeking the correct application of the law to a particular set of facts. The parties have a different view of the correct legal position. The Applicant does not consider that it makes much practical (as opposed to legal) difference as to whether the tunnelling works are street works. It is a matter for the Secretary of State to reach a conclusion and to apply that in the DCO, assuming it is granted. With that in mind, the Applicant has prepared a version of the street works schedules and plans to include the trenchless crossings should the ExA and Secretary of State determine that these do form street works (in contrast to the Secretary of State's view in the Southampton to London Pipeline DCO that equivalent tunnelling

works did not form street works). This is simply provided to prevent delay in determination only, and does not constitute any acceptance by the Applicant that the position adopted in the dDCO is incorrect. The changes necessary to the DCO schedule 3 part 1 are shown in Appendix 2 and a corresponding set of plans has been submitted at Deadline 8 [D2.5 revision F].

- 6.6 The Applicant wishes to be extremely clear, given some of National Highway's Deadline 7 submissions, that it has always accepted and agreed that National Highways requires and is entirely justified in requiring to approve the tunnelling works under the strategic road network (see as an example, the SoCG submitted at Deadline 1 [REP1-028]) which records that the Applicant has applied for technical screening for DMRB CD622 and had already accepted that the DMRB CD622 technical approval process and standards would apply.
- 6.7 The unsupported assertion made by National Highways that the Applicant is seeking to diminish its control or is not having due regard to public safety is entirely rejected. That assertion has no regard to the continued submissions made throughout the Examination that the Applicant accepts that DMRB CD622 should apply, that technical approval from National Highway will be required, that protective provisions in National Highway's favour are justified (but not in the terms sought by them) and that a financial indemnity in favour of National Highways should be included in those provisions. The Applicant's full response to National Highway's Deadline 7 submission is set out at section 7 below and is also addressed in key respects in the KC opinion.

CWCC submission on article 12

- 6.8 The Applicant notes that CWCC consider that article 12 is "unclear" [REP7-306, section 7], however, the Applicant submits that this is because CWCC are mis-interpreting that article rather than as a result of the drafting itself. Article 12 follows the wording set out in a considerable number of granted DCOs and has therefore been approved by various Secretaries of State who clearly, repeatedly, did not consider it to be confusing. The assertion that these decisions and granted DCOs are defective is not supported by any reasoning within the CWCC submission, and which the Applicant submits is simply incorrect.
- 6.9 The powers of the draft DCO allow certain provisions of NRSWA to apply to activities in streets beyond what falls within the definition of 'street works' under NRSWA, including restricting use rather than physical works. The key section is the last section of 12(1) which provides that the NRSWA provisions listed in paragraph (2) apply "*whether or not the carrying out of the works or the stopping up, alteration or diversion constitutes street works within the meaning of that Act*".
- 6.10 Article 12 paragraph (1) provides that the sections of NRSWA listed in paragraph (2) are applied (with necessary modifications) to the exercise of powers which would not otherwise fall within the definition of street works under NRSWA.
- 6.11 Paragraph (2) lists the provisions of NRSWA which are applied to that the paragraph (1) activities. This acts to extend the scope of these sections from that under NRSWA to include other activities which would affect the use of streets and to which it is reasonable that the provisions (especially notification) apply.
- 6.12 Paragraph (3) amends the application of section 55 of NRSWA to reflect the DCO context and amended scope set out in paragraph (1).
- 6.13 Paragraph (4) of article 12 disapplies the powers of NRSWA which are fundamentally incompatible with a DCO from 'street works' under the DCO. This is explained in the Explanatory Memorandum [REP7-017 at paragraph 4.58] where the example is given of s56A of NRSWA which allows street authorities to direct undertakers to locate their works in a different street than that proposed. Where works are being carried out under permitted development rights that is not commonly problematic, however works under the Order are constrained by the Order Limits and ES assessment, and no consent would be in place to

move the works outside of that envelope. It is therefore appropriate to be clear within the Order that this power cannot be applied in this case.

- 6.14 The Applicant accordingly submits that not only is article 12 perfectly sensible and intelligible, the effect of it is to protect highway authorities, including CWCC as local highway authority. It does this by extending the scope of NRSWA to activities empowered under the DCO which would not normally be covered by that Act in order to ensure that appropriate notice and control of interference with highways is secured in the DCO.

Surfacing of Deeside Lane

- 6.15 The Applicant notes FCC has maintained its position that Deeside Lane should be resurfaced as part of the authorised development [REP7-312]. The Applicant does not agree or accept that surfacing of the bridleway is necessary or appropriate. This is already appropriately surfaced and will only need minor repairs and improvements pre and post occupation of the compound. The Applicant is satisfied that the bridleway is suitable for the proposed use and would highlight that it is currently frequently used by HGVs to access the various agricultural and light industrial properties along the lane. The Applicant does not agree that their proposed use would be a material intensification of that use, particularly given the temporary nature of the use, which would require surfacing of this route. The Applicant notes that it has not assessed the drainage or landscape or visual impacts of surfacing this track. The Applicant also notes that it has adopted an approach of not providing new tarmac surfacing on tracks in agricultural areas elsewhere so that these are sympathetic with the rural nature of the landscape.
- 6.16 The Applicant submits rather than reducing noise and dust, the works necessary to resurface this lane (which are not sought as part of the consent or assessed in the ES) would result in additional traffic movements and considerable dust and noise caused directly by the works to resurface this area. The resurfacing of the lane could not be undertaken over the current base as that would result in a sub-standard work which would degrade quickly. In order to resurface this route, the current surface would require to be dug up, crushed for re-use and re-laid. That work, and the attendant noise and dust is not assessed in the project ES.
- 6.17 FCC have themselves described this as “an improvement for users as part of the legacy of the Hynet project” [table following paragraph 19.2 of the FCC local impact report REP1A-006]; that is not the same as being required to mitigate the impacts of the project. The Applicant maintains that this work would be entirely disproportionate to and not justified by the impacts of this project in this location.

