

Closing Submissions of National Highways Limited submitted at Deadline 8

Application by Liverpool Bay CCS Limited for an Order granting Development Consent for the HyNet Carbon Dioxide Pipeline Project

Planning Inspectorate Reference Number: EN070007

1 Introduction

- 1.1 National Highways (“**NH**”) has prepared these closing submissions to draw together the case it has put before the examination given that it has not been possible to reach agreement with the Applicant and therefore NH is not able to remove its objection to the Application.
- 1.2 The draft DCO (Examination Library Reference: D.3.1 Revision I, Deadline 7) (“**DCO**”) includes powers to acquire land rights and interests in land owned and occupied by NH which will be required. These plots comprise of land and rights held by NH for the purposes of its statutory undertaking and NH does not agree to interference with the plots without guarantees over the extent of that interference in the form of protective provisions appended to this document at Appendix 1. This remains a complete set as previously submitted to the examination but now includes some additional provisions which ‘carve out’ some of the requirements and obligations from applying to tunnelling works.
- 1.3 In addition to this, wide powers are being sought by the Applicant in the DCO which could result in ‘unknown’ highway works being brought forward under the DCO. Resultantly, it has been necessary to retain all National Highways standard provisions to ensure that appropriate protection is in place if the Applicant chooses to exercise those powers, if granted.
- 1.4 NH is a statutory undertaker for the purposes of section 127 of the Planning Act 2008 (“2008 Act”) as it falls within the definition set out in section 8(1) of the Acquisition of Land Act 1981. Where a statutory undertaker has made a representation about the compulsory acquisition of land or rights over land which has been acquired for the purposes of their undertaking, and this representation is not withdrawn, s127 of the 2008 Act applies.
- 1.4 NH believes that the powers of compulsory acquisition sought by the Applicant may result in serious detriment to the SRN, where the form of protective provisions required by NH are not agreed. Without prejudice to a finding of serious detriment to the SRN, there are strong public policy reasons why compulsory acquisition should not be agreed without offering NH the protections it requires.
- 1.5 Please note that all comments made by NH as part of its DL7 response (Examination Library Reference: REP7-316) remain up to date and valid but are not repeated as part of this final submission to prevent duplication.

2 Summary of Interference with the SRN

Plots 5-06 and 7-05

- 2.1 The DCO includes powers of permanent acquisition of the subsoil of operational highway land over Plots 5-06 (the M65 motorway) and 7-05 (the M53 motorway). The Applicant is proposing to use trenchless installation techniques to install apparatus underneath the SRN at these locations in an attempt to not disrupt the surface highway use at Plots 5-06 and 7-05.
- 2.2 Whilst NH does not object to the principle of development, the inclusion of compulsory powers over Plots 5-06 and 7-05 is detrimental to the SRN because permanent acquisition of the subsoil beneath the carriageway of both motorways would cause detriment due to loss of ownership of the estate and would therefore affect the ability to comply with regulatory responsibilities. It also becomes an issue with regard to suitable depth of ownership for maintenance purposes and potential for NH to trespass into third party land when carrying out vital and critical works necessary to support its undertaking.
- 2.3 Ownership of the subsoil beneath the highway (as well as the airspace above) also enables the highway authority to grant easements and to properly authorise street works. Should a third party own that land they could potentially benefit from a ransom position should other parties need to place apparatus over or under the highway – whilst the highway authority would still have powers under the New Roads and Street Works Act 1991 (NRSWA) to authorise such works, it would no longer have the proprietary interest to permit what would otherwise be a trespass in the absence of a statutory right. That third party would need to authorise such works. This would not be in the public interest.
- 2.4 There are numerous locations across the SRN where apparatus has been placed beneath the highway and NH as a responsible public body with statutory obligations to facilitate sustainable development routinely accommodates such requests in its role as street authority and landowner. NH is concerned that should subsoil ownership pass to a third party then NH would no longer be able to accommodate those requests without third party approval. Unlike when it is NH that own the land, there is no statutory obligation for that third party to acquiesce to such requests. The risk is such that should this become common practice, there may become a time when land beneath all highways no longer lies in public ownership and this may have implications for future development with those third parties holding strong ransom positions.
- 2.5 NH and Cheshire West & Cheshire Council (“**CWCC**”) have both confirmed that they are willing to grant the necessary rights, by way of a lease, over Plots 5-06 and 7-05 to enable the Applicant to place apparatus beneath the SRN in their roles as both street authority and/or landowner. As such, it would be inappropriate to grant powers of compulsory acquisition over operational highway land that could result in serious detriment.

Plots 2-09, 2-10, 5-09, 9-07, 9-09, 9-10 and 9-12

- 2.6 The DCO includes powers of permanent acquisition of land beneath the local road network over Plots 2-09, 2-10, 5-09, 9-07, 9-09, 9-10 and 9-12. The Applicant is proposing to use trenchless installation techniques to install cabling underneath the highway at these locations in an attempt to not disrupt the surface highway use at Plots 2-09, 2-10, 5-09, 9-07, 9-09, 9-10 and 9-12.
- 2.7 Whilst NH does not object to the principle of development, the inclusion of compulsory powers over Plots 2-09, 2-10, 5-09, 9-07, 9-09, 9-10 and 9-12 is detrimental to the local road network for the same reasons as are set out in paragraphs 3.2 – 3.4, above.
- 2.8 NH are willing to grant the necessary landowner consents over Plots 2-09, 2-10, 5-09, 9-07, 9-09, 9-10 and 9-12 to enable the Applicant to place apparatus beneath the local road network in its role as landowner. However, in respect of these Plots, it would be for CWCC to grant the associated consent for street works as the street authority. As such, it would be inappropriate to grant powers of compulsory acquisition over operational highway land that could result in serious detriment.

Plots 2-03, 2-05, 4-20, 5-01, 5-02, 5-05, 5-10, 5-12, 5-14, 5-15, 5-20, 5-22, 5-23, 6-02, 6-03, 6-04, 6-05, 6-06, and 9-04

- 2.9 The DCO includes powers of permanent acquisition of rights over Plots 2-03, 2-05, 4-20, 5-01, 5-02, 5-05, 5-10, 5-12, 5-14, 5-15, 5-20, 5-22, 5-23, 6-02, 6-03, 6-04, 6-05, 6-06, and 9-04. These rights include, inter alia, rights of drainage, rights of access and maintenance rights, all of which are necessary for NH to be able to carry out its undertaking. Should those rights be extinguished this would cause serious detriment to National Highways undertaking by introducing public safety risks. It is noted that the Applicant has now included the majority of these plots in their version of the protective provisions for National Highways' benefit confirming that they do not intend to extinguish these interests. This is welcomed although plots 5-12 and 6-03 are not included. Given the similarity with the other plots that have now been included National Highways does not consider it would be controversial to also add these two plots to the protective provisions to ensure that serious detriment does not arise.
- 2.10 NH would accept the permanent acquisition of rights over Plots 2-03, 2-05, 4-20, 5-01, 5-02, 5-05, 5-10, 5-12, 5-14, 5-15, 5-20, 5-22, 5-23, 6-02, 6-03, 6-04, 6-05, 6-06, and 9-04 provided that all plots are included in the protective provisions to provide NH with sufficient satisfaction that the Applicant does not intend to extinguish the rights it benefits from in such plots.

