HyNet North West

KING'S COUNSEL OPINION ON NATIONAL HIGHWAYS SUBMISSIONS

HyNet Carbon Dioxide Pipeline DCO

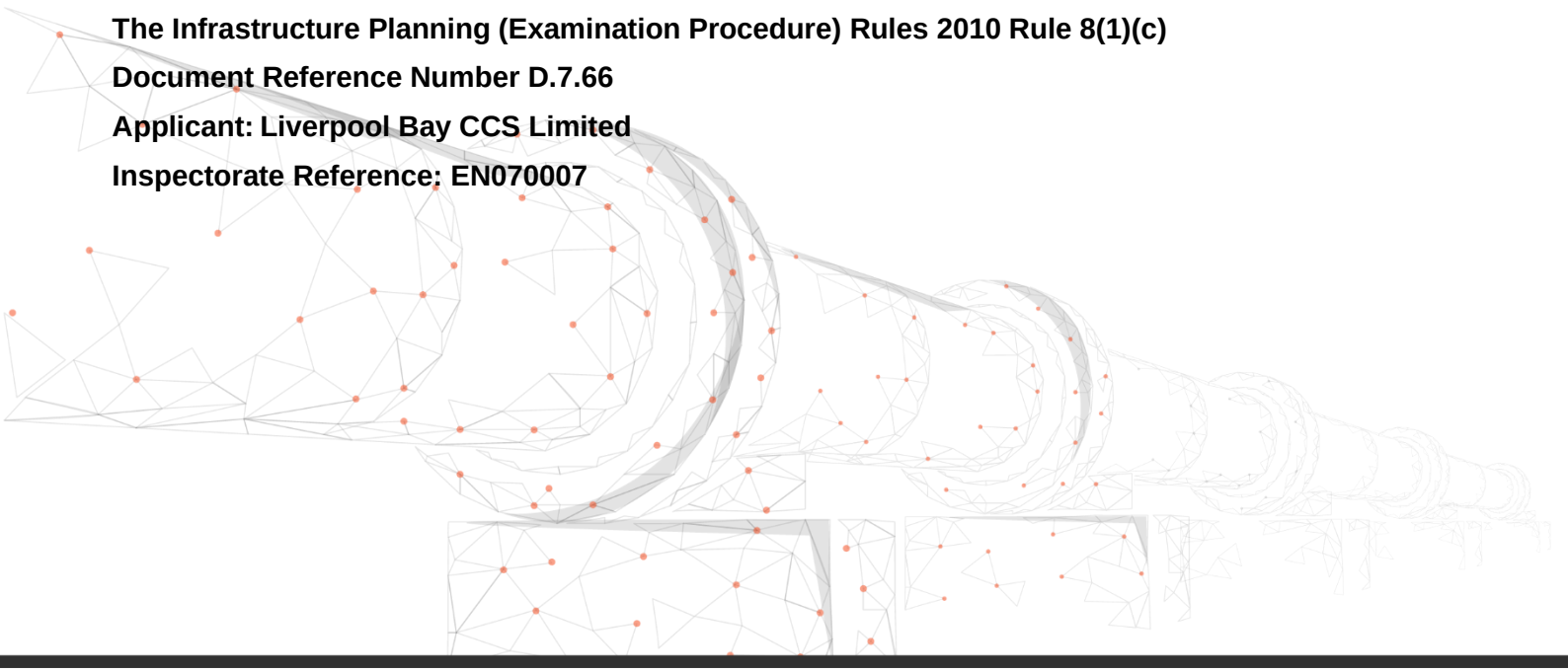
Planning Act 2008

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

Document Reference Number D.7.66

Applicant: Liverpool Bay CCS Limited

Inspectorate Reference: EN070007



REVISION: A

DATE: September 2023

DOCUMENT OWNER: Burgess Salmon

PUBLIC

QUALITY CONTROL

Document Reference		D.7.66			
Document Owner		**Burgess Salmon**			
Revision	**Date**	**Comments**	**Author**	**Check**	**Approver**
A	September 2023	Submission	Burgess Salmon	Burgess Salmon	AV

Re: Liverpool Bay CCS Limited

IN THE MATTER OF:

An application for a development consent order in respect of the Hynet Carbon Dioxide Pipeline project

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OPINION

Preliminary

1. I am asked to advise Liverpool Bay CCS Limited ('**the Applicant'**) in connection with its application ('**the Application'**) for an order granting development consent ('**the DCO'**) under the Planning Act 2008 ('**the 2008 Act'**) in respect of the proposal to construct the HyNet Carbon Dioxide Pipeline Project ('**the Pipeline'**). The Application was submitted to the Planning Inspectorate in October 2022, and the examination held in respect of it ('**the Examination'**) commenced on 20 March 2023. The Examining Authority ('**the ExA'**) has almost concluded the Examination, which is due to close on 20 September 2023.