7 RESPONSE TO NATIONAL HIGHWAYS’ DEADLINE 7 SUBMISISON

- 7.1 The Applicant noted the ExA’s request at the final CA hearing that the parties seek to narrow their differences, however, no meaningful progress has been made to resolve the disagreement. The parties are at an “agree to disagree” position on the points addressed in this submission. As already noted, the Applicant is not aware of any areas of disagreement on engineering and technical issues.
- 7.2 The Applicant has noted the changes proposed by National Highways in relation to the tunnelling works protective provisions, but is not able to agree with National Highways on the main areas of continuing disagreement. The Applicant had a virtual meeting with National Highways on 25 August to explore the position in advance of Deadline 7. The Applicant does not think it is fair to say that the Applicant was unwilling to engage further (paragraph 3.7.7 of National Highways’ submisison), simply that it was plain to both parties that there continued to be major areas of disagreement which were not going to be resolved by further discussion.
- 7.3 The Applicant considers it is important to highlight the status of the project given some of the comments regarding the Applicant’s status as a private company and the need to protect the public purse. The project has been brought forward in response to government policy and a specific process initiated by BEIS (now DESNZ). Carbon dioxide transport

will be a regulated activity, when it is operational. Whilst the Applicant does not have formal statutory undertaker status, its function is clearly akin to a statutory undertaker. The pipeline for which consent is sought is an element of a proposed network serving the public interest in delivering Net Zero and decarbonisation of industry and use of hydrogen.

- 7.4 The Applicant further highlights that this project will receive public money to assist in its delivery as a Track 1 project. It is a publicly subsidised project. The Applicant raises this because it means that the Applicant must account to DESNZ (or the appointed regulator) for financial matters and justify its expenditure (e.g. in relation to unnecessary or excessive bonding costs). In short, the need to protect the public purse is in place on both sides of this project. Both networks – the SRN and the proposed carbon dioxide network – exist to serve the public interest.
- 7.5 Given the distance between the parties and the disagreement over the scope of the DCO works, the opinion of King’s Counsel has been sought by the Applicant on National Highways’ stance on three issues: ‘unknown’ works under the DCO; serious detriment and extent of protective provisions. A copy of that opinion is being submitted to the Examination at Deadline 8 [Applicant’s document reference D.7.66]. It should be read in conjunction with this submission.

Need for approval of works below the SRN

- 7.6 It is, and has always been, agreed by the Applicant that National Highways requires and is entirely justified in retaining approval of the works below the carriageway of the SRN. The Applicant refers to the following examples of submissions as demonstrating its consistent agreement on that point:
- (a) The draft SoCG submitted at Deadline 1 [REP1-028] which records that the Applicant has applied for technical screening for DMRB CD622 and had already accepted that the DMRB CD622 technical approval process and standards would apply.
 - (b) Acceptance of the need for protective provisions in principle is demonstrated from the earliest submissions, see for example REP2-038 at line 2.7.9 where it is stated “NH’s consent under that provision will be required for these works, protecting its interest as highway authority and providing the control over the works sought. The Applicant has agreed in principle that protective provisions will be included. The drafting of those is under negotiation” and REP2-046 at table 2.7 where it is stated that “Discussions on the content of the protective provisions with National Highways is ongoing”;
 - (c) REP3-033 at line 2.2.3 states “The Applicant can confirm that all works in the vicinity of National Highways assets will be undertaken in accordance with the DRMB Standard CD622, as agreed in the draft SoCG with National Highways [REP2-029]”.
 - (d) REP4-264, summary of oral submissions part 3 for ISH2, at line 1.40 “In response to concerns from National Highways regarding the depth of works under the highway, the Applicant explained that it had committed to complying with DMRB standards, namely CD622 managing geotechnical risk, and that this would inform the design of the crossing under the highway”.
- 7.7 The disagreement has only ever been about the scope and wording of the protective provisions necessary to secure the necessary approval. The Applicant accordingly entirely refutes the allegation in National Highways’ Deadline 7 submission that it is not paying due regard to public safety. Safety is a core driver of the decisions made in this project and is considered to be of overriding importance by the Applicant and its parent company.
- 7.8 The Applicant notes that the summary of the report of the rail accident submitted by National Highways as part of its Deadline 7 submission concludes that the relevant standards were not complied with and important factors not addressed in the approvals

stage [paragraph 3.2.9]. The Applicant entirely agrees that it is important that the appropriate standards apply – as demonstrated above. The Applicant is not and has not sought to disapply National Highways' standard approval process for the tunnelling works. The rail accident report accordingly provides no support to National Highway's position as there is no dispute before the Examination that the DMRB CD622 standard applies – that is explicitly stated in the Applicant's proposed protective provision drafting. What this accident report does not do is support the case made by National Highways for its preferred drafting of the protective provisions; it is the Applicant's drafting [REP7-294 at appendix 1] which is clear and inarguable on this point stating;

Prior approvals and security

6.—(1) Any specified works which involve tunnelling, boring or otherwise installing the pipeline under the strategic road network without trenching from the surface, must be designed by the undertaker in accordance with DMRB CD622 unless otherwise agreed in writing by National Highways.