Plot 6-07

- 2.11 The DCO includes powers of permanent acquisition of non-highway land over plot 6-07. As noted by the Applicant this plot forms part of the NH drainage system. The Applicant states that their compulsory acquisition proposals are compatible with NH interests resulting in no permanent impact on the use arising from acquisition of a sub-soil interest.
- 2.12 With this in mind, it should not be controversial to include this plot within the protective provisions showing their commitment not to extinguish NH's interests. Without this commitment there would remain a risk that NH's interests could be extinguished which would cause serious detriment to NH's undertaking.

3 Serious Detriment

- 3.1 NH is a statutory undertaker for the purposes of the 2008 Act and holds land within the Order limits as both strategic highway authority and landowner. The land it holds forms part of the highway acquired for the purposes of its undertaking in accordance with sections 127(1)(a) and 138(1) of the 2008 Act. NH submitted a relevant representation on 12 January 2023 (Examination Library Ref: RR-064) and has not withdrawn that representation pursuant to section 127(1)(b) of the 2008 Act. The land NH holds within the Order limits is used for the purposes of carrying on its statutory undertaking.
- 3.2 Consequently, the Secretary of State may only include provision authorising the compulsory acquisition of NH's land to the extent that:
- (a) it can be purchased and not replaced without *serious detriment* to the carrying on of the undertaking; or
 - (b) if purchased it can be replaced by other land belonging to, or available for acquisition by, the undertakers without *serious detriment* to the carrying on of the undertaking.
- 3.3 There is no legal definition of serious detriment and what will be merely detrimental to one statutory undertaker may be seriously detrimental to another. Each case for serious detriment must be determined on its own facts and in the context of the relevant statutory undertaking concerned. In the Richborough Connection DCO examination, the ExA considered that the term 'serious detriment' goes beyond just 'detriment' to something 'important or significant'.¹ The ExA continued that:

¹ https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN020017/EN020017-002706-RCP_Panel%20Report%20-%20Main%20Report_FINAL.pdf – paragraph 9.9.101

“The issue of whether any detriment is important or significant has to be judged having regard to how [the statutory undertaker] conducts its business. This needs to take account of how it fulfils the duties and standards that apply to it as a statutory undertaker”²

- 3.4 To summarise the position taken from the key decisions in this area, for ‘serious detriment’ to be engaged, the land the subject of the proposed compulsory purchase:
- (a) Must be statutory undertaker’s land; and
 - (b) Must be held by the owner in its capacity as a statutory undertaker.
- 3.5 In addition, the ‘serious detriment’ resulting from the project:
- (a) Does not have to affect a large area in scale or extent;
 - (b) Must have a detrimental impact determined as being serious, significant or important; and
 - (c) Will seriously impact upon the statutory undertaker’s ability to carry out its functions and/or comply with its statutory duties and obligations.
- 3.6 The following paragraphs set out why the Applicant’s proposed compulsory acquisition strategy would result in serious detriment to NH.

Permanent Acquisition of the subsurface of motorway and verges

- 3.7 The permanent acquisition of plots 5-06 and 7-05 comprising the entire subsurface estate of the SRN in these locations includes a combined 17,025sqm of the subterranean highway estate. This is an extremely large area, particularly when considering that the SRN is a linear piece of infrastructure in a very narrow and limited envelope. The acquisition of any part of this linear envelope will result in a far greater impact than the acquisition of a part of an undertaking comprising a wider and non-linear area – such as a port. This has a seriously detrimental effect on the carrying on of NH’s undertaking on the SRN for the reasons that NH submitted at DL7 (Examination Library Reference REP6A-023 paragraphs 2.7 – 2.15). NH does not repeat those reasons here but given the importance of defending this position expands further below.

² Paragraph 9.8.57 of the Recommendation Report

- 3.8 The area of the subsurface that the Applicant seeks to permanently acquire comprises an extremely large area of land rather than an easement corridor which is all that should be required. It is unnecessary for the extent of acquisition being sought and the serious detriment to NH's undertaking that would result.
- 3.9 The Applicant does not agree to safety critical provisions in the NH protective provisions that would protect NH, road users and highway contractors from risk. There is understandably an inherent risk in any subterranean works of causing displacement or carriageway settlement and these situations are heavily regulated by NH's own technical DMRB standard (CD622). This is not an academic risk – NH is seeing a substantial increase in the number of accidents and property damage as a result of highway settlement, which is compounded by third party works beneath the carriageway. Even if the NH protective provisions were agreed, there are strong legal arguments as to why the acquisition of subsurface estates should be refused.
- 3.10 Whilst the subsurface land is not operational highway, it fulfils just as important a role in supporting the structural integrity of the SRN and the apparatus within it. Without the guarantee of ownership of the subsurface, NH's ability to carry out emergency repair or even routine maintenance at particular depths would be heavily constrained. The Supreme Court held in *London Borough of Southwark v Transport for London* [2018] UKSC 63 that the meaning of highway is no longer limited to "the surface and top two spits of subsoil" but rather incorporates the full "zone of ordinary use" of the road, both horizontally and vertically. The test of what constitutes the zone of ordinary use of the road will vary on a case by case basis – meaning that it is not a quantifiable depth. For a safety critical asset such as the SRN, the only option in such circumstances, to avoid a risk of trespassing into third party owned subsurface (i.e. the interest in land beneath the highway surface) that would be owned by the Applicant, is for NH to own the subsurface estate. This is the only way that NH can effectively guarantee that whatever emergency or routine maintenance required at depths exceeding what would be typical for works on the local road network, it would not be at risk of a third party claim. Carriageway depth on the SRN is significantly greater than on the local road network, adding further uncertainty as to what the zone of ordinary use would be in the case of the SRN. This is all of particular importance to when considering the huge area (17,025sqm) that the Applicant is looking to acquire by acquiring plots 5-06 and 7-05.
- 3.11 In addition to litigation risk, acquisition of the entire subsurface estate would place a significant administrative burden on NH to maintain ownership records (which are currently not required) and to negotiate licences where there was a risk of works penetrating below the zone of ordinary use. This would also be the case for other statutory undertakers and utilities with apparatus in the SRN and managed under the New Roads and Street Works Act 1991. This third party apparatus is already managed with NH and through established processes understood at an industry level. This apparatus does not require the

freehold interest in the subsurface estate in order to be sited and typically co-locates with the SRN through an easement granted over a narrow “sausage” within which the apparatus will sit. NH sees no reason why the Applicant needs to acquire the entire subsurface estate which spans an incredibly large area and considers the case for necessity is not made out.

3.12 Further, the permanent acquisition of the entire subsurface estate in plots 5-06 and 7-05 would seriously impact on NH’s ability to comply with its statutory licence obligations, including³:

(a) *To ensure the effective operation of the network;*

(b) *To ensure the maintenance, resilience, renewal and replacement of the network;*

(c) *To ensure the improvement, enhancement and long-term development of the network;*

(d) *Protect and improve the safety of the network;*

3.13 Paragraph 5.37 of NH’s statutory licence also requires NH *“to hold and manage land and property in line with, and as a function of, NH’s legal duties as highway authority, and solely for the purposes of operating, managing and improving the highway, unless otherwise approved by the Secretary of State for Transport”*.