2. I have previously provided advice to the Applicant in relation to the compulsory purchase powers which it is seeking be included within the DCO; specifically in relation to the powers sought in relation to Special Category Land and the application of Sections 131 and 132 of the 2008 Act.

3. My advice is now sought in relation to certain discrete matters which have been raised by National Highways (formerly Highways England[1]) in the course of the Examination. In this regard I note that that there is a dispute between the Applicant and National Highways, amongst other things, as to the impact which the Pipeline will have on the Strategic Road Network ('**the SRN'**), giving rise to disagreement about (amongst other things) the nature

[1] The change from Highways England to National Highways was simply a change in the public facing name of Highways England Limited

and extent of protective provisions which should be included in the DCO for the benefit of National Highways.

4. I am conscious of the impending closure of the Examination, and that my advice is sought on an urgent basis. For that reason I do not propose to rehearse in this Opinion the factual background, save insofar as is necessary to provide context to the matters in respect of which I am asked to advise.

5. In the remainder of this Opinion, I first set out a very limited overview by way of context, before going on to identify the specific issues in respect of which my advice is sought. I then provide my analysis in relation to each issue in turn.

6. I understand that this Opinion may be shared with the ExA and other parties, including National Highways.

Summary Context

Preliminary

7. When constructed, the Pipeline would transport carbon dioxide produced and captured by both future hydrogen producing facilities and existing industrial premises in North West England and North Wales, for offshore storage. The Pipeline would be comprised of both new-build and existing pipelines that will be addressed within the terms of the DCO. When complete, it will run from the Ince above ground installation in Cheshire to the Point of Ayr Terminal at Talacre, Flintshire in North Wales.

Authorised Works

8. The route of the Pipeline will traverse various pieces of land in which National Highways hold an interest. Some of this land comprises part of the SRN. By way of example, I note that the works specified in the draft DCO ('**the Works'**) will include construction of the Pipeline under the M56[2]. In this location (and indeed elsewhere when the route of the Pipeline traverses the SRN) construction will be effected by means of 'trenchless' techniques, at a level no

[2] Work 12 as identified in the draft DCO, which is Examination Document Ref: REP7-015 (Revision I, Applicant's preferred version)

higher than 4m below the underside of the carriageway. It is the Works which have been the subject of assessment by the Applicant, in the environmental statement prepared in support of the Application ('**the ES'**)[3].

9. The Works are identified in Schedule 1 to the Draft DCO, in the ordinary manner. That schedule specifies the development which would be authorised by the DCO, were it to be made. In addition to the specific Works identified in Part 1 of Schedule 1, that part of the schedule also includes as being authorised the following, namely:

> *'And in connection with Work Nos. 1 to 57N, and to the extent that they do not otherwise form part of any such work, development comprising such other works as may be necessary or expedient for the purposes of or in connection with the relevant part of the authorised development and which fall within the scope of the work assessed by the environmental statement, including –*
> *(a) ……'*

10. Further, Part 2 of Schedule 1 provides for the authorisation of ancillary works, described in the following terms:

> *'Works within the Order limits which fall within the scope of the work assessed by the environmental statement comprising works for the benefit or protection of land affected by the authorised development'.*

11. Such provisions are sometimes referred to as 'Sweeper Provisions', and I adopt that terminology for the purposes of this Opinion.

12. Various plans have of course been submitted pursuant to the Application. These include works plans, identifying (inter alia) those works which comprise 'street works' for the purposes of New Roads and Street Works Act 1991 ('**the 1991 Act'**). I understand that whilst the Applicant has not identified as street works those works which will be constructed in the substrata beneath the SRN (since it does not consider that such works are properly regarded as street works for the purposes of the 1991 Act) it is the position of National Highways that they do comprise street works for the purposes of the legislation, and so should be recorded as such[4].

[3] Document Ref: REP7-030 to 235

[4] I am not asked to advise in respect of the 'street works issue', but I note in passing that the approach adopted by National Highways in respect of this matter is contrary to its past practice. In this regard, I observe

Compulsory Purchase

13. The Application seeks (inter alia) that powers of compulsory purchase be conferred within the DCO, authorising the acquisition of land and rights. The powers sought include powers to compulsory acquire substrata beneath ground level in land in which National Highways hold an interest, within which the Pipeline will be constructed ('**the CPO Land'**).