(2) The specified works must not commence until—

(a) the programme of works has been approved by National Highways;

(b) the detailed design of the specified works comprising of the following details, insofar as considered relevant by National Highways, has been submitted to and approved by National Highways—

(i) the detailed design information;

(ii) the identity and suitability of the contractor and nominated persons; and

(iii) a process for stakeholder liaison, with key stakeholders to be identified and agreed between National Highways and the undertaker;

Need for land rights in the subsoil and compulsory acquisition

- 7.9 It has been agreed that a lease for the subsoil interest required by the Applicant can be granted by National Highways. It has been (belatedly) agreed by National Highways that land rights are necessary, that the Applicant cannot rely on NRSWA in place of these and that the Applicant has no statutory rights to place apparatus in land unlike many statutory undertakers. The Applicant is content to seek a lease voluntarily. However, as it is not possible to create a new lease by way of compulsion (as a generally accepted point of CPO law), and because the Applicant is not a statutory undertaker and cannot define the undertaking as the benefited property for an easement, an easement is not suitable in this case, the Applicant is required to seek acquisition of freehold through compulsory acquisition in order to ensure that the authorised development is deliverable.
- 7.10 National Highways assert at paragraph 3.4.4 of their Deadline 7 submission that compulsory powers are not necessary because it is “willing to grant the appropriate landowner consent for plot 5-06 (the crossing of the M56 motorway) subject to the Applicant applying for the necessary licences. In respect of plot 7-05 (the crossing of the M53 motorway) as street authority National Highways is willing to grant the appropriate consent for street works and it is understood that as landowner CWCC would be willing to grant the associated landowner consent subject to the Applicant applying for the necessary licences”.
- 7.11 Putting aside that the licence caveat is inconsistent with their submissions that the tunnelling works must be added to the DCO (which would give the works statutory authority meaning a licence is not required), the fact remains that negotiation of land rights is ongoing, and has not concluded. A binding option agreement is not in place. No DCO developer would remove CA powers from a DCO application on the basis of an indication of willingness to progress a voluntary agreement. National Highways are also unable to commit CWCC to complete an agreement.

- 7.12 The Applicant is following the normal strategy of any DCO promoter (including National Highways on its own DCOs) – seeking a binding option by way of negotiation whilst at the same time seeking CA powers in the DCO. The approach the Applicant is following is entirely consistent with the CA guidance and does not contradict the “last resort” principle in the way the National Highways appears to be arguing.

Unknown works

- 7.13 The Applicant considers it is plain on the wording of the DCO and related documents that there are no “unknown” works which could allow it to carry out works directly to the SRN (as opposed to the tunnelling underneath). National Highways disagrees and thinks that its (new) ‘standard’ protective provisions should apply to any such “unknown works”. The latest example used (previous examples having been shown to be inapplicable in the context of the application under Examination) is a new access. However, no such access is described in the ES, assessed in the transport assessment, shown on the access and rights of way plans, or listed in schedule 4 of the draft DCO. No areas have been identified for restriction of traffic within or temporary possession of such accesses (because they do not exist).
- 7.14 A design decision was taken at an early stage not to take access directly from motorways and the Applicant has never diverged from that. The Applicant has included in the DCO application all of the accesses needed to deliver and operate the authorised development, and these are all identified clearly in the documents. The Applicant cannot agree that such works are consented by the DCO as it is simply incorrect to assert this and implies that multiple documents across the application are incomplete, when they are not.
- 7.15 The Applicant does not accept that a DCO can legally consent unspecified works of the level or type which would justify National Highways’ protective provisions. The sweeper provisions in the DCO are required to cover the minor and ancillary works necessary to deliver the development described in numbered works. That is necessary because not every minor activity or work is listed in the works descriptions, in the same way as not every element is covered in the description of development in a TCPA planning permission. That does not mean that the sweeper consents new ‘works’ rather than matters ancillary to or required to deliver the numbered works. The Applicant asserts that this would be fundamentally unlawful as it would mean the consent was being relied upon to deliver works not described or assessed as part of that consent and its EIA.
- 7.16 This issue is also addressed in the KC opinion [Deadline 8 submission document reference D.7.66] which concludes that National Highways’ position is untenable on the basis of the application in front of the Examination.

