

A14
Cambridge to Huntingdon
improvement scheme
Development Consent Order Application
Response to the First Written Questions

HE/A14/EX/33

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Development Consent Order Application Response to the First Written Questions
Report 6: Development Consent Order

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The Infrastructure Planning (Examination Procedure) Rules 2010

A14 Cambridge to Huntingdon improvement scheme

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(Report 6: Development Consent Order)

Contents

6 Development Consent Order.....	5
Question 1.6.1.....	5
Response.....	5
Question 1.6.2.....	7
Response.....	7
Question 1.6.3.....	8
Response.....	8
Question 1.6.4.....	9
Response.....	9
Question 1.6.5.....	10
Response.....	10
Question 1.6.6.....	11
Response.....	11
Question 1.6.7.....	12
Response.....	12
Question 1.6.8.....	13
Response.....	13
Question 1.6.9.....	14
Response.....	14
Question 1.6.10.....	15
Response.....	15
Question 1.6.11.....	17
Response.....	17
Question 1.6.12.....	18
Response.....	18
Question 1.6.13.....	20
Response.....	20
Question 1.6.14.....	21
Response.....	21
Question 1.6.15.....	22
Response.....	22
Question 1.6.16.....	23
Response.....	23
Question 1.6.17.....	26
Response.....	26

Question 1.6.18.....	27
Response.....	27
Question 1.6.19.....	28
Response.....	28
Question 1.6.20.....	29
Response.....	29
Question 1.6.21.....	30
Response.....	30
Question 1.6.22.....	31
Response.....	31
Question 1.6.23.....	32
Response.....	32
Question 1.6.24.....	33
Response.....	33
Question 1.6.25.....	34
Response.....	34
Question 1.6.26.....	35
Response.....	35
Question 1.6.27.....	36
Response.....	36
Question 1.6.28.....	37
Response.....	37
Question 1.6.29.....	38
Response.....	38
Question 1.6.30.....	39
Response.....	39
Question 1.6.31.....	40
Response.....	40
Question 1.6.32.....	41
Response.....	41
Question 1.6.33.....	42
Response.....	42
Question 1.6.34.....	44
Response.....	44
Question 1.6.35.....	45
Response.....	45

Question 1.6.36.....	46
Response.....	46
Question 1.6.37.....	47
Response.....	47

6 Development Consent Order

Question 1.6.1

Art 2 - definitions: 'authorised development' - What is the 'other development' authorised by this order and where is it identified in the draft DCO? 'commence' – is it the case that the exclusion of certain works from constituting a commencement has consequences for the effectiveness of certain requirements (see below relating to requirement 1)? 'compulsory acquisition notice' – is this necessary. There does not appear to be another reference to it in the DCO 'cycle tracks' – these are limited to cycle tracks which include a right of way on foot. Is this correct? 'Secretary of state' – the regulation of aspects of the proposal are by the same person as the consenting authority. Are there any changes to the structure, function or status of the applicant which would change this set-up?

Response

1. Highways England sets out its response to the Examining Authority's questions on specific definitions in the draft Development Consent Order ("DCO") as follows:
 - 'the authorised development' - The definition as drafted is standard, and reflects a number of other made DCOs. For example, the recently-made White Moss Landfill Order 2015 (S.I. 2015/1317) together with DCOs for various highway schemes including the Northumberland County Council (A1 - South East Northumberland Link Road (Morpeth Northern Bypass)) Development Consent Order 2015 (S.I. 2015/23), A160/A180 (Port of Immingham Improvement) Development Consent Order 2015 (S.I. 2015/129) and A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 (S.I. 2014/2269) all contain identical or similar definitions which incorporate the concept of 'other development'. This is simply to reflect the fact that certain articles within DCOs authorise development which is not contained within Schedule 1 to the DCO. For example, article 18 of the draft DCO would authorise Highways England to carry out protective works to buildings, but such works are not referred to in Schedule 1.
 - 'commence' - The definition of commence has been incorporated into the draft DCO in order to allow Highways England to carry out certain preliminary works prior to full discharge of the requirements contained in Schedule 2 to the draft DCO. Highways England is aware that this has the potential to impact on certain requirements. As such, this matter is currently under review and a modified definition will be included within the next draft of the DCO submitted to the Examination.

- 'compulsory acquisition notice' - Highways England agrees that this is a redundant definition and it will be deleted in the next draft of the DCO.
- 'cycle tracks' - The definition of 'cycle track' under s.329 of the Highways Act 1980 is "a way constituting or comprised in a highway, being a way over which the public have the following, but no other, rights of way, that is to say, a right of way on pedal cycles (other than pedal cycles which are motor vehicles within the meaning of the Road Traffic Act 1988) with or without a right of way on foot". As such, cycle tracks can include a right of way on foot and pedal cycle at the same time. Highways England can confirm that it is seeking authorisation for such cycle tracks, as those which form part of the authorised development are intended for use by both cyclists and pedestrians.
- 'the Secretary of State' - With effect from 1 April 2015 Highways England was designated under the Infrastructure Act 2015 as a highway authority for nearly all highways within England for which the Secretary of State for Transport (acting via the Highways Agency) was previously highway authority, including the A14 trunk road. By virtue of The Infrastructure Act 2015 (Strategic Highways Companies) (Consequential, Transitional and Savings Provisions) Regulations 2015 the DCO application was, from the same date, effectively transferred to Highways England. Ultimately Highways England will be 'the undertaker' for the purposes of the Order, if made. As such, the definition of 'undertaker' will be amended in the next draft of the DCO to make clear that this is Highways England, rather than the Secretary of State. Highways England is considering which would be the most appropriate body to discharge the requirements contained in Schedule 2 to the DCO following Highways England's transition from the Highways Agency. This issue has wider impacts than just on this application – for example, it has also been raised in Highways England's application for the A19/A1058 Coast Road junction improvement scheme. Highways England will provide the Examining Authority with an update on this issue at a later stage of the Examination.