14. National Highways object to the grant of compulsory purchase powers in respect of its interests. In this regard, I note that in maintaining its objection National Highways is contending (in its capacity as a statutory undertaker) that the CPO Land could not be purchased without causing serious detriment to the carrying on of its statutory undertaking for the purposes of Section 127(3) of the 2008 Act.

Protective Provisions

15. The Applicant recognises, and indeed has (I understand) always recognised, that it is appropriate to include within the DCO a series of protective provisions for the benefit of National Highways. To that end it has prepared a draft set of provisions which are included in the most recent draft of the DCO (provided to the Examination at Deadline 7)[5]. I have considered these protective provisions ('**the Applicant Provisions'**) in the course of preparing this Opinion.

16. However, I am aware that National Highways is not content with the (previous draft of the) Applicant Provisions, and has made representations to the ExA that its own, more extensive provisions ('**the NH Provisions'**) should be included in the DCO when made. I have been provided with a copy of these Provisions[6] also, and have also had regard to them when preparing this Opinion.

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that I promoted the application on behalf of Esso Plc for a development consent order in respect of the construction of a pipeline to transport aviation fuel northwards from Esso's refinery at Fawley, near Southampton, to its West London Terminal storage facility at Hounslow. The route of that 'Southampton to London pipeline' ('**the SLP**') ran beneath – amongst other highways – the M25 motorway. Highways England did not contend that the works to construct the SLP beneath the M25 amounted to street works for the purposes of the 1991 Act. However I understand that, in order to prevent any delay at determination should the ExA and Secretary of State accept National Highway's submissions on this point, the Applicant intends to submit revised plans at Deadline 8 which do identify Works beneath the SRN as street works for the purposes of the 1991 Act.

[5] Document Ref REP7-015 (Revision I, Applicant's preferred version)

[6] Document Ref: REP7-194

17. The NH Provisions are extensive, and go materially beyond the protections which the Applicant is suggesting are necessary for the purposes of the Pipeline. I understand that the central premise on which National Highways is basing its case that the Applicant Provisions are inadequate, and that imposition of the NH Provisions is justified, is that it is concerned that the DCO as currently drafted will authorise the construction of 'unknown works', by means of the Sweeper Provisions. Such unknown works, it is suggested by National Highways, may give rise to significant adverse impacts to the SRN.

Matters for Advice

18. It is in this context that my advice is sought. In particular, I am asked to advise in relation to the following issues:
    1) The extent to which the Sweeper Provisions as currently drafted would authorise 'unknown works' not currently before the Examination ('**the Sweeper Issue**');
    2) Whether or not I consider that National Highways has demonstrated that the CPO Land could not be acquired from it without causing serious detriment to the carrying on of its statutory undertaking ('**the Detriment Issue'**); and
    3) Whether inclusion of the full extent of the NH Provisions in the DCO, as required by National Highways, is justified ('**the Provisions Issue'**).

19. However, before turning to these matters I first address a contextual issue, being National Highways recent representations to the Examination at Deadline 7[7] ('**the NH Deadline 7 Submission**'). Given that I address the matters above in the context of what is said in the NH Deadline 7 Submission, I first make some preliminary, overarching observations regarding that document.

NH Deadline 7 Submission

20. Whilst National Highways is of course entitled to express concerns regarding the provisions of the draft DCO, and its implications for the SRN, I do not consider that the approach adopted in the NH Deadline 7 Submission is appropriate. Indeed, the exaggerated tone of the document is, in my view, positively unhelpful in the context of the Examination and the

[7] Document Ref: REP7-316

task before the ExA. I do not intend to comment in detail on this matter, but I provide the following by way of illustration.

21. One of the representations made by National Highways in its document is as follows:

"It is clear that the Applicant does not fully appreciate National Highways significant safety concerns associated with its proposed works. This is evidenced by their belief that installing large pipes beneath a high speed motorway are not street works and do not require appropriate highway authority oversight or protection…

[This] demonstrates the difficulties that National Highways faces over the Applicant's approach and its disregard for National Highways concerns. It is of particular concern that even at this late stage of the examination, the Applicant still does not appear to appreciate the dangers that its project could cause if National Highways' standards and procedures are bypassed"[8].