Serious detriment

- 7.17 For public highways generally it is extremely common for the subsoil not to be owned by the relevant highway authority. In fact, it is almost certainly the case that a much greater percentage of the total highway length in England and Wales has its subsoil not owned by the relevant highway authority than is so owned. Section 263 Highways Act 1980 vests the highway in the relevant highway authority precisely because of this land ownership situation, but only to the depth required by the highway status. A long standing rule of law exists to presume ownership of the subsoil by the neighbouring landowners, to the centre line, in the absence of specific title information.
- 7.18 The Applicant set out the legal position on this in detail in REP3-033. Nothing in National Highways’ submissions sets out how acquisition of the subsoil, which is not held by the highway authority by virtue of their status but in the entirely separate and separable capacity as landowner, results in serious detriment to the statutory undertaking.
- 7.19 The Applicant maintains the detailed submission it made on serious detriment in REP6-035 appendix A. The Applicant submits that the decisions it has referred to were decided by reference to the quality of argument and evidence on the question of detriment. There

is nothing in those decisions to suggest they would have been decided differently if the promoter had not been a public body or a statutory undertaker.

- 7.20 This issue is addressed in the KC opinion [Deadline 8 submission document reference D.7.66], which considers National Highways' Deadline 7 submissions in more detail and concludes that a serious detriment case is not made out.

Protective provision drafting

- 7.21 The Applicant notes that National Highways are seeking to establish a new set of national protective provisions for third party DCOs. It has to be the case that to be imposed in a DCO, the protective provisions sought by National Highways are necessary (i.e. relate to the actual works/project for which consent would be granted) and proportionate.
- 7.22 The Applicant maintains its position that the protective provisions it has put forward provide appropriate and reasonable protections for National Highways. Its position is set out in detail in [REP6-03 and REP7-294]. In particular, the Applicant would highlight that a bond is not justified or required given the other protections proposed. This would expose the project to unnecessary and uncertain cost. The security protections proposed by the Applicant have been accepted by National Grid and National Gas Transmission, and the Applicant considers they should be acceptable to National Highways.
- 7.23 The seeking of a further undefined cash surety of an unknown amount adds a further layer of concern as regards the cost provisions to National Highways' position. It cannot be reasonable to require an Applicant to provide an undefined, uncosted, uncapped cash surety for works in the circumstances of this DCO and where a security for the indemnity from the parent company (whose financial health and good standing is demonstrated in the Funding Statement [APP-029]) is already offered.
- 7.24 National Highways are also seeking a protective provision to provide for a commuted sum for maintenance, however the Applicant is not seeking to consent anything which National Highways would be liable to maintain. The pipeline will be operated and maintained by the Applicant in accordance with the Pipeline Safety Regulations 1996. National Highways will not be responsible for maintaining this. No commuted sum is therefore necessary or justified.
- 7.25 The justification or otherwise of the National Highways protective provisions sought is considered in general terms in the KC's opinion [Deadline 8 submission document reference D.7.66F].
- 7.26 The Applicant would emphasise that the protective provisions it is offering provide an appropriate level of control and protection for National Highway's position.

8 PROTECTIVE PROVISIONS – RESPONSE TO DEADLINE 7 SUBMISIONS

Canal & River Trust

- 8.1 The Applicant concurs with CRT's Deadline 7 submission that the only unagreed point is the restriction on the CA provisions sought. As set out in the Applicant's Deadline 7 submission, this cannot be agreed.

CWCC Protective Provisions

- 8.2 The Applicant notes the CWCC submission [REP7-036 section 8]. The Applicant has not supplied a list of 'affected' highways because it has been seeking since June to agree with CWCC a list of the sensitive highways where monitoring is required and has received no input to that from CWCC. The Applicant will not agree to list all highways used for deliveries as that is clearly disproportionate and unreasonable, especially as HGV traffic is not 'extraordinary' on every road.
- 8.3 Many of the routes used will be main HGV routes, for example there is considerable HGV traffic to Ince and Stanlow and the Applicant's traffic does not add to that at a significant

level. The Applicant should be not expected to monitor every highway in Cheshire regardless of the level or type of use, and the impact the Applicant will have. It is not reasonable or necessary for the Applicant to monitor roads already in frequent use for HGVs. This provision was intended to identify any particular instances of concern, not impose general road monitoring responsibilities on the Applicant. The Applicant strongly objects to CWCC's drafting on this point as failing to have regard to the level of impact on each route with reference to the existing use, and accordingly being an entirely unreasonable position not based on any objective assessment of need.