Question 1.6.2

Art 3 – Given the disapplication of powers particularly those in relation to watercourses, flood defence, land drainage and waterways what agreements, if any, has been reached as to the inclusion of these provisions with the relevant authorities as per s150 of the 2008 Act?

Response

2. Highways England is currently in discussions with the relevant consenting bodies whose agreement is required under section 150 of the Planning Act 2008 to disapply the consents specified in article 3. It is hoped that such agreement will, in due course, be confirmed in the relevant Statements of Common Ground or by separate correspondence later in the Examination. Highways England will keep the Examining Authority updated as to how these discussions are progressing.

Question 1.6.3

Art 8(2) – Should the statutory undertakers having the express benefit of the DCO be identified?

Response

3. Highways England does not consider that, at this stage, there is any requirement for specific statutory undertakers to have the benefit of the DCO and, indeed, no statutory undertaker has to date expressed any wish to be expressly identified. The wording of this article follows a number of other made DCOs and gives relevant third parties sufficient comfort but it will be kept under review as discussions with the relevant statutory undertakers draw to a conclusion.

Question 1.6.4

Art 9 – Should this article be amended to gain consent from the secretary of state? Is it appropriate to transfer “all or any” of the benefit of the powers given the need for a co-ordinated approach to the project?

Response

4. As a result of the change in status of the applicant, Highways England considers that it would now be appropriate for the Secretary of State to have a consenting role in any transfer of the benefit of the Order. This will be reflected in the next draft of the DCO.
5. In respect of the wording ‘any or all’, this is standard wording in a number of made DCOs. Highways England agrees with the Examining Authority’s contention as to co-ordination in the carrying out of the development. However, this wording simply reflects flexibility that may be required in future should discrete elements need to be transferred for effective delivery. The Secretary of State’s consenting role would ensure that a co-ordinated approach to the execution of the project is maintained.

Question 1.6.5

Art 11(1) (2) and (4)- 'unless otherwise' agreed' is considered informal without the qualifying words 'in writing' should these words therefore be included and with regard to transfer of powers to the relevant highway authority have discussions already been had with the relevant authorities?

Response

6. Highways England accepts the suggestion that the words 'in writing' should be added to the DCO for the sake of certainty. This will be reflected in the next draft of the DCO.
7. Discussions are on-going with Cambridgeshire County Council (as local highway authority) in respect of the transfer of assets, whether such assets be new 'local' roads or 'de-trunked' roads. It is anticipated that arrangements for the handover process will be regulated by a legal agreement, a draft of which is currently the subject of discussions between Highways England and Cambridgeshire County Council. The parties' intentions are that this is concluded well before the end of the Examination.

Question 1.6.6

Art 14 – Have discussions been had with the relevant street authority on deemed consent for applications after 28 days, given that this would be outside the normal statutory process?

Response

8. The 28-day deemed consent provision within article 14 of the draft DCO is a standard provision which has appeared in a number of made DCOs. See, for example, the Cornwall Council (A30 Temple to Higher Carblake Improvement) Order 2015 (S.I. 2015/147) and the A160/A180 (Port of Immingham Improvement) Development Consent Order 2015 (S.I. 2015/129).
9. No discussions to date have taken place with the relevant street authority(s) specifically on this point but, equally, Highways England is not aware of any objections to the inclusion of this provision within the DCO. However, Highways England will discuss the mechanics of this article with the relevant street authority(s) as part of on-going discussions.

Question 1.6.7

Art 16 – Are there any differences between the proposed restrictions and those that would apply under RTRA 1984. If so, how do they compare?

Response

10. Highway authorities have previously made orders under the Road Traffic Regulation Act 1984 to bring into effect similar restrictions to those contained in article 16 of the draft DCO. As such, there is no material difference to the restrictions included within this article and those that could be imposed by an order made under the Road Traffic Regulation Act 1984. In light of one purpose of a DCO to, in effect, 'wrap up' a number of consents, Highways England has opted to seek to bring into effect clearways restrictions as part of the DCO, together with a number of other traffic regulation matters in Schedule 3 to the draft DCO.

Question 1.6.8

Art 17(7) (b) – Is ‘watercourse’ an excluded term because already defined in article 2. If so, why is there a difference?

Response

11. The definition of 'watercourse' is excluded due to the fact that, as the Examining Authority has pointed out, this term is defined within article 2 of the draft DCO, so no further definition is required in article 17. The wording adopted in the draft DCO reflects the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009, which has been followed in a number of made DCOs to date (albeit that these Model Provisions have now been revoked). The definition within article 2 is very similar to that found in various provisions of the Water Resources Act 1991, but this enactment contains a number of subtly different definitions of 'watercourse' depending on the purpose of the provision to which the definition relates. As such, it is considered that a 'standalone' definition is the easiest solution from an interpretation perspective. This is also the common practice with Transport and Works Act Orders, for the same reason.

Question 1.6.9

Part 5 – should this Part additionally be headed ‘Imposition of Restrictive Covenants’?