22. Having regard to this extract of the NH Deadline 7 Submission, I make the following brief observations:

- First, as regards the question of whether the installation of "*large pipes beneath a high speed motorway*" comprise street works, I note that in the context of the SLP examination (referred to above), it was the view of Highways England that the installation of an aviation fuel pipeline beneath the carriageway of the M25 did not comprise street works either. The development consent order in respect of the SLP was made by the Secretary of State on that basis. Thus in adopting the stance that equivalent works in the present context do not comprise street works, the Applicant has done no more than stand on the position which National Highways itself[9] adopted in a very recent examination held pursuant to the 2008 Act, and which both the examining authority and the Secretary of State accepted.

- Second, as regards the suggestion it is the Applicant's position that the works "…*do not require appropriate highway authority oversight or protection*", and that the Applicant wishes to ensure that "…*National Highways' standards and procedures are bypassed*", such assertion is simply misconceived. This is a fundamental misrepresentation of the true position. In fact, and as the ExA will be well aware, the draft DCO provides expressly

[8] See Paragraphs 3.2.8-3.2.10 of the NH Deadline 7 Submission (Document Ref:REP7-316)
[9] In this context of course the relevant name was Highways England.

for National Highways to have oversight of the works to be carried out in the vicinity of the SRN. In this regard, Paragraph 6 of the Applicant Provisions provides in terms for National Highways to exercise control over all operations proposed beneath the SRN – not just the M53 and M56 motorways, but the SRN more generally. Matters of both programme and detailed design must be submitted to National Highways for its approval, together with other information such as the identity of the contractors who are to undertake the works. Thus on a fair and objective reading of the relevant documentation National Highways is manifestly wrong insofar as it asserts that the Applicant is contending that former's standards should be '*bypassed*', and that the Pipeline be constructed without its '*oversight*'.

23. In these circumstances, it is simply not appropriate for National Highways to suggest that the Applicant has '*disregarded*' its '*significant safety concerns*' as it does in the extract above. Such submissions are materially unhelpful and risk misleading the ExA.

24. As already indicated, the brief analysis in the foregoing paragraphs is intended to illustrate my concerns as to what I regard as being the inappropriate tone of the NH Deadline 7 Submission. Having addressed that issue, I now turn to consider the matters which are the subject of my instructions.

The Sweeper Issue

25. I can address this matter relatively shortly. It is my opinion that National Highways position is misconceived in relation to this issue.

26. I first make the general observation that the use of Sweeper Provisions in development consent orders is not unusual; indeed the ExA will doubtless be aware of their use in previous instances.

27. Turning to the present case, I note that if made in its current draft form, the DCO would authorise the construction of the Works as identified in Schedule 1[10]. Not only are those works specified in detail in the DCO and associated plans, they have been the subject of analysis in the ES provided to the Examination.

[10] The current draft of the DCO is at Document Ref REP7-015 (Applicant's preferred version)

28. Insofar as the Sweeper Provisions within the DCO serve to authorise further works outside of and beyond the Works as specified, such authorisation is restricted by the terminology employed. Specifically, having regard to the provisions as set out in full at Paragraphs 9 & 10 above, they stipulate that the development authorised is limited to that "…*which fall[s] within the scope of the work assessed by the environmental statement*". Thus, insofar as works fall outside of the scope of what has already been assessed in the ES, they are not authorised by either of the Sweeper Provisions.

29. I am instructed that the ES does not assess any development (potentially) affecting the SRN which goes beyond the Works as specifically identified in Schedule 1. Further, I have myself reviewed the scope of the works assessed in the ES, particularly having regard to Chapter 3 of that document. Having considered the relevant materials, I concur that no development in the vicinity of the SRN has been assessed save that identified as the specific Works included in Schedule 1 to the DCO. Certain of those Works do entail operations beneath the carriageway of the SRN – for example beneath the A5117, the A41, the M53 and the M56 – and the impacts of those Works and the construction methodologies to be employed in delivering them have been assessed in the ES. It is only those 'assessed' Works/methodologies which are authorised by the Sweeper Provisions[11].

30. As such, I do not consider that there is any question of the Applicant being entitled to rely upon the DCO to carry out works which are 'unknown' to National Highways (or the ExA, for that matter). Rather, the works touching on the SRN as assessed in the ES are all identified as specific Works for the purposes of the DCO, and National Highways has already had full opportunity to consider their nature and extent[12].

[11] In this regard see for example Works 5 (Plot 2-09), 12 (Plot 5-06, and others), 16 (Plot 7-05) and 22 (Plot 9-07).