3.14 Jurisdictionally, whilst the Secretary of State has the power to authorise the compulsory acquisition of the SRN within the order limits, NH’s licence expressly provides that NH is under a legal duty to hold and manage its estate unless otherwise approved by its own responsible Minister, the Secretary of State for Transport. It is respectfully submitted that the permanent acquisition of part of such a critical asset in the national transport system – however seemingly insignificant – should not be exercised without consulting with the relevant Ministerial department, to proffer a view on the impact of the decision.

3.15 It is important to note that NH are in discussions with the Applicant regarding the grant of a lease in respect of Plots 5-06 and 7-05 in order to negate the need for compulsory acquisition. However, it is not considered in any event that the tests for compulsory acquisition have been made out due to the huge area (17,025m²) that the applicant intends to acquire. NH would only be willing to grant a lease for the corridor in which the pipeline would sit and not the full 17,025m² that is being sought. This is considered unnecessary and unjustified.

³ [Highways England: licence \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/674422/Highways_England_-_licence.pdf)

3.16 In summary, the proposed permanent acquisition of the subsurface of motorway and verges relates to land held by a statutory undertaker, for the purposes of its statutory undertaking. The area in question is considered to be an extremely large area and the result of permanent acquisition would lead to significant safety implications on the SRN. It would also substantially impact on NH's ability to discharge key statutory licence requirements regarding the integrity of the highway estate, the operational effectiveness of the SRN in this location and the statutory requirement to have regard to safety. Irrespective of whether the NH protective provisions were included, NH considers the permanent acquisition of the entire subsurface of motorways and verges in this location to be a serious detriment and requests the Secretary of State to refuse the grant of compulsory powers over plots 5-06 and 7-05. NH accepts that in order for the authorised development to be deliverable and fundable, a permanent right would need to be granted for the cable beneath the SRN and is prepared to grant a lease over a corridor within the subsurface estate, subject to the NH protective provisions being included on the order and the Applicant entering into the necessary transactional documents to ensure that NH had the necessary rights of support for the SRN.

Acquisition of Rights in Land

3.17 The Applicant is proposing to acquire the rights which are detailed above in paragraphs 2.9 and 2.10.

3.18 NH are prepared to agree to the acquisition of the rights set out above, subject to the inclusion of the NH protective provisions as appended to this document at Appendix 1, on the face of the order. Whilst the Applicant has agreed to include wording to satisfy NH that it will not extinguish NH rights in a number of plots, two important plots have been omitted (5-12 and 6-03). These plots must be added to the protective provisions to give NH sufficient satisfaction that the Applicant does not intend to extinguish these important rights which would cause serious detriment to NH's undertaking as set out in its DL7 submission.

Temporary Possession

3.19 The Applicant is proposing to temporarily possess plots 2-02, 2-06, 2-07, 2-11, 5-03, 5-04, 9-08, 9-11 and 9-13. It is critical to the safe operation of the SRN that any temporary possession is carried out in strict accordance with NH's governance procedures, which are proportionately distilled into the NH protective provisions included at Appendix 1. For example, paragraph 6(2) provides that no specified work may commence until the relevant works programmes, road safety audits, road space bookings and detailed design specifications have been agreed with NH. Further, the exercise of temporary possession powers is controlled by paragraph 6(4), which requires the Applicant to seek NH's consent (not to be unreasonably withheld or delayed).

4 Protective Provisions

- 4.1 NH set out its position in detail in relation to the Protective Provisions at DL7 and does not therefore propose to duplicate those submissions here. For the purposes of this final submission NH relies on the comments made at DL7 which can be found in Examination Library Reference: REP7-316 paragraphs 3.2 and 3.7. In addition NH makes the following points.
- 4.2 In its “*written summaries of oral submissions made at the hearings held during week commencing 7 August 2023*” (Examination Library Reference: REP7-292 paragraph 4.4), the Applicant submits “*The ExA queried whether the Applicant consider there was any likelihood of agreement with National Highways. The Applicant stated that it considered that very unlikely, as **the Applicant does not consider National Highways’ drafting is appropriate, reasonable or proportionate given the development authorised by the DCO does not include works to an operational carriageway. National Highways have advised they will not accept any amendments to their standard drafting, so it seems there is an impasse***”. (Emphasis added)
- 4.3 It is NH’s assertion that the protective provisions submitted by NH in the form included at Appendix 1 are appropriate, reasonable and proportionate for two important reasons:
- (i) For the reasons stated at DL7, NH considers that the Applicant is underestimating the potential impact that tunnelling could have on the SRN. It relies on positions that NH may have taken historically which NH is determined to put right going forward. These historic positions should not be seen as setting a precedent for this application. Following recent changes within the organisation closer scrutiny is now being given to such proposals and combined with legal advice received this has informed a change in approach for NH; and
 - (ii) The Applicant has included wide powers in their draft DCO which would allow them to carry out works to operational carriageway, notwithstanding they say they are not intending to use them for SRN works.
- 4.4 As has been highlighted in NH’s previous submissions, and notwithstanding the contrary view of the Applicant, the DCO includes powers for the Applicant to carry out additional works outside of the listed numbered works included in Schedule 1. This is standard practice in DCO drafting to allow flexibility should works within the Order limits but not expressly set out as numbered works be required to effectively deliver the Project. NH made these same submissions during the examination of the Yorkshire Green DCO given the similar nature of wide powers being sort for that project. The Applicant in that case, National Grid, accepted NH’s position and agreed to NH’s full set of protective provisions. In return NH agreed to some proportionate carve outs for the known works which involve oversailing the SRN in various locations. NH has taken the same view here and offered some proportionate carve outs for the underground works – albeit such works pose greater risks

to NH's undertaking than oversailing works and so the carve outs are more limited for this project than have been agreed for Yorkshire Green.

- 4.5 Noting the concerns raised by NH during the Yorkshire Green examination, the ExA asked the applicant to provide without prejudice drafting that is capable of being inserted into the Schedule 1 description of associated development to exclude works affecting the SRN. This would remove NH's concern around 'unknown' works being brought forward to the SRN under these wide powers. National Grid's response⁴ stated: "*Whilst at the time of application no works are anticipated within the strategic road network above what has been specifically identified, placing an outright exclusion over the ability to consent any such work would be an overly onerous resolution to the issue.*" Their preference was to address the concern by agreeing to National Highways protective provisions. It was therefore unnecessary to provide the without prejudice drafting with National Grid advising the ExA: *The updated wording within the protective provisions now ensures that National Highways has the approval powers it requires over the works anticipated, as well as any unanticipated further associated development.*
- 4.6 For the avoidance of doubt National Highways' concern in this regard relates to the following wording included at the end of Schedule 1:

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) temporary works for the benefit or protection of land, watercourses or structures affected by the authorised development;
- (b) site clearance (including fencing and demolition of existing structures);
- (c) earthworks (including soil stripping and storage, site levelling and alteration of ground levels), and remediation of contamination if present;
- (d) works to alter the position of apparatus at or below ground level including mains, sewers, drains and cables and also including below ground structures associated with that apparatus;
- (e) watercourse and other temporary crossings;

⁴ [Document 8.33 Applicant's Response to the Examining Authority's commentary and questions on the draft Development Consent Order \(DC1\)](#) (Examination Library Ref REP7-084) Table 2.7 ref 7.0.2

(f) means of access and other vehicular and/or pedestrian means of access, including creation of new tracks and footpaths, and/or widening, upgrades, alterations and improvements of existing roads, tracks and footpaths / alteration of layout of streets to form temporary and permanent accesses, altering the level of any kerb, footway or verge within a street and surface treatments; diversions during construction of existing access routes and subsequent reinstatement of existing routes;

(g) surface water management systems, temporary drainage during installations;

(h) landscaping works/ landscaping, planting, vegetation removal, trimming and lopping of trees, tree planting and erection of permanent means of enclosure and boundary facilities including fences and gates, alteration of drains and ditches; / bunds, embankments, swales, landscaping, fencing and boundary treatments;

(i) manholes, marker posts, underground markers, tiles and tape;

(j) works for the provision or relocation of apparatus including cabling, water and electricity supply works, foul drainage provision;

(k) creation, use and reinstatement of crane pads; and

(l) works of restoration.

4.7 This list of works could quite clearly include works to the SRN (particularly under (f)). In addition, by way of further example the Applicant seeks the following power in Article 11(2):

(2) Without limitation on the specific powers conferred by paragraph (1), but subject to paragraph (4), the undertaker may, for the purposes of constructing and maintaining the authorised development, permanently or temporarily alter the layout of any street (and carry out works ancillary to such alterations) whether or not within the Order limits and the layout of any street having a junction with such a street and, without limiting the scope of this paragraph, the undertaker may—

(a) increase the width of the carriageway of the street by reducing the width of any footpath, footway, cycle track, central reservation or verge within the street;

(b) alter the level or increase the width of any such street, footpath, footway, cycle track, central reservation or verge;

(c) reduce the width of the carriageway of the street;

(d) execute any works to widen or alter the alignment of pavements;

(e) make and maintain crossovers and passing places;

- (f) execute any works of surfacing or resurfacing of the highway;
- (g) carry out works for the provision or alteration of parking places, loading bays and cycle tracks;
- (h) execute any works necessary to alter or provide facilities for the management and protection of pedestrians;
- (i) execute any works to provide or improve sight lines required by the highway authority;
- (j) execute and maintain any works to provide hard and soft landscaping;
- (k) carry out re-lining and placement of new temporary markings; and
- (l) remove and replace kerbs and flume ditches for the purposes of creating permanent and temporary accesses

- 4.8 It is beyond doubt that the Applicant is seeking powers in the draft DCO that would enable it to carry out works to the SRN and as such NH must be afforded appropriate protection. It is misleading for the Applicant to suggest these powers could not be used on the SRN as they were not included in the Environmental Assessment. That position is correct for large scale highway interventions, such as a new grade separated junction, as an example, however that is a misunderstanding of NH's concerns. Many smaller scale highway interventions, such as those listed in (f) and Article 11 could come forward under these powers. They would not be so significant that they would fall outside of the wide assessment that has taken place and are clearly ancillary works that may be necessary to facilitate the development of the Project. Any works to the SRN, no matter how small scale they may be perceived to be, must be carried out in accordance with NH guidance and processes. Outside of a DCO this would not be in dispute and there is no justified reason why the situation should be different here.
- 4.9 If it is the Applicant's view that the draft DCO only authorises those works specifically set out in the ES project description then why would it include such wide ancillary powers as by their own admission they would not be able to deliver such works and therefore the drafting is unnecessary and superfluous. It is abundantly clear that these wide powers do exist. Whilst it may be correct for the Applicant to say that they don't intend to carry out any such works to the SRN, unless they are prepared to explicitly carve out the SRN from the ambit of such powers (as the ExA suggested may be appropriate during the Yorkshire Green examination) then it must be accepted that NH are entitled to protection in case those powers are ultimately used. If the Applicant has no intention of carrying out such works then it need not have any concern for the protections appearing in the order as they would not be triggered should those works never come forward.
- 4.10 For the reasons stated the position taken in this regard by NH is both appropriate and reasonable. In addition NH has agreed to take a proportionate stance and carve out some provisions from applying to the tunnelling works. This is

considered to be a reasonable compromise. Whilst NH has sort to reach common ground with the Applicant in this regard, it is disappointing that they have not been willing to do so.

- 4.11 NH strongly recommends that the form of drafting included at Appendix 1 is included on the face of the order to ensure that all works on a safety critical asset are appropriately and proportionately controlled.

5 Summary

- 5.1 For all of the reasons given above, NH maintains its objection to this Application unless its preferred form of protective provisions (as included at Appendix 1) are included on the face of any order made.
- 5.2 Should the ExA or the Secretary of State wish to discuss these matters further, NH would be happy to assist in whatever way it can.

APPENDIX 1

National Highways Protective Provisions

FOR THE PROTECTION OF NATIONAL HIGHWAYS LIMITED

Application etc.,

1. — (1) The provisions of this Part of this Schedule apply for the protection of National Highways and have effect unless otherwise agreed in writing between the undertaker and National Highways.

(2) Except where expressly amended by the Order the operation of the powers and duties of National Highways or the Secretary of State under the 1980 Act, the 1984 Act, the 1991 Act, the Transport Act 2000, or Town and Country Planning (General Permitted Development) (England) Order 2015 which shall continue to apply in respect of the exercise of all National Highways' statutory functions.

Interpretation

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

(2) In this Part of this Schedule—

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

- (a) as constructed drawings in both PDF and AutoCAD DWG formats showing the location and depth of the pipeline as installed and any ancillary or protective measures installed within the strategic road network;
- (b) list of suppliers and materials used, as well as any relevant test results and CCTV surveys (if required to comply with DMRB standards);
- (c) product data sheets and technical specifications for all materials used;
- (d) as constructed information for any utilities discovered or moved during the specified works;
- (e) method statements for the specified works carried out;
- (f) in relation to road lighting, signs, and traffic signals any information required by Series 1300 and 1400 of the Specification for Highway Works or any replacement or modification of it;
- (g) organisation and methods manuals for all products used;
- (h) as constructed programme;
- (i) test results and records as required by the detailed design information and during construction phase of the project;
- (j) a stage 3 road safety audit subject to any exceptions to the road safety audit standard as agreed by the undertaker and National Highways;

- (k) in so far as it is relevant to the specified works, the health and safety file; and
- (l) such other information as is reasonably required by National Highways to be used to update all relevant databases and to ensure compliance with National Highway's *Asset Data Management Manual* as is in operation at the relevant time.