Response

12. Highways England does not consider that this additional wording in the Part 5 heading is required. The Part headings do not confer any powers on Highways England and commentary on legislative drafting makes clear that they are simply a label or signpost by indicating the broad scope of the relevant Part and nothing more.
13. The Part heading 'Powers of Acquisition and Possession of Land' is considered to be appropriate. It indicates the scope of the Part, and the imposition of restrictive covenants comes within that scope. The heading of this Part is also well precedented in DCOs and in TWA Orders authorising the imposition of restrictive covenants.

Question 1.6.10

Article 23(1) (2) and (3) refer to restrictive covenants. Which specific areas of land do they refer to and what kinds of restrictive covenants are anticipated?

Response

14. The power to impose restrictive covenants, which is provided for in article 23(1), is required in connection with areas of land which will need to be controlled by Highways England for the purpose of ensuring the long term maintenance of mitigation measures required to be secured as part of the delivery of the scheme, but which are not compulsorily acquired by Highways England.
15. As is explained in Highways England's response to the Examining Authority's Written Question 1.4.1, Highways England is open to the possibility that as the detailed design of the scheme is progressed, it may be able to agree solutions with landowners which allow certain discrete elements of the scheme (such as areas required in connection with the provision of ecological or flood mitigation) to be delivered through the use of powers of temporary possession in combination with the imposition of restrictive covenants, to ensure that Highways England's obligations to secure mitigation (as part of the scheme) could continue to be met, notwithstanding the fact that Highways England may not actually own the land in question.
16. As is also explained in the response to Question 1.4.1, at this stage in the scheme design process, the definitive identification of specific areas which could be dealt with in this manner would risk compromising the integrity of the detailed design process. For that reason, Highways England considers that the power of compulsory acquisition sought in article 20 of the draft DCO is necessary to secure the vast majority of the land required for the scheme. Should the outcomes of the detailed design process and negotiations with landowners prove otherwise, then in combination with powers of temporary possession, Highways England would need to employ the power to impose restrictive covenants which is provided in article 23.

17. For example, Highways England considers that the power in article 23 to impose restrictive covenants could be engaged in respect of land which is proposed to be compulsorily acquired to provide borrow pits for the purposes of mineral extraction. Highways England's current intention is to acquire the land required for borrow pits, as is explained in the *Response to Relevant Representations* document (*document reference HE/A14/EX/25 (at page 142)*). However, discussions have commenced with affected landowners to ascertain their interest in taking borrow pit land back on completion of the scheme. Such discussions are likely to continue whilst the scheme construction is progressed. In the event of returning the land to its owner following temporary possession, the terms of such 'handback' would include commitments to secure agreed restoration and aftercare proposals.
18. The power in article 23 to impose restrictive covenants on land within the Order limits would be essential in this scenario to ensure that any use of the land would not inhibit the Borrow Pits Restoration Plan (as secured by requirement 10 of the DCO and currently contained in Appendix 3.3 to the *Environmental Statement (document reference 6.3)*).

Question 1.6.11

Art 25 What is the justification for the list of private rights. Should it additionally include 'restrictive covenants'?

Response

19. The list of private rights in article 25(9) of the draft Development Consent Order (DCO) is drafted widely to ensure that once a general vesting declaration or a transfer of land following a notice to treat is made in respect of any plots which are compulsorily acquired, Highways England can take the land free from encumbrances. This includes restrictive covenants, which are 'restrictions on the user of land'.
20. As set out in the *Statement of Reasons (document reference HE/A14/EX/42)* there is a proposed use for each of the plots of land affected by the scheme. The provisions in article 25 are intended to ensure the removal of any restrictions on the title to this land, which is standard practice in a compulsory acquisition scenario.

Question 1.6.12

Art 30 – In relation to the taking of temporary possession of land, does this article anticipate temporary possession of land which is additionally being permanently acquired? Alternatively do the provisions of temporary and permanent possession relate to separate areas of land? Is it intended that there will be protection for vehicular access and other rights over private property during periods where temporary possession may be needed?

Response

Temporary Possession of Land proposed to be Compulsorily Acquired

21. The effect of article 30(1)(a)(ii), taken with the definition of 'the Order land', would be to give Highways England the ability to possess temporarily, for the purposes of carrying out the authorised development, land which is shown on the *Land Plans (document reference 2.03, with some sheets updated at HE/A14/EX/12)*, that form part of the Development Consent Order application as being land which Highways England proposes to acquire compulsorily.
22. The *Statement of Reasons (document reference HE/A14/EX/16)* demonstrates Highways England's justification and reasoning for the compulsory acquisition of the plots identified in the *Book of Reference (document reference HE/A14/EX/02)*, and this DCO provision does not change this justification.
23. The provisions in article 30 have been included in the draft DCO to give Highways England the flexibility to implement and successfully deliver the scheme and its environmental mitigation. This flexibility is required for two reasons.
24. First, it may be that, during the detailed design and construction of the scheme, it becomes apparent that the full extent of the land proposed to be acquired is not needed for the construction and operation of the scheme. In this case, Highways England would decide not to utilise its powers to acquire compulsorily all of the proposed land and would only acquire compulsorily the land required for the scheme. This reflects Highways England's commitment to minimise the land take impact of the scheme where it is appropriate and possible to do so.
25. Where plots were not later acquired, Highways England would still need the ability to use all of this land for the construction of the scheme, and would therefore utilise this provision to enable it to access the land and possess it temporarily during construction of the scheme.