[12] The NH Deadline 7 Submission, although it addresses this issue, does not take matters materially further. The only example provided with a view to illustrating its alleged concern is set out at Paragraph 3.7.4, which states: "*The Applicant's drafting quite clearly permits such works and its reference to such works being "within the scope of the work assessed within the environmental statement" is misleading. The environmental statement does not need to precisely set out all works that may be undertaken, so long as they are in some way connected with the main works. A clear example is if the Applicant decided it needed to construct a temporary access off the highway. That would clearly fall within scope*". Such submission on the part of National Highways is mistaken. There is no access road proposed off the motorway. All such accesses are identified in the Means of Access schedule. Thus any such 'access' of the type about which National Highways raises concern, has not been assessed and would not be authorised.

31. In this context, I note in passing that the Sweeper Provisions proposed in respect of the Pipeline are, if anything, more restrictive than those deemed appropriate by the examining authority and the Secretary of State in the context of SLP project, referred to above. In that case, the relevant wording included within the made development consent order was as follows:

> '*In connection with the construction of any of those works, further development within the Order limits which does not give rise to any materially new or materially different environmental effects to those assessed in the environmental statement*….'[13]

32. Such wording gave rise to no concern on the part of Highways England/National Highways in the context of that project and its interaction with the M25, and there is no reason why an equivalent provision could or should not be included in the DCO in the present instance.

Concluding Remarks on Sweeper Issue

33. It follows that in considering the merits of the Application (whether in the context of the Detriment Issue or the Provisions Issue, or otherwise) the ExA can be content that, if made, the DCO would not authorise 'unknown works' to the SRN as alleged by National Highways. Indeed, I consider the position of National Highways to be untenable in this regard.

The Detriment Issue

34. The Applicant rightly accepts[14] that National Highways comprises a statutory undertaker, and that in consequence any compulsory acquisition in respect of its land potentially engages Section 127 of the 2008 Act. I further note that the Applicant has also accepted that the CPO Land comprises land which National Highways acquired for the purposes of its statutory undertaking. In circumstances where National Highways has made (and is maintaining) a representation for the purposes of Section 127(1)(b), it falls to the Secretary of State to consider whether or not they are satisfied of the matters set out in Section 127(3).

[13] See schedule 1 to the development consent order made in respect of the SLP.
[14] See section 4 of the Applicant's Deadline 6 response to National Highways submissions, at Document Ref REP6-035

35. In this context, the relevant criterion is that set out in Section 127(3)(a), namely that the CPO Land

> *'…can be purchased and not replaced without serious detriment to the carrying on of the undertaking'.*

36. On the basis of the materials before me I do not consider that National Highways has demonstrated that the 'serious detriment' test would be met by the compulsory acquisition of the CPO Land. Indeed, I do not consider that it has demonstrated that any material detriment would result at all.

37. I draw this distinction advisedly, since it is important that both the ExA and the Secretary of State note that the statutory test does not require only that there be detriment, but instead 'serious detriment'. The distinction between these two notional hurdles, and the manner in which the 'serious detriment' hurdle has been approached by the Secretary of State in the past when making previous development consent orders, is illustrated by the examples given by the Applicant in its Deadline 6 Submissions[15]. I concur with the view expressed in those submissions that the 'serious detriment' test is a high bar. The election of the draughtsman to include the qualifying term 'serious' in this context must be a matter to which due regard is had, and that is the approach which the Secretary of State has previously adopted.

38. In terms of the case advanced by National Highways, I note that the issue of detriment to its undertaking was not addressed in its submissions at Deadline 5, nor was it addressed in its submissions at Deadline 6. That said, I am aware that the matter was raised in earlier representations. By way of example I note in its Post Hearing Submissions in respect of CAH1 (provided at Deadline 4)[16], the assertion that:

> *"National Highways considers that there is no compelling case in the public interest for the Compulsory Powers and that the Secretary of State, in applying section 127 of the Planning Act 2008, cannot conclude that the permanent acquisition of land forming the SRN and the creation of new rights and restrictions over all of the Plots*

[15] See Paragraphs 4.7-4.16 of the Applicant's Deadline 6 response to National Highways submissions. I note that in the NH Deadline 7 Submission, at Paragraph 3.5.3 National Highways seeks to distinguish the examples provided by the Applicant on the basis that the promoters of those schemes were statutory undertakers or public authorities. I do not consider that this issue provides the basis for any distinction to be drawn. Further, I note that whilst the Applicant is not a statutory undertaker, it is in receipt of public money to deliver the Pipeline, the construction of which project is in the public interest.

[16] Document Ref REP4-290

can be created without serious detriment to National Highways' undertaking. No other land is available to National Highways to remedy the detriment"[17].