- 8.4 The Applicant does not consider the definition of "highway condition surveys" provided by CWCC to be appropriate. It is highly prescriptive, and the Applicant is concerned that there is a risk that this description may not be reflective of standards and technology at the time any highway condition surveys require to be carried out, as technology can move on quickly. Further, these Protective Provisions apply for the protection of both local highway authorities. CWCC have not confirmed that the definition they have provided would be acceptable to FCC.
- 8.5 The Council requested that the rectification period for street works be extended to 24 months from the 12 months originally proposed by the Applicant. At the time of making that request they did not raise any objection to the remediation process drafting of the provisions. Indeed, despite being provided with the Applicant's draft and having discussion on that in June, no comments at all were received on that drafting until the end of August. The Council has not responded to requests to meet or discuss the DCO drafting for some weeks. The Applicant has therefore had very limited opportunity to respond to the Council's changes as now submitted.
- 8.6 The Applicant has explained to the Council that post build it will have no retained construction contractor to undertake minor works of remediation to streets. Any works required from the Applicant would require procurement with attendant delay. The Applicant considers it is of greater public advantage for the Council to use staff or suppliers already approved and engaged by it to deliver works at the Applicant's cost under the Council's direction and remedy any issue timeously, rather than the pipeline operator contracting directly for this.
- 8.7 Works to streets would also require closures of those affected streets and parts of streets. The Applicant notes that CWCC has previously wished to limit the Applicant's ability to close streets on the basis it needs to co-ordinate roadworks. It is therefore inconsistent that the Council is rejecting the Applicant's proposal that it controls remediation works (at the Applicant's cost) and is instead arguing that the Applicant should physically deliver them, which will require further reliance on the very powers which were previously of concern.
- 8.8 As has been explained, more than once, to CWCC, the Applicant does not agree that the provisions of NRSWA to which they refer in section 8.3 apply to the works. If they do, there is no need or justification for protective provisions sought at all. CWCC's position as set out therefore results in the logical conclusion that they do not need protective provisions as NRSWA applies. The Applicant submits that the outcome of the CWCC position is that no protective provisions should be imposed on the Applicant in this case as the Council is submitting that there is no justification for their drafting. The Applicant has no objection to the provisions being deleted in full.

Encirc

- 8.9 As set out in the Applicant's Deadline 7 submission [REP7-294], the Applicant agrees that Protective Provisions in favour of Encirc Limited are appropriate for this development. The Applicant does not however agree that the form of such provisions put forward by Encirc is proportionate or reasonable to secure the required protections for the works which would be consented by this DCO. The Applicant included its preferred drafting of the Protective Provisions in favour of Encirc in the draft DCO submitted at Deadline 7 [REP7-013 schedule 10 part 15].

- 8.10 The Applicant notes that Encirc has submitted further material at Deadline 7 [REP7-323]. The Applicant has responded to that submission in appendix 1 of this statement. In summary, the Applicant does not consider that the Encirc Deadline 7 submission changes the position or undermines the case the Applicant has presented that its protective provision drafting should be preferred.

Appendix 1

Applicant's response to Encirc's deadline 7 submission [REP7-323]

1 THE APPLICANT'S POSITION – ENCIRC INTERACTION - SUMMARY

- 1.1 In the Ince area there are three main stakeholders the Applicant has considered: Peel NRE Limited (owners of the Protos Plastics Park with future development plans, as summarised in the Applicant's signed Statement of Common Ground with Peel NRE [REP7-262]), Encirc Limited (owner and operator of the adjacent glass factory, with future development plans) and Network Rail (statutory undertaker with duties to operate and maintain the Hapsford Railway). As Encirc's current development plans are yet to be fixed in terms of final designs, granted consents, and execution schedules, the Applicant must therefore secure its consent having regard to the current physical realities. The Applicant has engaged extensively with all three parties to ensure that the parties' proposed developments and existing operations in this area can co-exist.
- 1.2 The Applicant and Encirc have four main interactions due to the Proposed Development. A number of these interactions involve other parties (notably Peel NRE and Network Rail). The Applicant has laid out its position regarding interaction with Encirc, and consequently the basis for its proposed Protective Provisions.
- 1.3 Encirc's submissions regarding existing planning permissions and S.106 Agreements do not alter the Applicant's submissions made at Deadline 7 [REP7-294]. Encirc's submissions confirm that a further planning permission is required to facilitate their future development plans.

2 ACCESS TO PEEL NRE PROTOS SITE OVER ENCIRC LAND

- 2.1 The Applicant is seeking permanent rights of access from the Grinsome Road Roundabout (Plot 1-01a) to Perimeter Road (1-04). Both of the referenced plots are owned by Peel NRE Limited. However, the Applicant seeks Permanent acquisition of rights over the Encirc owned Plots 1-02 and 1-03 to ensure Plot 1-04 (and adjacent plots on the Peel NRE Protos site) can be accessed through the construction phase and during the operational phase.
- 2.2 The Applicant is aware that Peel NRE Limited have plans to develop this site, and as such they would potentially construct alternative access(es) via other consenting routes, that are at various stages of approval. As such, in the Applicant's proposed Protective Provisions with each of Peel NRE Limited and Encirc Limited, it is stated that as long as a suitable alternative access road(s) is provided by Peel NRE Limited from Plot 1-01a to Plot 1-04, and the Applicant can secure acceptable use of that alternative access within the relevant timeframe before any permanent acquisition is exercised, then permanent rights of access over Plots 1-02 and 1-03 will not be relied upon.
- 2.3 Please note that there is a scenario that the Applicant would need temporary possession of land over Plots 1-02 and 1-03 to enable the movement of abnormal loads during construction – please refer to the detail in the "Secondary (Abnormal Load) Access to the Encirc Owned Works Area" section below.

3 INCE RAILWAY CROSSING – CURRENT AND FUTURE RAILWAY LINES AND SIDINGS

- 3.1 The Applicant is seeking options to cross the assets owned by Peel NRE Limited, Encirc Limited and Network Rail (from Plot 1-18 to 1-25 inclusive) either in a single trenchless crossing or in two back-to-back trenchless crossings:
- (a) The Applicant notes that a single trenchless crossing would have very little impact on Encirc Limited (access from Ash Road (south) via Plot 1-06c would be required during construction for surveys and during operation for access to the pipeline easement).