26. Secondly, the precise positioning of some elements of the scheme may not be known at the start of construction and so in order not to acquire more land than is absolutely necessary for the scheme, in these instances Highways England may well wish initially to occupy and use the land concerned using the DCO's temporary possession powers and only then serve the relevant notice(s) to treat or execute the relevant General Vesting Declaration(s) once it has become clear how much of the land concerned does need to be acquired.
27. At this stage in the design of the scheme and its environmental mitigation, however, as shown on the *General Arrangement Plans (document reference 2.02)* and explained in the *Statement of Reasons (document reference HE/A14/EX/42)*, it is Highways England's view that the full extent of every plot needs to be included within the scope of the DCO's compulsory acquisition powers.
28. In summary, therefore, this article of the DCO does anticipate temporary possession of land which is proposed to be permanently acquired. Highways England's response to the Examining Authority's Question 1.4.1 provides a further illustration of this approach.

Protection for Vehicular Access and Rights over Private Property during Temporary Possession

29. Where it is possible, it is Highways England's intention that its commitment to working with affected landowners during construction of the scheme and environmental mitigation is contained within Parts 5 and 8 of the Code of Construction Practice (*Environmental Statement Appendix 20.2 (document reference 6.3)*).
30. These parts of the Code of Construction Practice set out the arrangements for managing and monitoring construction sites and activities to ensure that there are minimal impacts on agricultural and business activities during construction, including on access and other private rights.
31. Highways England is engaging with landowners to identify fully the nature of their concerns in relation to access and private rights during both temporary possession and after compulsory acquisition and will commit to practical measures to alleviate those concerns where possible.
32. This will also be recorded in the Statements of Common Ground which are to be submitted at Deadline 3 of the Examination, on 26 June 2015 and, where necessary, in updates to the application documents submitted during the Examination.

Question 1.6.13

30(3) – What will be the measure for the ‘completion’ of works in order for owners to know when they can re-occupy land which is temporarily possessed.

Response

33. The wording contained in article 30(3) is standard and has been incorporated in a number of made DCOs to date. Because of the nature of the purposes for which temporary possession of land is required, it is not possible to define 'completion'. However, the wording in article 30 states that Highways England cannot remain in possession after the end of one year beginning with the date of completion of the specific Work Number (by reference to Schedule 1 to the DCO) in relation to which the land was taken, unless (except in the case of the Schedule 7 land) the land has by that time been acquired by Highways England. As a result, the concept of 'completion' only needs to be applied to very distinct parts of the authorised development and, as such, it should be clear using the ordinary meaning of 'completion' when a particular part of the development has been completed.
34. In any case, compensation is payable for the possession of the land and so it is in Highways England's interest not to keep possession of land longer than is necessary to carry out the authorised development. In reality, Highways England will be in regular contact with relevant landowners, so they will be fully aware of when land can be re-occupied, and the need for landowners' agreement to restoration under article 30(4) is also a relevant mechanism for landowners to know when works have been completed.

Question 1.6.14

30(9) – Why is there a general power for the undertaker to occupy land without having to acquire it first?

Response

35. The nature of temporary possession is that no proprietary interest is acquired in the relevant land. It is simply held on a temporary basis and then handed back to the landowner on completion of the relevant works.
36. Article 30(9) simply makes it clear that Highways England is not *obliged* to acquire any land, or any interest in any land, that is possessed temporarily under article 30. It is a standard provision to prevent the landowner from seeking to force compulsory acquisition of the land. It would not prevent Highways England from opting at a later date to acquire the land if necessary for the scheme (with appropriate compensation then payable to the landowner).

Question 1.6.15

Art 34 –There may be an anomaly between paragraphs (1) and (2) since the term ‘public utility undertaker’ as defined in the 1980 Act does not in any event include an undertaker for public sewers. Additionally that term is limited to suppliers of gas or hydraulic power and no other utility undertakers. Should this article be altered in the light of this point?

Response

37. A number of made DCOs include identical provisions, indicating the Secretary of State’s acceptance of this wording. Highways England is mindful of departing from standard provisions, but it will consider this point further when preparing the next draft of the DCO.

Question 1.6.16

Art 36 – Is it known that there are trees (other than TPO trees) and hedgerows (including ‘important’ hedgerows) which may need to be removed to facilitate development? If so, can they be identified by reference to a plan and schedule?

Response

Vegetation to be retained and removed

38. There are trees, including trees subject to tree preservation orders (TPOs), and hedgerows, but excluding ‘important’ hedgerows, which would need to be removed to facilitate the scheme.
39. The precise extent of vegetation loss would be subject to detailed design and the full detail of individual trees, hedgerows and other vegetation to be removed would be confirmed at that stage. As a result, a plan and accompanying schedule has not been prepared to specifically identify any category of vegetation, subject to designation or otherwise, that is to be either removed or retained. However the *Environmental Statement (ES)* (document reference 6.1) and the *draft Development Consent Order (DCO)* (document reference 3.1) provide information about retained and removed vegetation which is summarised below under three headings.
40. Detail design and construction planning will be informed by a tree survey in accordance with BS5837: 2012 Trees in relation to design, demolition and construction (BSI, 2012) for which some further detail is provided below in the final section of this response.

Trees, hedgerows and other vegetation not subject to designation

41. The principal areas of vegetation loss, including trees and hedgerows are briefly described in chapter 10, paragraph 10.5.3 of the *ES*.
42. Indicative vegetation loss, including trees, hedgerows and shrubs, is illustrated by figure 3.4 of the *Environmental Statement Figures* (document reference 6.2) which also shows trees, hedges and shrubs to be retained within 20m of the scheme boundary and areas where existing vegetation is unaffected by the proposed scheme. However, as stated in the *Errata Report* (document reference HE/A14/EX/10), there are discrepancies between the trees proposed to be retained or removed within the DCO boundary on Figure 3.4 and Figure 3.2 of the *Environmental Statement Figures*. Figure 3.2 (document reference HE/A14/EX/18) has been revised and should be referred to for indication of the trees hedgerows and shrubs to be retained by the scheme. The figure also shows the mitigation proposals.