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

- (a) as constructed drawings in both PDF and AutoCAD DWG formats showing the location and depth of the pipeline as installed and any ancillary or protective measures installed within the strategic road network;
- (b) as constructed information for any utilities discovered or moved during the tunnelling works;
- (c) method statements for the specified works carried out;
- (d) test results and records as required by the detailed design information and during the construction phase of the project;
- (e) in so far as it is relevant to the tunnelling works, the health and safety file; and
- (f) such other information as is reasonably required by National Highways to be used to update all relevant databases and to ensure compliance with National Highway's *Asset Data Management Manual* as is in operation at the relevant time.

“the bond sum” means the sum equal to 200% of the cost of the carrying out the specified works (to include all costs plus any commuted sum) or such other sum agreed between the undertaker and National Highways;

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

“commuted sum” means such sum calculated as provided for in paragraph 9 of this Part of this Schedule to be used to fund the future cost of maintaining the specified works;

“condition survey” means a survey of the condition of National Highways structures and assets within the Order limits that may be affected by the specified works;

“contractor” means any contractor or subcontractor appointed by the undertaker to carry out the specified works;

“defects period” means the period from the date of the provisional certificate to the date of the final certificate which shall be no less than 12 months from the date of the provisional certificate;

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

- (a) site clearance details;
- (b) boundary, environmental and mitigation fencing;
- (c) road restraints systems and supporting road restraint risk appraisal process assessment;
- (d) drainage and ducting as required by DMRB CD 535 Drainage asset data and risk management and DMRB CS551 Drainage surveys – standards for Highways
- (e) earthworks including supporting geotechnical assessments required by DMRB CD622 Managing geotechnical risk and any required strengthened earthworks appraisal form certification;
- (f) pavement, pavement foundations, kerbs, footways and paved areas;
- (g) traffic signs and road markings;

- (h) traffic signal equipment and associated signal phasing and timing detail;
- (i) road lighting (including columns and brackets);
- (j) regime of California Bearing Ratio testing;
- (k) electrical work for road lighting, traffic signs and signals;
- (l) motorway communications as required by DMRB;
- (m) highway structures and any required structural approval in principle;
- (n) landscaping;
- (o) proposed departures from DMRB standards;
- (p) walking, cycling and horse riding assessment and review report;
- (q) stage 1 and stage 2 road safety audits and exceptions agreed;
- (r) utilities diversions; and
- (s) topographical survey;
- (t) maintenance and repair strategy in accordance with DMRB GD304 Designing health and safety into maintenance or any replacement or modification of it;
- (u) health and safety information including any asbestos survey required by GG105 or any successor document; and
- (v) other such information that may be reasonably required by National Highways to be used to inform the detailed design of the specified works;

“detailed design information for the tunnelling works” means such of the following drawings specifications and calculations as are relevant to the tunnelling works—

- (a) site clearance details;
- (b) boundary, environmental and mitigation fencing;
- (c) earthworks including supporting geotechnical assessments required by DMRB CD622 Managing geotechnical risk and any required strengthened earthworks appraisal form certification;
- (d) proposed departures from DMRB standards;
- (e) utilities diversions; and
- (f) other such information that may be reasonably required by National Highways to be used to inform the detailed design of the tunnelling works;

“DMRB” means the Design Manual for Roads and Bridges or any replacement or modification of it;

“final certificate” means the certificate relating to those aspects of the specified works that have resulted in any alteration to the strategic road network to be issued by National Highways pursuant to paragraph 9;

“the health and safety file” means the file or other permanent record containing the relevant health and safety information for the specified works required by the Construction Design and Management Regulations 2015 (or such updated or revised regulations as may come into force from time to time);

“nominated persons” means the undertaker’s representatives or the contractor’s representatives on site during the carrying out of the specified works as notified to National Highways from time to time;

“programme of works” means a document setting out the sequence and timetabling of the specified works;

“provisional certificate” means the certificate of provisional completion relating to those aspects of the specified works that have resulted in any alteration to the strategic road network to be issued by National Highways in accordance with paragraph 7 when it considers the specified works are substantially complete and may be opened for traffic;

“road safety audit” means an audit carried out in accordance with the road safety audit standard;

“road safety audit standard” means DMRB Standard HD GG119 or any replacement or modification of it;

“road space booking” means road space bookings in accordance with National Highways’ Asset Management Operational Requirements (AMOR) including Network Occupancy Management System (NOMS) used to manage road space bookings and network occupancy;

“Specification for Highways Works” means the specification for highways works forming part of the manual of contract documents for highway works published by National Highways and setting out the requirements and approvals procedures for work, goods or materials used in the construction, improvement or maintenance of the strategic road network;

“specified works” means so much of the authorised development, including any maintenance of that work, as is on, in, under or over the strategic road network for which National Highways is the highway authority, including Work No.12 in so far as that crosses the M56 motorway, Work No.16 in so far as that crosses the M53 motorway, and Work No. 22 in so far as that crosses the A41 highway.

“strategic road network” means any part of the road network including trunk roads, special roads or streets for which National Highways is the highway authority including drainage infrastructure, street furniture, verges and vegetation and all other land, apparatus and rights located in, on, over or under the highway;

“tunnelling works” means any specified works which involve tunnelling, boring or otherwise installing the pipeline under the strategic road network without trenching from the surface;

“utilities” means any pipes wires cables or equipment belonging to any person or body having power or consent to undertake street works under the New Roads and Street Works Act 1991; and

“winter maintenance” means maintenance of the road surface to deal with snow and ice.

(3) References to any standards, manuals, contracts, Regulations and Directives including to specific standards forming part of the DMRB are, for the purposes of this Part of this Schedule, to be construed as a reference to the same as amended, substituted or replaced, and with such modifications as are required in those circumstances.

General

3.The undertaker acknowledges that parts of the works authorised by this Order affect or may affect parts of the strategic road network in respect of which National Highways may have appointed or may appoint a highway operations and maintenance contractor.

4. Notwithstanding the limits of deviation permitted pursuant to article 6 (limits of deviation) of this Order, no works in carrying out, maintaining or diverting the authorised development may be carried out under the strategic road network at a distance less than 4 metres below the lowest point of the carriageway surface.

5. References to any standards, manuals, contracts, regulations and directives including to specific standards forming part of the DMRB are, for the purposes of this Part of this Schedule, to be construed as a reference to the same as amended, substituted or replaced, and with such modifications as are required in those circumstances.