- (b) Two trenchless crossings would require an intermediate shaft on Encirc Limited owned land between the existing railway lines (i.e. between the existing Encirc sidings to the North of 1-22 and the Hapsford railway line to the south in Plot 1-23).
 - (c) The crossing type will need approval from Network Rail at the detailed design development stage, and as such the Applicant is applying for consent for both crossing techniques as part of the DCO. The Applicant notes that whilst a single crossing may be technically feasible, it cannot commit to it without Network Rail's review and approval of the detailed design. Given the complex nature of this crossing, the Applicant requires both options to be retained.
- 3.2 It is disappointing that Encirc Limited have only just shared the feasibility study (dated February 2023) [REP7-323] of their railway development with the Examining Authority (and the Applicant) at deadline 7 of the DCO examination process.
- 3.3 As indicated in Encirc Limited's submission at deadline 7 [REP7-323], the Applicant has been proactive in terms in the private discussions between the parties regarding the construction scheduling and impact to the parties' respective development plans. The Applicant notes that due to
- (a) the approval required from Network Rail;
 - (b) the Encirc's final technical design is yet to be fixed (which can only be done during its detailed engineering);
 - (c) the Applicant's final technical design is yet to be fixed (which can only be done during its detailed engineering); and
 - (d) the current detailed schedule ambiguity on both developments
- it will not be possible to establish a decisive collaborative construction schedule until the detailed engineering stage of the projects and has proposed that at this point an appropriate agreement will be sought to resolve this issue.
- 3.4 The Applicant notes that the details of such an agreement can only be definitively agreed when both parties have appointed their respective detailed design contractors.
- 3.5 The Applicant notes, despite this in its proactive engagement it has proposed a framework for resolution via development of the Protective Provisions and via Heads of Terms discussions. The Applicant also notes that throughout the DCO process, the Applicant has provided a number of options to Encirc with the intent of finding a mutually acceptable solution to ensure that their respective proposed developments can co-exist.
- 3.6 In terms of the depth of the railway crossing, Encirc Limited have suggested in a version of their Protective Provisions that a depth of 8m is adopted, which is based solely on an informal discussion around local geological conditions. It is inappropriate to use such a depth at this stage of the design of the project, as the applicable depth can only be confirmed during detailed design. The Applicant would defer to the Network Rail standard and the pipeline design code '*PD 8010-1 Code of practice for pipelines — Part 1 Steel pipelines on land*', which stipulates a minimum depth of cover of 1.4m under railways. This; this has been used as the starting point in the drafting of the Applicant's proposed Protective Provisions.
- 3.7 The Applicant is keen to work with Encirc Limited regarding construction timing with respect to Encirc Limited's train scheduling to ensure minimal operational impact to Encirc Limited's business, and has included requirement for a "Construction and Traffic Scheduling" fortnightly meeting during detail design and construction, as part of its proposed Protective Provision drafting.

4 PRIMARY ACCESS TO THE ENCIRC OWNED WORKS AREA

- 4.1 As a result of consultation with Encirc, the Applicant added Plots 1-06a, 1-06b and 1-06c at Change Request 1 as a means to use Ash Road from a southern direction for its primary construction route to access Plots 1-06, 1-20, 1-21, 1-22 and the north section of 1-23. This route will also serve access to the pipeline easement during operation.
- 4.2 The Applicant notes that in the scenario where only a single trenchless crossing is required under the railways (from 1-18 to 1-25), the Applicant will no longer need a means of access to Plots 1-02, 1-03 and 1-06d, for the purpose of access to 1-20, 1-22, and the North side of 1-23 during construction and operation.
- 4.3 However, if an intermediate shaft is required in Plot 1-22, the Applicant requires provision for an abnormal load access (see “Secondary (Abnormal Load) Access to Encirc Owned Works Area” section below).
- 4.4 The Applicant has confirmed with Encirc Limited that, once the construction activities have been completed, it would need operational access to the pipeline. The Applicant requires permanent acquisition of rights through 1-06, 1-06a, 1-06b and 1-06c, to access Plots 1-20, 1-22 and the North side of 1-23 during operation, to comply with the **Pipelines Safety Regulations 1996, Regulation 7 – (Access for examination and maintenance)** “*The operator shall ensure that no fluid is conveyed in a pipeline unless it has been so designed that, so far as is reasonably practicable, it may be examined and work of maintenance may be carried out safely.*” The operational access required by the Applicant is vehicular access (such as a jeep or van) to the pipeline easement area in Plots 1-20, 1-22 and the North side of 1-23, and pedestrian access to the pipeline easement to carry out pipeline easement inspections, installation and maintenance of pipeline markers and other non-intrusive checks.
- 4.5 The Applicant requires permanent acquisition of rights at Plot 1-21 due to the current terrain, a steep scrubland comprising challenging rocks and other debris / infill (this area was visited on ASI1), and in light of development proposals in the area which may result in access being more appropriately taken over an altered route than the current access track. The width of the area will ensure that full accessibility to the pipeline easement area is possible without constraining the access to the alignment of the existing track (1-06). This is immediately adjacent to the railway from which a new spur line is to be taken and accordingly may need to be altered.
- 4.6 If vehicular access to the pipeline easement is secured (via the Protective Provisions or commercial agreement) through the existing access track (Plots 1-06 and 1-20), then it would be feasible for a light vehicle to be parked in this location. As long as safe pedestrian access can be secured from the parked vehicle to Plot 1-22 and the North side of 1-23 (via Plot 1-21 or directly), then this would be adequate for the Applicant’s operational requirements and the land take over Plot 1-21 could be reduced.
- 4.7 As the Applicant would be content with any route from Plot 1-06c to Plots 1-20, 1-22 and the North side of 1-23, the Applicant has included protective provisions that would allow Encirc Limited to redevelop this area, as long as suitable access for the Applicant to reach the pipeline easement is maintained on any reasonable route that aligns with their development proposals.