Trees subject to TPOs

43. Individual and groups of trees that have TPOs in place and which would be affected by the scheme are summarised in chapter 10, paragraph 10.5.2 of the *ES*.
44. Within the *Environmental Statement Figures*, figure 3.2 (as revised – see above) and figure 3.4 both identify where a TPO applies but neither gives details of the TPO or the nature of any work that may be required to TPO trees that are to be retained.
45. Schedule 9 to the *Draft DCO (document reference 3.1)* comprises a descriptive summary of the proposed work to be undertaken to TPOs set out by reference to individually numbered TPOs. This is mainly felling in whole or in part but includes tree surgery where trees subject to TPO are affected but can be retained by the scheme.

Important hedgerows

46. As stated in chapter 9, section 9.2 of the *ES*, an assessment of hedgerows was undertaken to establish if there are any hedgerows that would be 'important' under the Hedgerow Regulations 1997 (amended 2002). No important hedgerows have been identified in the study area.

Detailed design and the management of vegetation affected by the scheme

47. As mentioned above, the precise extent of vegetation loss would be subject to detailed design and the full detail of individual trees, hedgerows and other vegetation to be removed would be confirmed at this point.
48. To limit damage to trees and significant vegetation outside of the land take, detailed design and construction planning will be informed by a tree survey in accordance with BS5837:2012 Trees in relation to design, demolition and construction (BSI, 2012). The survey will include trees next to the scheme boundary (15m either side). See Ref L1 in appendix 20.1 (Register of Environmental Actions and Commitments) of the *Environmental Statement Appendices (document reference 6.3)*.
49. Protective fencing would be erected and maintained for the duration of construction works to limit damage to trees and significant vegetation to be retained within the permanent land take. See Ref L2 in appendix 20.1 (Register of Environmental Actions and Commitments) of the *Environmental Statement Appendices*.

50. The main contractors would protect trees in line with the recommendations in BS5837:2012. Such trees to be protected both in and outside of the scheme boundary would be identified by the main contractor's arboricultural consultants as confirmed by paragraph 10.3.2 of the Code of Construction Practice (CoCP) in appendix 20.2 of the *Environmental Statement Appendices (document reference 6.3)*. Provisions for protective measures are covered by paragraph 10.3.2 of the CoCP. The CoCP is secured by the Draft DCO – see paragraph 3 of Schedule 2.
51. Part 6 of the *Draft DCO* comprises articles 36 and 37 relating to the management of vegetation affected by the scheme. Article 37 relates to TPOs.

Question 1.6.17

Art 43 – Who are the persons referred to as ‘the parties’ that are anticipated in this article to be able to refer any matters (of disagreement) to arbitration? Is it considered they are to include ‘relevant planning authorities’, ‘relevant highway authorities’ and ‘relevant traffic authorities’? If not, why?

Response

52. Article 43 is a very standard arbitration provision which has been included in numerous made DCOs and other similar Orders. The 'parties' are those parties which are in dispute under the terms of the DCO. These could include the 'relevant planning authorities', 'relevant highway authorities' and 'relevant traffic authorities', but could also include other parties who have an interest in the DCO, such as statutory undertakers having the benefit of protective provisions. As such, Highways England considers the current wording to be appropriately broad and so does not consider that it needs to be modified.

Question 1.6.18

Art 44 – A bespoke appeal process is anticipated which is outside the normal statutory process and public general legislation. Has discussion been had with the relevant authorities about the appeal process? If so, what was the outcome?

Response

53. The wording of article 44 has been accepted by the Secretary of State in paragraph 4 of Schedule 17 to the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014. This does alter the existing regime by streamlining the appeals process should a notice be issued under the Control of Pollution Act 1974. Instead of appealing to the Magistrates' Court, the DCO provides for appeals to be made to the Secretary of State with a set timetable for submission of representations. Highways England considers that this approach is appropriate in the context of the scale of the authorised development and to ensure that a robust construction programme is achievable. Similar arrangements are in place in relation to the Crossrail 1 project and were put in place for the construction of HS1. No specific discussions with the local authorities have been held on this issue.

Question 1.6.19

General (1): In each requirement (below) where a relevant party is consulted on a submission for approval should the requirement further recite that the views of the consultee would be reflected in the submission which is subsequently made for approval?

Response

54. Schedule 2 provides for consultation in relation to the discharge of the requirements in two main ways, i.e. either before submission (e.g. paragraph 7(2)) or before approval (e.g. paragraph 8(1)). In practice it is expected that Highways England will carry out all of the consultation obligations, including those that attach directly to the Secretary of State's discharge functions under Schedule 2. The wording of the consultation obligations follows established precedent in DCOs and in conventional TCPA planning permission conditions. In addition, given the well understood meaning pursuant to case law of what an obligation to consult entails, including the duty to take into account conscientiously the responses to consultation before finalising the matter concerned, Highways England does not consider that it is necessary to spell out in each requirement that the views of the consultee should be reflected in the submission subsequently made for approval or should be considered by the decision-maker (as appropriate).