39. This representation echoed (in the sense of repeated) the submissions previously made by National Highways at Deadlines 1 and 2[18]. However, at no point in the Examination had National Highways gone beyond a 'general assertion' of the type set out above. No explanation, far less evidence, of detriment had been provided. In essence, its position amounted to the proposition that acquisition of land interests held by National Highways must, necessarily and of itself amount to serious detriment

40. Such proposition is not tenable in my view. It is not enough for National Highways that it point to the fact of its ownership, and ask that the ExA and Secretary of State assume 'serious detriment' as an inevitable consequence of compulsory acquisition.

41. The first occasion where National Highways purports to identify any substantive detriment is in the NH Deadline 7 Submission. The initial references to detriment are, again, generalised and non-specific in nature; they do nothing to make out a positive substantive case[19]. However at Paragraphs 2.7 – 2.11 of the document[20], National Highways assert that compulsory acquisition of the CPO Land would result in the following:
    - Inability to discharge its "*regulatory responsibilities*" (Paragraph 2.8);
    - Risk of its being guilty of "*trespass*" when undertaking works (Paragraph 2.8); and
    - Potential for the Applicant to "*ransom*" third parties seeking to lay infrastructure beneath the SRN (Paragraph 2.9-10).

42. I have considered each of these various matters, but remain of the view that National Highways has failed to demonstrate any material detriment, let alone 'serious' detriment. Taking each in turn, I note firstly that no particular 'regulatory responsibility' is identified by National Highways as being put at risk in consequence of the compulsory acquisition of the Reference Land. Thus once again, there is no detail/substance to the point which National

[17] See Paragraph 2.2, supra.
[18] See Paragraphs 3.1 and 4.2 of the Deadline 2 and Deadline 1 submissions (Document Refs REP2-049 and REP1-069) respectively.
[19] At Paragraph 2.5 of the NH Deadline 7 Submission, National Highways simply assert that compulsory acquisition "… *could cause serious detriment to National Highways undertaking as it may no longer be possible for National Highways to carry out its statutory duties and maintenance responsibilities*", without providing any particulars to substantiate that proposition.
[20] Paragraphs 3.5.1 – 3.5.3 of the NH Deadline 7 Submission refer back to those earlier paragraphs.

Highways raise, and to which the Applicant can respond. Rather, the assertion is a general and unparticularised one. Once again therefore, I do not consider that any substantive case of detriment has been made out.

43. The second of the issues raised by National Highways concerns trespass; in particular it states that compulsory acquisition:

> "…*also becomes an issue with regard to suitable depth of ownership for maintenance purposes and potential for National Highways to trespass into third party land when carrying out vital and critical works necessary to support its undertaking*".

44. Again, I do not understand the basis on which detriment (or indeed serious detriment) is alleged. In this context, I note firstly that it is in no way uncommon for National Highways not to be the owner of land on which the SRN is constructed. Indeed National Highways itself expressly recognises this point. Thus the fact of its being required to carry out works within land that is not within its ownership would not represent a new or unworkable proposition.

45. Secondly, and crucially, in the event that the Pipeline were constructed it would be imperative that National Highways engage with the Applicant before carrying out any works to the SRN in the vicinity of the Pipeline irrespective of whether or not the Applicant had compulsorily acquired the CPO Land. Failure to do so would result in significant safety issues, and the risk of damage to a carbon dioxide carrying infrastructure. It would be necessary for the parties to agree a basis on which any works could safely be undertaken, having regard to the works proposed and the minimum distance required for safe working.

46. Thus the fact of the CPO Land having been acquired would not – of itself – result in any detriment – serious or otherwise – to National Highways' ability to carry on its statutory undertaking.

47. The third issue raised by National Highways is the question of whether, having acquired a tranche of substrata beneath certain carriageways of the SRN, it would be in a position to 'ransom' other bodies/undertakers who approached National Highways with a view to constructing infrastructure in/beneath the SRN.

48. Again, I do not understand on what basis National Highways suggest detriment/serious detriment in this context.

49. Firstly, there is the point that any restriction on the ability of a third party to lay infrastructure in/beneath the SRN would not amount to detriment to National Highways; if indeed there were detriment (which I do not consider there would be, for the reasons set out in paragraphs below), then the detriment would be experienced by that third party and not National Highways.

50. Secondly, it must be remembered that the Applicant is not seeking to acquire the full extent of the land identified within the relevant plots, but instead only a strata of land within it. Thus there would be only a limited extent of land over which the Applicant would retain any element of control. This would mean, for example, that if it were imperative that a third party install its infrastructure in a way that 'crossed' the route of the Pipeline underneath the SRN (as opposed to elsewhere) it could potentially do so at a level beneath the Applicant's Pipeline (albeit in carefully controlled circumstances).