Prior approvals and security

- 6.—(1) Any tunnelling works must be designed by the undertaker in accordance with DMRB CD622 unless otherwise agreed in writing by National Highways.
- (2) Subject to sub paragraph (3) the specified works must not commence until—
- (a) a stage 1 and stage 2 road safety audit has been carried out and all recommendations raised by them or any exceptions are approved by National Highways;
 - (b) the programme for those works has been approved by National Highways;
 - (c) the detailed design of the specified works comprising of the following details, insofar as considered relevant by National Highways, has been submitted to and approved by National Highways—
 - (i) the detailed design information, or in respect of tunnelling works the tunnelling detailed design information, incorporating all recommendations and any exceptions approved by National Highways under sub-paragraph (a) ;
 - (ii) details of the proposed road space bookings;
 - (iii) the identity and suitability of the contractor and nominated persons;
 - (iv) a process for stakeholder liaison, with key stakeholders to be identified and agreed between National Highways and the undertaker;
 - (v) information demonstrating that the walking, cycling and horse riding assessment and review process undertaken by the undertaker in relation to the specified works has been adhered to in accordance with DMRB GG142 – Designing for walking, cycling and horse riding; and
 - (d) a scheme of traffic management has been submitted by the undertaker and approved by National Highways such scheme to be capable of amendment by agreement between the undertaker and National Highways from time to time;
 - (e) stakeholder liaison has taken place in accordance with the process for such liaison agreed between the undertaker and National Highways under sub-paragraph (c)(v) above;
 - (f) National Highways has approved the audit brief and CVs for all road safety audits and exceptions to items raised in accordance with the road safety audit standard;
 - (g) the undertaker has agreed the estimate of the commuted sum with National Highways;
 - (h) the scope of all maintenance operations (routine inspections, incident management, reactive and third party damage) to be carried out by the undertaker during the construction of the specified works (which must include winter maintenance) has been agreed in writing by National Highways;

- (i) the undertaker has procured to National Highways collateral warranties in a form approved by National Highways from the contractor and designer of the specified works in favour of National Highways to include covenants requiring the contractor and designer to exercise all reasonable skill care and diligence in designing and constructing the specified works, including in the selection of materials, goods, equipment and plant; and
 - (j) a condition survey and regime of monitoring of any National Highways assets or structures that National Highways reasonably considers will be affected by the specified works, has been agreed in writing by National Highways.
- (3) Sub paragraphs 2(a), 2(b)(iv), 2(b)(v), 2(d), 2(e), 2(f), 2(g) and 2(h) do not apply in respect of any tunnelling works.
- (4) The undertaker must not exercise—
- (a) article 5 (*power to maintain the authorised development*);
 - (b) article 10 (*street works*);
 - (c) article 11 (*power to alter layout etc. of streets*);
 - (d) article 13 (*temporary restriction of public rights of way*);
 - (e) article 14 (*stopping up of public rights of way*);
 - (f) article 15 (*temporary restriction of use of streets*);
 - (g) article 16 (*access to works*);
 - (h) article 19 (*traffic regulation*);
 - (i) article 20 (*discharge of water*);
 - (j) article 22 (*authority to survey and investigate the land*);
 - (k) article 23 (*protective works to buildings*);
 - (l) article 25 (*compulsory acquisition of land*);
 - (m) article 27 (*compulsory acquisition of rights and restrictive covenants*);
 - (n) article 28 (*statutory authority to override easements and other rights*);
 - (o) article 30 (*private rights*);
 - (p) article 32 (*acquisition of subsoil or airspace only*);
 - (q) article 34 (*rights under or over streets*);
 - (r) article 35 (*temporary use of land for carrying out the authorised development*);
 - (s) article 36 (*temporary use of land for maintaining the authorised development*);
 - (t) article 37 (statutory undertakers); or
 - (u) article 40 (*felling or lopping trees*) of this Order,

over any part of the strategic road network or land of National Highways without the consent of National Highways including from ThirdPartySchemesNWA10@nationalhighways.co.uk and Area10Roadspace@nationalhighways.co.uk, and National Highways may in connection with any such exercise require the undertaker to provide details of any proposed road space bookings and/or submit a scheme of traffic management for National Highways' approval.

(5) National Highways must prior to the commencement of the specified works or the exercise of any power referenced in sub-paragraph (4), inform the undertaker of the identity of the person who will act as a point of contact on behalf of National Highways for consideration of the information required under sub-paragraph (2), (3) or (4).

(6) Any approval of National Highways required under this paragraph-

- (a) must not be unreasonably withheld;
- (b) must be given in writing;
- (c) shall be deemed to have been refused if neither given nor refused within 2 months of the receipt of the information for approval or, where further particulars are requested by National Highways (acting reasonably) within 2 months of receipt of the information to which the request for further particulars relates; and
- (d) may be subject to any reasonable conditions as National Highways considers necessary.

(7) Any change to the identity of the contractor and/or designer of the specified works will be notified to National Highways immediately and details of their suitability to deliver the specified works will be provided on request along with collateral warranties in a form agreed by National Highways.

(8) Any change to the detailed design of the specified works must be approved by National Highways in accordance with paragraph 6(2) or 6(3) of this Part.

Construction of the specified works

7.—(1) The undertaker must give National Highways 28 days' notice in writing of the date on which the specified works will start.

(2) The undertaker must comply with National Highways' road space booking procedures prior to and during the carrying out the specified works and no specified works for which a road space booking is required shall commence without a road space booking having first been secured from National Highways.

(3) The specified works must be carried out by the undertaker to the reasonable satisfaction of National Highways in accordance with—

- (a) the relevant detailed design information and programme of works approved pursuant to paragraph 6(2) or 6(3) above or as subsequently varied by agreement between the undertaker and National Highways;
- (b) in so far as it may be applicable the DMRB, the Manual of Contract Documents for Highway Works, including the Specification for Highway Works, together with all other relevant standards as reasonably required by National Highways to include, inter alia; all relevant interim advice notes, the Traffic Signs Manual and the Traffic Signs Regulations and General Directions 2016 save to the extent that exceptions from those standards apply which have been approved by National Highways; and
- (c) all aspects of the Construction (Design and Management) Regulations 2015 or any statutory amendment or variation of the same.

(4) The undertaker must permit and must require the contractor to permit at all reasonable times persons authorised by National Highways (whose identity must have been previously notified to the undertaker by National Highways) to gain access to the specified works for the purposes of inspection and supervision of the specified works.

(5) If any part of the specified works is constructed-

- (a) other than in accordance with the requirements of this Part of this Schedule; or
- (b) in a way that causes damage to the highway, highway structure or asset or any other land of National Highways,

National Highways may by notice in writing require the undertaker, at the undertaker's own expense, to comply promptly with the requirements of this Part of this Schedule or remedy any damage notified to the undertaker under this Part of this Schedule, to the satisfaction of National Highways, acting reasonably.

(6) If during the carrying out of the authorised development the undertaker or its appointed contractors or agents causes damage to the strategic road network then National Highways may by notice in writing require the undertaker, at its own expense, to remedy the damage.

(7) If within 28 days on which a notice under sub-paragraph (5) or sub-paragraph (6) is served on the undertaker (or in the event of there being, in the opinion of National Highways, a danger to road users, within such lesser period as National Highways may stipulate), the undertaker has failed to take the steps required by that notice, National Highways may carry out the steps required of the undertaker and may recover any expenditure reasonably incurred by National Highways in so doing, such sum to be payable within 30 days of demand.

(8) Nothing in this Part of this Schedule prevents National Highways from carrying out any work or taking any such action as it reasonably believes to be necessary as a result of or in connection with the carrying out or maintenance of the authorised development without prior notice to the undertaker in the event of an emergency or to prevent the occurrence of danger to the public and National Highways may recover any expenditure it reasonably incurs in so doing.

(9) In constructing the specified works, the undertaker must at its own expense divert or protect all utilities and where relevant all agreed alterations and reinstatement of highway over existing utilities must be constructed to the satisfaction of National Highways.