Question 1.6.20

General (2): An earlier version of the draft DCO contained a reference to implementation of construction in accordance with a construction environmental plan (CEMP). Has this requirement been deleted? If so, why?

Response

55. Paragraph 3 of Schedule 2 to the DCO requires the authorised development to be carried out in accordance with the provisions of the code of construction practice ("the CoCP"). The CoCP contains obligations for certain plans to be produced, including a Construction Environmental Management Plan ("CEMP"). As such, the requirement for Highways England (and its contractors) to produce a CEMP is still secured but simply in a different way.

Question 1.6.21

Req 1 – What is the justification for the exclusions from the definition of ‘commence’? How is it considered that will this impact on the need to provide mitigation measures from the outset, for example those in the code of construction practice (Req 3), protected species (Req 4) and archaeology (Req7)?

Response

56. Please see the answer given to Q1.6.1 which comments on the definition of “commence”.

Question 1.6.22

Req 2 – How is it considered that changes to the ‘scheme design’ as shown on the works plans, engineering drawings and sections are such that they are changes which can be ‘agreed in writing’ subsequent to the authorised development being approved?

Response

57. The wording in paragraph 2 of Schedule 2 to the DCO has been included because it is not the purpose of the DCO to approve a detailed design for all of the works comprising the scheme.
58. The purpose of the DCO is to approve an outline (or reference) design within limits/parameters, that has been consulted upon and assessed, i.e. “the authorised development”.
59. Such a provision has also been included in a number of made DCOs to date. For example, the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 (S.I. 2014/2269) at paragraph 3 of Schedule 2.
60. Highways England considers that any changes to the scheme design through this provision would necessarily be minor in order that they could fall within the envelope of assessment carried out by the environmental impact assessment, as recorded in the *Environmental Statement* (document reference 6.1).

Question 1.6.23

Req 3 – What information is available for local residents in relation to the measures to be put in place for good construction practice? In the event that there was a breach of the requirement to comply with the code of construction in the carrying out of works, who would be the enforcing authority? Would the nature and scale of the development be such as to necessitate community liaison measures, for those living in the vicinity of construction works?

Response

61. The code of construction practice ("the CoCP") is secured under paragraph 3 of Schedule 2 to the DCO, such that the authorised development must be carried out in accordance with its terms. As such, any breach of the CoCP would be a breach of the terms of the DCO and the local planning authority has various courses of enforcement action open to it under Part 8 of the Planning Act 2008.
62. Section 4 of the CoCP states how local communities will be engaged with throughout construction. This includes the production of a community engagement strategy which will include (see paragraph 4.1.1 of the CoCP) procedures to:
- inform affected communities in advance of the relevant construction works commencing about how the effects of construction activities will be managed and, as appropriate, mitigated; and
 - maintain effective community engagement throughout the construction period to build on existing relationships with the communities alongside the scheme.
63. Community engagement will continue through the construction period via an already established structure of stakeholder engagement boards and community focus groups. Meetings will be attended by a Community Liaison Officer together with members of the main contractor's site team and local authorities as may be necessary to cover the matters to be discussed (see paragraph 4.1.2 of the CoCP). The Community Liaison Officer will be appointed by the main contractor who will be responsible for liaising with affected landowners, occupiers and agents, as appropriate.
64. Communication will also be achieved through online methods, a scheme newsletter and advance notification of works. There will also be an enquiries and complaints procedure, facilitated by an information telephone line (see paragraph 4.3.1 of the CoCP).

Question 1.6.24

Req 4 – 4(1) Should both ‘*European protected species*’ and ‘*protected species*’ be defined in the DCO? Should the words ‘*reflecting that contained in...*’ be replaced with the words ‘*in accordance with the steps contained in...*’ for more precision?

Response

65. Highways England agrees that definitions where relevant should be included for clarity. As such, this will be taken into account in the next draft of the DCO.
66. The wording 'reflecting that contained in...' has been included in the DCO on the basis of other made DCOs having taken the same approach, which is intended to give a degree of flexibility so that the pre-construction surveys do not have to be precisely the same as those carried out for the purposes of the ES. Highways England is not minded to stray from precedent DCOs and therefore considers that no amendments are necessary. By making the other DCOs, the Secretary of State has shown he is content with this approach of affording a reasonable degree of flexibility whilst also requiring certainty that surveys will be carried out. Further, Natural England has not commented on this point.

Question 1.6.25

At 4(3) for consistency should the words '*in writing*' be inserted after '*unless otherwise agreed...*'? If not, how is it considered that there will be any record of such approvals having been granted? Where protected species are found during the course of the construction process should construction cease until the relevant licences have been obtained?

Response

67. Highways England agrees that the wording suggested by the Examining Authority adds clarity and this will be reflected in the next draft of the DCO.
68. In correspondence to date (including its relevant representation), Natural England has expressed satisfaction in principle with the wording of this requirement and therefore Highways England is not minded to amend paragraph 4(3). However, should Natural England raise any concerns, Highways England will welcome the opportunity to discuss this further. Furthermore, if a protected species is found during construction and a licence is required under the general law in order to disturb it, then the relevant works would need to cease in the meantime, although as that is the position already there is no need for the DCO to say so.

Question 1.6.26

Req 5 – 5(3) should the issue of remediation be determined by the Environment Agency rather than the ‘undertaker’? If not, why not?