5 SECONDARY (ABNORMAL LOAD) ACCESS TO THE ENCIRC OWNED WORKS AREA

- 5.1 The Applicant requires this routing only if two trenchless crossings with an intermediate shaft are required (see “Ince Railway Crossing – Current and Future Railway Lines and Sidings” section above).
- 5.2 If Peel NRE Limited construct the alternative routing (as described in “Access to Peel NRE Protos site over Encirc Land” section above), then access over Plot 1-01 will not be possible due to Peel NRE Limited’s planned developments on the Protos Plastic Park.

- 5.3 Under the Applicant's proposed Protective Provisions, where access over Plot 1-01 is not possible, the Applicant requires temporary possession rights over Plots 1-02 and 1-03 to ensure there is a route for abnormal loads from Grinsome Road to the Order Land during construction.
- 5.4 The Applicant anticipates there will be few abnormal loads required during construction and have communicated this to Encirc Limited during the course of discussion during the DCO process. The requirements for abnormal loads will only be confirmed during detailed design based on the construction contractor's selected construction technique for the trenchless crossings.
- 5.5 The Applicant is seeking to reach a voluntary land agreement with Encirc Limited which will:
- (a) ensure a suitable route is available that will avoid making a gap in Encirc's fence line (between plots 1-02/1-03 and 1-06d) to facilitate construction vehicles;
 - (b) provide an alternative route for abnormal loads that will use Peel NRE Limited's new access(es) and will require temporary possession of Encirc Limited's Plots 1-02 and 1-03; and
 - (c) provide flexibility for a suitable alternative route to Plot 1-06d to the order land, if Plot 1-06d is no longer accessible (due to Encirc Limited's planned developments being enacted).
- 5.6 The Applicant has detailed in its proposed Protective Provisions that once this and an alternative suitable abnormal load route has been secured, with the support of an appropriate private agreement, the Applicant will remove its capability to make a gap in the fence line to ensure access (between plots 1-02/1-03 and 1-06d).
- 5.7 Encirc Limited have questioned the suitability for abnormal loads accessing Plot 1-03 to the order land, due to concerns over the extent of the turning circle at that location. Based on the studies undertaken by the Applicant, the Applicant is of the view that the extent of the turning circle is sufficient to enable abnormal loads to pass through Plot 1-03 to the [Order Land]. The Applicant is keen to work with Encirc Limited to resolve their concerns. If construction access at Plot 1-03 is withheld for this reason, the Applicant notes that Plot 1-03 can still be utilised for heavy loads, with the original DCO plan of a temporary gap in the Encirc fence line being utilised if required to access 1-06d during the construction phase, as this would remove the requirement for any abnormal load to turn. In this scenario, the Applicant has acknowledged that Encirc Limited will need extra security provision and has acknowledged this requirement explicitly in the Applicant's submission of their Protective Provisions.

Appendix 2

Revised dDCO schedule 3 to include tunnelled crossings as street works

SCHEDULE 3
Streets subject to street works

PART 1

Articles 10 and 11

Streets subject to permanent street works

<i>(1) Area</i>	<i>(2) Streets subject to street works</i>	<i>(3) Description of the street works</i>
In the Borough of Cheshire West and Chester	Private roads being Grinsome Road, Perimeter Road and Elton Lane, Ash Road and unnamed road off Ash Road	Works for the installation and maintenance of access for Work No. 3 between the points marked 1AA, 1-A and 1-B and 1-C, 1-CC and 1-D on sheet 1 of the access rights of way plans
In the Borough of Cheshire West and Chester	Ince Lane	Works for the installation and maintenance of access for Work No. 5 between the points marked 2-G and 2-H on sheet 2 of the access rights of way plans
In the Borough of Cheshire West and Chester	A5117	Works for the trenchless installation of Work No. 5 between the points marked 2-K and 2-L on sheet 2 of the access rights of way plans
In the Borough of Cheshire West and Chester	Private roads being unnamed road off Pool Lane	Works for the installation and maintenance of access for Work No. 10 between points marked 3-D and 3-E on sheet 3 of the access and rights of way plans
In the Borough of Cheshire West and Chester	A5117	Works for the trenchless installation of Work No. 7 between points marked 3-G and 3-H on sheet 3 of the access and rights of way plans
In the Borough of Cheshire West and Chester	M56	Works for the trenchless installation of Work No. 12 between points marked 5-M and 5-N on sheet 5 of the access and rights of way plans
In the Borough of Cheshire West and Chester	Picton Lane	Works for the trenchless installation of Work No. 15 between points marked 6-K and 6-L on sheet 6 of the access and rights of way plans
In the Borough of Cheshire West and Chester	Wervin Road	Works for the installation and maintenance of access for Work No. 17 between points marked 7-D and 7-E on sheet 7 of the access and rights of way plans
In the Borough of Cheshire West and Chester	Wervin Road	Works for the trenchless installation of Work No. 17 between points marked 7-D and