51. Thirdly, insofar as any third party were minded to lay its infrastructure within the 'lozenge' of land acquired by the Applicant, then the fact of its being in the ownership of the Applicant (as opposed to National Highways) would not of itself prove the relevant constraint. Whatever the land-ownership position, the Applicant would necessarily require that any new infrastructure be laid at distance from the Pipeline in any event, for reasons of operational safety. Indeed such distance would a requirement of both the Applicant and the third party, since both would wish to ensure the safe installation/operation of their respective assets[21].

52. In these circumstances, it does not appear to me that there is any material prospect of the Applicant holding either National Highways or a third party 'to ransom' by reason of its land ownership position. Indeed, the suggestion to the contrary would appear to be an artificial one.

[21] In this regard, at Paragraph 2.11 of the NH Deadline 7 Submission National Highways allude to a particular instance where a request has been made to it by a third party in respect of the laying of infrastructure. This is understood to be a reference to the laying of a hydrogen pipeline by Cadent as part of their HyNet project. In that case it would of course be necessary for the Applicant and Cadent to ensure material distance from their respective assets, for reasons of safety.

53. For all these reasons, I do not consider that National Highways has made out any case of detriment (or serious detriment) that would result from acquisition of the very limited part of its estate which the CPO Land represents.

54. The only further observation which I make in this context is as regards the impacts on the SRN which National Highways allege may result from the carrying out of works to construct the Pipeline. The first point to note is that – as noted already in this Opinion – the carrying out of all relevant works beneath the SRN would of course be within the control/oversight of National Highways, in that the Applicant Provisions provide a mechanism for it to approve all such works[22]. However, even were detriment to result (which there is no reason to anticipate, particularly given the oversight which National Highways is entitled to exercise), such detriment would not be a consequence of the compulsory acquisition of its interest in the CPO Land. The fact of the purchase of the CPO Land would not have given rise to the impacts on the SRN, rather it would be the manner in which the Pipeline was constructed which would be the cause of those impacts. This is significant, since the matter for the Secretary of State's consideration under Section 127(3) is whether the act of the Applicant in purchasing the CPO Land would cause serious detriment. Given the nature of the land to be acquired (that is, substrata well beneath the SRN), evidently it would not.

Concluding Remarks on the Detriment Issue

55. For all these reasons, I consider that National Highways has failed to show that the purchase of the CPO Land would result in serious, or indeed material, detriment to its ability to carry on its statutory undertaking.

The Provisions Issue

56. As noted above, the Applicant acknowledges the need to provide protective provisions for the benefit of National Highways in the DCO. The dispute between the parties is as to the extent and nature of the provisions to be so included. At Appendices 2 and 3 of its Deadline 6 submissions responding to National Highways[23], the Applicant provided a version of the Applicant Provisions, and also a version of the NH Provisions showing the Applicant's proposed amendments to the document as tracked changes. At Deadline 7, the Applicant

[22] See Paragraph 6 of the Applicant Provisions to the Examination as Document Ref: Rep7-294.
[23] Document Ref REP 6-035

provided a further version of the Applicant Provisions, containing certain revisions intended to address some of the matters raised by National Highways[24].

57. National Highways set out its concerns regarding the Applicant's approach to protective provisions in its Deadline 6 submission[25], which contained detailed commentary as to why it considered such approach afforded inadequate protection. It also provided a further draft of the NH Provisions as an appendix to the NH Deadline 7 Submission.

58. I am not instructed to undertake a detailed comparative analysis of the two parties' suggested protective provisions. Nor would it be appropriate for me to do so in the context of a legal opinion, given that the ExA will have been better assisted by the expert evidence provided by the parties (whether at issue specific hearings or in the context of answers given to written questions). Rather, I am asked to provide general comments by way of overview.

59. The first observation which I make in relation to the approach of National Highways, and the NH Provisions generally, is that they go far beyond the scope of the protective provisions included in the SLP development consent order (referred to above). That order – as would be the case with the DCO – proposed construction of a pipeline beneath the SRN (indeed it authorised tunnelling beneath the M25).