Response

69. Paragraph 5 of Schedule 2 to the DCO requires that previously unidentified contamination of land or groundwater is reported to the relevant planning authority or the Environment Agency as appropriate, that a risk assessment is undertaken and, where Highways England determines that remediation is necessary, that any remediation should be undertaken in accordance with a scheme approved by the Secretary of State having consulted with the relevant planning authority or Environment Agency as appropriate.
70. The requirement has been drafted in this way to reflect the respective statutory functions of the Environment Agency and local authorities in relation to different types of contamination. The 'as appropriate' wording is included to highlight the fact that there is often overlap between local authorities' and the Environment Agency's functions.
71. Highways England considers that this wording is appropriate and does include an active role for the Environment Agency (or the local authority) should any contamination be identified. It will be notified of the contamination and, in reality, be heavily involved in any risk assessment. Usual practice is for dialogue between a developer and the Environment Agency to be on going in such circumstances. It is for Highways England to 'determine' whether remediation is required because Highways England is best placed to consider what the scheme requires in terms of remediation, although Highways England will be in receipt of the views of the Environment Agency as to what action might be required. Further, the Environment Agency and the local planning authority have a consultation role in the approval of any remediation scheme of works. Indeed, section 9.3 of the Code of Construction Practice further covers the development of a remediation strategy, which will be consulted on with the regulatory authorities prior to implementation.
72. However, Highways England is in on-going discussions with the Environment Agency on a number of issues and is happy to discuss any concerns or desired amendments that are raised.

Question 1.6.27

Req 6 – 6(1) How is it considered the timing of the submission of the landscaping scheme be regulated and should the scheme be submitted before development commences? If not, why not?

Response

73. Highways England considers that the requirement contained in paragraph 6 of Schedule 2 to the DCO clearly implies that any scheme of landscaping must be submitted relatively early within the construction programme. This is because paragraph 6(1) sets out that the authorised development must be landscaped in accordance with an approved scheme. As a result, no landscaping can take place until a scheme has been approved. The drafting has not 'regulated' the submission of approved details prior to the commencement of development on the basis that landscaping is not considered by Highways England to be a fundamental point that needs to be confirmed prior to any works being carried out. By its very nature, landscaping will take place later in the construction programme and there is therefore flexibility as to precisely when the scheme should be submitted for approval. This is considered reasonable and reflects the same approach taken in other DCOs.

Question 1.6.28

At 6(3) Does the reference to ‘*a reasonable standard*’ and ‘*appropriate BS.*’ accord with the need for precision and enforceability in the drafting of conditions as set out in the NPPF paragraph 206?

Response

74. Highways England considers that the references to 'reasonable standard' and 'appropriate British Standards' are appropriate and they also follow established DCO and other precedents. The precision of the requirement contained in paragraph 6 of Schedule 2 to the DCO comes from the requirement to carry out the landscaping in accordance with a specific scheme that has been approved by a separate body. The references to 'standard' simply relate to how certain works should be carried out. There is also a risk that referring to specific standards may prejudice Highways England's ability to adhere to any new standards in future. In any case, the reference to 'British Standards' is specific. As such, Highways England does not propose to make any amendments to this provision of the DCO at this stage.

Question 1.6.29

Req 8 – How would the timing of the submission of the traffic management plan (for each part) be regulated and at what stage? Should ‘*relevant planning authority*’ in 8(1) instead read ‘*relevant highway authority*’?

Response

75. The requirement contained in paragraph 8 of Schedule 2 to the DCO states that no part of the authorised development can be commenced until a traffic management plan applicable to the construction of that part has been submitted and approved. As a result, Highways England considers that the timing of submission of the traffic management plans is regulated - before commencement of development of the relevant part of the scheme. Subject to that, a degree of flexibility needs to be afforded in terms of quite when the traffic management plan should be submitted for approval.
76. In the context of conventional planning permissions, traffic management plans are matters for the planning authority. As such, Highways England considers it appropriate for the traffic management plan to be subject to consultation with the local planning authority prior to approval. In turn, the local planning authority can be expected to consult the relevant highway authority.

Question 1.6.30

Req 9 – How would the timing of the submission of the surface water drainage be regulated?

Response

77. The requirement contained in paragraph 9 of Schedule 2 to the DCO states that no part of the authorised development can be commenced until written details of the surface water system to be constructed for that part have been submitted and approved. As a result, Highways England considers that the timing of submission of details is regulated - before commencement of development of the relevant part. Subject to that, a degree of flexibility needs to be afforded in terms of quite when the details of the surface water system to be constructed for that part should be submitted for approval.

Question 1.6.31

Req 10 – How would the timing of the restoration and aftercare of the borrow pits be regulated?

Response

78. The requirement contained in paragraph 10 of Schedule 2 to the DCO states that the restoration and aftercare of the borrow pits must be carried out in accordance with 'the borrow pits restoration plan'. This is a defined term, and it is anticipated that this document will be finalised during the Examination (the reference to appendix 3.3 of the *Environmental Statement (document reference 6.1)* is a placeholder) and that the plan will deal with timing issues as well as all other relevant issues. As such, Highways England envisages this matter being secured in the same way as the Code of Construction Practice. The finalised borrow pits restoration plan would be a certified document that Highways England would be obliged to comply with.

Question 1.6.32

Req 11 – See the question for requirement 2 (above) as to the nature of the approved details, which may be ‘amended’ by subsequent approval in writing.

Response

79. Paragraph 11 of Schedule 2 to the DCO deals with a subtly different point to Q1.6.22 relating to requirement 2.
80. It may well be necessary in relation to at least some of the requirements, having obtained approvals under them, to return to the Secretary of State at a later stage to seek his approval of certain revised details, e.g. to the landscaping scheme, if it transpires that a change to the approved details is necessary. Paragraph 11 simply recognises this possibility.
81. A useful analogy is in the discharge of planning conditions of a conventional planning permission where various approved details and approved schemes can be amended subsequently, as long as there is written agreement from the local planning authority.