		7-E on sheet 7 of the access and rights of way plans
In the Borough of Cheshire West and Chester	M53	Works for the trenchless installation of Work No. 16 between points marked 7-H and 7-I on sheet 7 of the access and rights of way plans
In the Borough of Cheshire West and Chester	A41 (Liverpool Road)	Works for the trenchless installation of Work No. 22 between points marked 9-AA and 9-CC on sheet 9 of the access and rights of way plans
In the Borough of Cheshire West and Chester	Station Road	Works for the installation and maintenance of access for Work Nos. 25 and 25A between points marked 10-AA and 10-BB on sheet 10 of the access and rights of way plans
In the Borough of Cheshire West and Chester	Station Road	Works for the trenchless installation of Work No. 25 between points marked 10-AA and 10-BB on sheet 10 of the access and rights of way plans
In the Borough of Cheshire West and Chester	Overwood Lane	Works for the trenchless installation of Work No. 25 between points marked 10-K and 10-L on sheet 10 of the access and rights of way plans
In the Borough of Cheshire West and Chester	Townfield Lane	Works for the trenchless installation of Work No. 25 between points marked 10-N and 10-O on sheet 10 of the access and rights of way plans
In the Borough of Cheshire West and Chester	Parkgate Road	Works for the trenchless installation of Work No. 28 between points marked 11-G and 11-H on sheet 11 of the access and rights of way plans
In the County of Flintshire	Sealand Road	Works for the installation and maintenance of access for Work Nos. 30 and 30B between points marked 12-E and 12-F on sheet 12 of the access and rights of way plans
In the County of Flintshire	Sealand Road	Works for the trenchless installation of Work Nos. 30 between points marked 12-E and 12-F on sheet 12 of the access and rights of way plans
In the Borough of Cheshire West and Chester	Hermitage Road	Works for the trenchless installation of Work Nos. 28 between points marked 12-G and 12-H on sheet 12 of the access and rights of way plans

In the County of Flintshire	Deeside Lane	Works for the installation and maintenance of access for Work Nos. 30C and 31 between points marked 12-DD on sheet 12 and 13-AA on sheet 13 of the access and rights of way plans
In the County of Flintshire	Private road off B5129 (Flint Road)	Works for the installation and maintenance of access for Work No. 31B between points marked 14-I and 14-J on sheet 14 of the access and rights of way plans
In the County of Flintshire	Chester Road	Works for the trenchless installation of Work No. 33 between points marked 15-CC and 15-DD on sheet 15 of the access and rights of way plans
In the County of Flintshire	Chester Road	Works for the trenchless installation of Work No. 34 between points marked 16-AA and 16-DD on sheet 16 of the access and rights of way plans
In the County of Flintshire	Mancot Lane	Works for the trenchless installation of Work No. 35 between points marked 16-EE and 16-FF on sheet 16 of the access and rights of way plans
In the County of Flintshire	Private road off Gladstone Way	Works for the installation and maintenance of access for Work Nos. 35 and 35A between points marked 16-M and 16-N on sheet 16 of the access and rights of way plans
In the County of Flintshire	Gladstone Way	Works for the trenchless installation of Work No. 35 between points marked 16-O and 16-P on sheet 16 of the access and rights of way plans
In the County of Flintshire	A494	Works for the trenchless installation of Work No. 39 between points marked 17-T and 17-U on sheet 17 of the access and rights of way plans
In the County of Flintshire	Church Lane and unnamed private track off Old Aston Hill	Works for the trenchless installation of Work No. 40 between points marked 17-S on sheet 17 and 18-A on sheet 18 of the access rights of way plans
In the County of Flintshire	Holywell Road	Works for the installation and maintenance of access for Work Nos. 41 and 41C between points marked 18-KK and 18-JJ on sheet 18 of the access and rights of way plans
In the County of Flintshire	Holywell Road	Works for the trenchless installation of Work No. 41 between points marked 18-KK

		and 18-JJ on sheet 18 of the access and rights of way plans
In the County of Flintshire	Green Lane	Works for the trenchless installation of Work No. 42 between points marked 18-T and 18-U on sheet 18 of the access and rights of way plans
In the County of Flintshire	Connah's Quay Road	Works for the trenchless installation of Work No. 44 between points marked 20-LL and 20-MM on sheet 20 of the access and rights of way plans
In the County of Flintshire	Alt-Goch Lane	Works for the installation and maintenance of access for Work Nos. 48 and 49 between points marked 22-K and 22-L on sheet 22 of the access and rights of way plans