60. This is a matter of some significance, since the protective provisions included in the SLP development consent order were the subject of agreement between the applicant and Highways England. Indeed, the final participation of Highways England in that examination was its confirmation that it withdrew its objection to the application for the SLP development consent order, on the basis that it had agreed protective provisions with the applicant[26]. Thus in no sense can the NH Provisions be regarded as National Highways 'standard' approach to a pipeline project. I make this observation noting that in the course of the NH Deadline 7 Submission National Highways refer to the Applicant seeking to depart from its "*usual requirements*" and "*standard provisions*"[27]. I do not consider that the NH Provisions can fairly be represented as being 'standard' or 'usual' in the context of nationally

[24] Document Ref REP7-294. See new provisions on acceptable security (Paragraph 2(1)) and payments (Paragraph 8) in the appendix to that document.
[25] Document Ref REP6-047
[26] See Highways England's Deadline 7 submission in respect of the SLP examination, dated 24 March 2020.
[27] For example see references at Paragraphs 3.2.1, 3.2.3 and 3.2.7 of the document.

significant infrastructure consented under the 2008 Act, as National Highways appears to suggest[28].

61. The further relevance of Highways England's approach in respect of the SLP lies in the fact that the development consent order made in respect of that project contained Sweeper Provisions in substantively the same form as (and if anything, allowing more latitude to the promoter than) the Sweeper Provisions in the DCO. This is significant because the justification given by National Highways' in its Deadline 6 submission for very many of the positions it has adopted, is the possibility that the DCO will authorise works – potentially to the SRN – which are as yet unknown/uncertain[29].

62. For the reasons I have already given when discussing the Sweeper Issue above, I do not consider that the concern voiced by National Highways is justified. In my view the DCO would not have the effect of consenting 'unknown' works to the SRN, and thus the justification given by National Highways for insisting on many of its preferred provisions is not sound.

63. A second observation which I would make is that the protective provisions proposed by the Applicant would serve to allow National Highways to safeguard its assets to its satisfaction, by controlling the works that are carried out beneath the SRN. I make this observation having regard to the fact that at Appendix 2 to the NH Deadline 7 Submissions National Highways provide a report in respect of works undertaken beneath the infrastructure of Network Rail.

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[28] I note that at Paragraph 3.2.2 of the NH Deadline 7 Submission National Highways refer to their experience regarding development consented under the Town and Country Planning Act 1990. I say no more than to observe that the 1990 Act provides an entirely different consenting procedure, which does not entail detailed scrutiny of proposals at public examination, following extensive pre-application consultation with relevant bodies. Such comparison is not appropriate/helpful in my view.

[29] By way of example/illustration, regarding Paragraph 2 of the National Highways submission, and the Applicant's proposed deletion of the definition of the term "commuted sum", the Applicant states:
"Commuted sums are payable only for maintenance of non - standard road works. No such works are proposed or required and the Applicant is not creating any new highway asset that NH would be liable to maintain. Relevant works and maintenance relate to the 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".
National Highways response is to the following effect:
"*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*".

64. I do not consider that such report serves any material purpose in the present context. Leaving to one side the fact that the report is not concerned with the assets of National Highways, it appears that the incident occurred due to the fact that in the course of constructing a microtunnel "*Network Rail's asset protection standards and guidance were not fully complied with and as a result important factors were not addressed during the planning and approvals stages*" [30].

65. In the present case, the Applicant is advocating that National Highways have right of approval/refusal over the detailed design of the works to be constructed beneath the SRN[31]. Thus it would be within National Highways control to ensure that no damage is caused to its assets. Equivalent controls to those now proposed were afforded to Highways England in the context of the proposed construction of the SLP beneath the M25, and those were regarded as being acceptable for the purposes of that project.

66. A third observation which I would make is that many of the provisions sought by National Highways do not appear appropriate in circumstances where the consented works in the vicinity of the SRN will not entail any operations in, or opening up of, the fabric of the highway. By way of example, in Paragraph 6(1) of the National Highways Deadline 6 submission, the Applicant is recorded as proposing deletion of prior approval provisions relating to matters such as road safety audits and road space bookings. National Highways resist the deletion of those provisions, but their inclusion appears unjustified in circumstances where the extent of works to the SRN are known, and none of those works would require either road safety audits or road space bookings.

<u>Concluding Remarks on the Provisions Issue</u>

67. In these circumstances, I do not consider that the extent of provisions which National Highways is seeking to require through its insistence on inclusion of the NH Provisions is justified. Some at least of the provisions which it is seeking over and above what has already been offered in the Applicant Provisions appear to be superfluous.

[30] The report is discussed at Paragraph 3.2.9 of the NH Deadline 7 Submission.
[31] See the 'Prior Approvals' provisions at Paragraph 6 of the Applicant Provisions.

I trust that this Opinion satisfactorily addresses the matters raised in my instructions. I would be happy to advise further, either in writing or in consultation if that would assist. Should Instructing Solicitors have any queries arising, they should not hesitate to contact me in Chambers.

Alexander Booth KC

12 September 2023