(10) During the construction of the specified works, with the exception of any tunnelling works, the undertaker must carry out all maintenance (including winter maintenance) in accordance with the scope of maintenance operations agreed by National Highways pursuant to paragraph 6(2)(h) and the undertaker must carry out such maintenance at its own cost.

(11) The undertaker must notify National Highways if it fails to complete the specified works in accordance with the agreed programme pursuant to paragraph 6(2)(b) of this Part, or suspends the carrying out of any specified work beyond 14 days, and National Highways reserves the right to withdraw any road space booking granted to the undertaker to ensure compliance with its network occupancy requirements.

Payments

8.—(1) The undertaker must pay to National Highways a sum equal to the whole of any reasonable costs and expenses which National Highways incurs (including costs and expenses for using internal or external staff and costs relating to any work which becomes abortive) in relation to the specified works and in relation to any approvals sought under this Order, or otherwise incurred under this Part, including—

- (a) the checking and approval of the information required under paragraph 6(2);
- (b) the supervision of the specified works;
- (c) the checking and approval of the information required to determine approvals under this Order;
- (d) all costs in relation to the transfer of any land required for the specified works; and

- (e) all legal and administrative costs and disbursements incurred by National Highways in connection with the Order and sub-paragraphs (a)-(d); and
- (f) any value added tax which is payable by National Highways in respect of such costs and expenses and for which it cannot obtain reinstatement from HM Revenue and Customs,

together comprising “the NH costs”.

(2) The undertaker must pay to National Highways upon demand and prior to such costs being incurred the total costs that National Highways believe will be properly and necessarily incurred by National Highways in undertaking any statutory procedure or preparing and bringing into force any traffic regulation order or orders necessary to carry out or for effectively implementing the authorised development.

(3) National Highways must provide the undertaker with a schedule showing its estimate of the NH costs prior to the commencement of the specified works and the undertaker must pay to National Highways the estimate of the NH costs prior to commencing the specified works and in any event prior to National Highways incurring any cost.

(4) If at any time after the payment referred to in sub-paragraph (3) has become payable, National Highways reasonably believes that the NH costs will exceed the estimated NH costs it may give notice to the undertaker of the amount that it believes the NH costs will exceed the estimate of the NH costs (the excess) and the undertaker must pay to National Highways within 28 days of the date of the notice a sum equal to the excess.

(5) National Highways must give the undertaker a final account of the NH costs referred to in sub-paragraph (1) above within 91 days of the issue of the provisional certificate issued pursuant to paragraph 10(4).

(6) Within 28 days of the issue of the final account:

(a) if the final account shows a further sum as due to National Highways the undertaker must pay to National Highways the sum shown due to it;

(b) if the account shows that the payment or payments previously made by the undertaker have exceeded the costs incurred by National Highways, National Highways must refund the difference to the undertaker.

(7) If any payment due under any of the provisions of this Part of this Schedule is not made on or before the date on which it falls due the party from whom it was due must at the same time as making the payment pay to the other party interest at 3% above the Bank of England base lending rate from time to time being in force for the period starting on the date upon which the payment fell due and ending with the date of payment of the sum on which interest is payable together with that interest.

Provisional Certificate

9.—(1) Following the completion of any specified works or prior to reopening any part of the strategic road network following any closure or partial closure, whichever shall be sooner, the undertaker shall notify National Highways who will carry out a site inspection to satisfy itself that the strategic road network is, in its opinion, safe for traffic and the undertaker must comply with any requirements of National Highways.

(2) As soon as the undertaker considers that the provisional certificate may be properly issued it must apply to National Highways for the provisional certificate.

(3) Following an application for a provisional certificate, National Highways must as soon as reasonably practicable:

- (a) inspect the specified works; and

(b) provide the undertaker with a written list of works that are required for the provisional certificate to be issued or confirmation that no further works are required for this purpose.

(4) Subject to sub paragraph (7) when—

(a) a stage 3 road safety audit for the specified works has been carried out and all recommendations raised including remedial works have (subject to any exceptions agreed) been approved by National Highways;

(b) the specified works incorporating the approved remedial works under sub-paragraph (4)(a) have been completed to the satisfaction of National Highways;

(c) any further works notified to the undertaker pursuant to sub-paragraph 9(3)(b) have been completed to the satisfaction of National Highways;

(d) the as built information, or where relevant the as built information for tunnelling works, has been provided to National Highways; and

(e) the undertaker has paid the commuted sum to National Highways,

National Highways must issue the provisional certificate.

(5) On the issue of the provisional certificate the bond sum shall be reduced to 20% of the total bond sum save insofar as any claim or claims have been made against the bond before that date in which case National Highways will retain a sufficient sum to ensure it does not have to meet any costs for or arising from the specified works.

(6) The undertaker must submit a stage 4 road safety audits as required by and in line with the timescales stipulated in the road safety audit standard. The undertaker must comply with the findings of the stage 4 road safety audit and must pay all costs of and incidental to such and provide updated as-built information to National Highways.

(7) Sub paragraphs (4)(a), 4(b), 4(e) and (6) do not apply in respect of any tunnelling works.

Opening

10. (1) Where it has been necessary to close, in whole or in part, the strategic road network the undertaker must notify National Highways not less than 56 days in advance of the intended date of opening to the public of the strategic road network and the undertaker must notify National Highways of the actual date the strategic road network will be opened to the public within 14 days of that date.

(2) The undertaker must notify National Highways as soon as possible, and in any event within 5 days, of completion of any tunnelling works.

Final condition survey

11.—(1) The undertaker must, as soon as reasonably practicable after making its application for a provisional certificate pursuant to paragraph 9(2), arrange for any highways structures and assets that were the subject of the condition survey under paragraph 6(2)(c) to be re-surveyed and must submit the re-survey to National Highways for its approval. The re-survey will include a renewed geotechnical assessment required by DMRB CD622 if the specified works include any works beneath the strategic road network.

(2) If the re-surveys carried out pursuant to paragraph 11 (1) indicates that any damage has been caused to a structure or asset, the undertaker must submit a scheme for remedial works in writing to National Highways for its approval in writing and the undertaker must carry out the remedial works at its own cost and in accordance with the scheme submitted.

(3) If the undertaker fails to carry out the remedial work in accordance with the approved scheme, National Highways may carry out the steps required of the undertaker and may recover any expenditure it reasonably incurs in so doing.

(4) National Highways may, at its discretion, at the same time as giving its approval to the re-surveys pursuant to paragraph 12(1) give notice in writing that National Highways will remedy any damage identified in the re-surveys and National Highways may recover any expenditure it reasonably incurs in so doing from the undertaker.

(5) The undertaker must make available to National Highways upon request copies of any survey or inspection reports produced pursuant to any inspection or survey of any specified work following its completion that the undertaker may from time to time carry out.

Defects Period

12.—(1) The undertaker must at its own expense remedy any defects in the strategic road network as are reasonably required by National Highways to be remedied during the defects period. All identified defects must be remedied in accordance with the following timescales—

- (a) in respect of matters of urgency, within 24 hours of receiving notification for the same (urgency to be determined at the absolute discretion of National Highways);
- (b) in respect of matters which National Highways considers to be serious defects or faults, within 14 days of receiving notification of the same; and
- (c) in respect of all other defects notified to the undertaker, within 4 weeks of receiving notification of the same.

(2) Following the expiry of the defects period National Highways has responsibility for routine maintenance of the strategic road network save for any soft landscaping works which must be established and which must thereafter be maintained for a period of 3 years by and at the expense of the undertaker.

Final Certificate

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

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

- (a) inspect the strategic road network; and
- (b) provide the undertaker with a written list of any further works required to remedy or make good any defect or damage in the strategic road network or confirmation that no such works are required for this purpose.

(3) The undertaker must carry out such works notified to it pursuant to sub-paragraph 13(2).

(4) When National Highways is satisfied that:

- (a) any defects or damage arising from defects during the defects period and any defects notified to the undertaker pursuant to sub-paragraph 13(2) and any remedial works required as a result of, where necessary, a stage 4 road safety audit have been made good to the satisfaction of National Highways; and
- (b) the NH costs have been paid to National Highways in full;

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

(5) The undertaker must pay to National Highways within 28 days of demand the costs reasonably incurred by National Highways in identifying the defects and supervising and inspecting the undertaker's work to remedy the defects that it is required to remedy pursuant to these provisions.

Security

14.—(1) The specified works must not commence until—

- (a) the undertaker procures that the specified works are secured by a bond from a bondsman first approved by National Highways in the agreed form between the undertaker and National Highways to indemnify National Highways against all losses, damages, costs or expenses arising from any breach of any one or more of the obligations of the undertaker in respect of the exercise of the powers under this Order and the specified works under the provisions of this Part of this Schedule provided that the maximum liability of the bond must not exceed the bond sum; and
- (b) the undertaker has provided the cash surety which may be utilised by National Highways in the event of the undertaker failing to meet its obligations to make payments under paragraph 8 or to carry out works the need for which arises from a breach of one or more of the obligations of the undertaker under the provisions of this Part of this Schedule.

Commuted sums

15.—(1) Subject to sub paragraph (3) National Highways must provide to the undertaker an estimate of the commuted sum, calculated in accordance with FS Guidance S278 Commuted Lump Sum Calculation Method dated 18 January 2010 or any successor guidance, prior to the commencement of the specified works.

(2) The undertaker must pay to National Highways the commuted sum prior to the issue of the provisional certificate.

(3) Paragraph 15 does not apply to any tunnelling works.

Insurance

16. Prior to the commencement of the specified works the undertaker must effect and maintain in place until the issue of the final certificate, public liability insurance with an insurer in the minimum sum of £10,000,000.00 (ten million pounds) in respect of any one claim against any legal liability for damage loss or injury to any property or any person as a direct result of the execution of specified works or use of the strategic road network by the undertaker.

Indemnity

17. The undertaker fully indemnifies National Highways from and against all reasonable costs, claims, expenses, damages, losses and liabilities suffered by National Highways arising from the construction, maintenance or use of the specified works or exercise of or failure to exercise any power under this Order within 30 days of demand save for any loss arising out of or in consequence of any negligent act or default of National Highways.

Maintenance of the specified works

18.—(1) The undertaker must, prior to the commencement of any works of external maintenance to the specified works, give National Highways 28 days' notice in writing of the date on which those works will start unless otherwise agreed by National Highways, acting reasonably. Works of inspection or maintenance undertaken from within the pipeline will not be subject to this paragraph.

(2) If, for the purposes of maintaining the specified works, the undertaker needs to occupy any road space, the undertaker must comply with National Highways' road space booking requirements and no maintenance of the specified works for which a road space booking is required shall commence without a road space booking having first been secured.

(3) The undertaker must comply with any reasonable requirements that National Highways may notify to the undertaker, such requirements to be notified to the undertaker not less than 14 days' in advance of the planned commencement date of the maintenance works.

(4) The provisions of paragraph 10 shall apply to the opening of any part of the strategic road network following occupation of any road space under this paragraph.

Land

19.—(1) Following the issue of the final certificate pursuant to paragraph 13(4) National Highways may serve notice on the undertaker that it wishes to take a freehold transfer of land within the extent of strategic road network boundary which is not in the ownership of National Highways but has been acquired by the undertaker for the purposes of carrying out the specified works.

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

(3) Where not covered under sub paragraphs (5), (6) or (7) the undertaker must not under the powers of this Order:

- (a) acquire or use land forming part of;
- (b) acquire new or existing rights over; or
- (c) seek to impose or extinguish any restrictive covenants over;

any of the strategic road network, or extinguish any existing rights of National Highways in respect of any third party property, except with the consent of National Highways by written request to legalservicesinbox@nationalhighways.co.uk.

(4) Where any land or interest is proposed to be acquired for the benefit of National Highways, the undertaker must, unless otherwise agreed by National Highways, exercise article 25 (*compulsory acquisition of land*) and article 27 (*compulsory acquisition of rights and restrictive covenants*) as applied by articles 31 (*application of the 1981 Act*) and article 33 (*modification of Part 1 of the 1965 Act*) of this Order to directly vest in National Highways any such land or interest.

(5) The undertaker must not, in reliance on or in exercise of any power under this Order, interfere with, remove, damage or prevent or impair the functioning of, and must on reasonable request (or in case of emergency, on demand) allow access by National Highways to, the highway drainage assets located in plots 2-14, 4-20, 5-01, 5-02, 5-03, 5-04, 5-10, 5-14, 5-15, 5-20, 5-22, 5-23, 6-02, 6-04, 6-05, 6-06,

(6) The undertaker must not, in reliance on or in exercise of any power under this Order, interfere with, remove or prevent access by National Highways in pursuance of any right held over plots 2-03, 2-14 and 5-05.

(7) The undertake must not, in reliance on or in exercise of any power under this Order, acquire, extinguish or remove any right National Highways holds for the purposes of its undertaking in any of the plots listed in sub-paragraph (5) and (6) and plot 9-04.

Expert Determination

20.—(1) Article 49 (*arbitration*) of the Order does not apply to this Part of this Schedule.

(2) Any difference under this Part of this Schedule may be referred to and settled by a single independent and suitable person who holds appropriate professional qualifications and is a member of a professional body relevant to the matter in dispute acting as an expert, such person to be agreed by the differing parties or, in the absence of agreement, identified by the President of the Institution of Civil Engineers.

(3) On notification by either party of a dispute, the parties must jointly instruct an expert within 14 days of notification of the dispute.

(4) All parties involved in settling any difference must use all reasonable but commercially prudent endeavours to do so within 21 days from the date that an expert is appointed.

(5) The expert must—

- (a) invite the parties to make submission to the expert in writing and copied to the other party to be received by the expert within 7 days of the expert's appointment;
- (b) permit a party to comment on the submissions made by the other party within 7 days of receipt of the submission;
- (c) issue a decision within 7 days of receipt of the submissions under sub-paragraph (b); and
- (d) give reasons for the decision.

(6) Any determination by the expert is final and binding, except in the case of manifest error in which case the difference that has been subject to expert determination may be referred to and settled by arbitration under article 49 (*arbitration*).

(7) The fees of the expert are payable by the parties in such proportions as the expert may determine or, in the absence of such determination, equally.