Question 1.6.33

Req 12 – Given the timescales in this requirement and also requirement 13 (request for further information) is it considered that the Secretary of State has sufficient capacity and expertise to perform the planning function set out in the requirements. Is the effect of 12(3) (c) that the absence of an (updated) environmental report (because it is not written into the requirement to provide such a report) might allow an applicant to gain approval by default even where such a report was required under the EIA Regs?

Response

82. It is considered that the timescales included in paragraph 12 of Schedule 2 to the DCO are appropriate – an 8 week period for approvals will allow the discharging authority enough time to carry out any consultation required and to properly consider any details submitted. Indeed, this timescale is included in other made DCOs (see, for example, the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 (S.I. 2014/2384)), indicating the Secretary of State’s previous acceptance of this approach. Further, the recent changes to the conventional planning regime relating to deemed discharge of planning conditions also states an 8 week period for decisions to be made (see article 27 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (S.I. 2015/595)). For the sake of consistency, it therefore follows that the time period included in paragraph 12 of Schedule 2 to the DCO should reflect this.
83. Highways England is considering which would be the most appropriate body to discharge the requirements contained in Schedule 2 to the DCO following Highways England’s transition from the Highways Agency. This issue has wider impacts than just on this application – for example, it has also been raised on Highways England’s application for the A19/A1058 Coast Road junction improvement scheme. Highways England will provide the Examining Authority with an update on this issue at a later stage of the Examination.
84. Turning to the potential to circumvent the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (“the Regulations”), Highways England considers that deemed consent could not be granted in the absence of any required environmental report for two fundamental reasons – both of these require paragraph 12 of Schedule 2 to the DCO to be read in conjunction with the Regulations.

85. First, the nature of the details required to be submitted pursuant to Schedule 2 to the DCO means that none is likely to be for 'EIA development' for the purposes of the Regulations and, as such, no environmental information would be required to be submitted by Highways England under Regulation 18 of the Regulations. If details did amount to 'EIA development', Highways England would be under a legal obligation to submit the required environmental information.
86. Secondly, and related to this, the discharging authority would be under an obligation pursuant to Regulation 18A of the Regulations to consider whether the (existing) *Environmental Statement (document reference 6.1)* is adequate for it to make a decision on any approved details. If it is not, further environmental information must be submitted by Highways England.
87. In light of these legal obligations, Highways England does not consider that there is any risk that the Regulations will be circumvented by paragraph 12 of Schedule 2 to the DCO. The drafting simply makes clear that no deemed discharge of the requirement can occur where any environmental information (which Highways England is obliged to submit) shows a materially new or materially worse environmental effect.

Question 1.6.34

Req 13 – Should there be reference to submission of an environmental report (in conjunction with requirement 12) in order to overcome the potential defect that might arise from the lack of an updated environmental report?

Response

88. Please see the response to Q1.6.33. Highways England does not consider there to be a potential defect in light of the obligations on both the applicant and the discharging authority under the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

Question 1.6.35

Schedule 7 – At the end of the temporary possession period how would the DCO provide for any stored material to be removed and how would this be achieved?

Response

89. Schedule 7 to the DCO (in conjunction with article 30) provides that certain land can only be possessed temporarily by Highways England for certain purposes. These purposes include various storage areas for materials, including soil.

90. Article 30(4) states:

“Before giving up possession of land of which temporary possession has been taken under this article, the undertaker must remove all temporary works and restore the land to the reasonable satisfaction of the owners of the land; but the undertaker is not required to—

(a) replace a building removed under this article;

(b) restore the land on which any permanent works have been constructed under paragraph (1)(d);

(c) remove any ground strengthening works which have been placed on the land to facilitate construction of the authorised development; or

(d) remove any measures installed over or around statutory undertakers’ apparatus to protect that apparatus from the authorised development.”

91. As a result, Highways England considers that this provision provides landowners with enough comfort as to the removal of any stored materials. These materials do not fall within the exclusions at sub-paragraphs (a) to (d) and therefore Highways England will be required to remove the ‘temporary works’ (i.e. the storage areas and stored material) and restore the land to the reasonable satisfaction of the landowner (which would capture any further removal works required) prior to handing the land back to the landowner.

Question 1.6.36

Explanatory Note – There would seem to be a few inconsistencies for example between *This Order* or *The Order, Secretary of State* or *undertaker*, duplication in paragraph 3. Can the applicant comment?

Response

92. Highways England has reviewed the Explanatory Note but considers that it is not internally inconsistent or repetitive (the term ‘the Secretary of State’ (which will be changed to ‘Highways England’) was used because using instead the term ‘the undertaker’ would not have made any sense in isolation).

Question 1.6.37

Under what mechanism would the A14 be de-trunked to county road status outside the DCO boundary?

Response

93. The term 'the Order limits' (i.e. what might be referred to as the DCO boundary) as defined in article 2 of the DCO relates to the limits of land to be acquired or temporarily possessed and the limits of deviation, within which 'the authorised development' may be carried out. The 'de-trunking' of the existing A14 under article 12(4) does not form part of 'the authorised development'. As such, there is no requirement for all of the 'de-trunked' roads to be within 'the Order limits' as the provisions of article 12(4) are not linked to those limits. They instead relate to the roads described in Part 3 of Schedule 3 to the DCO. Highways England therefore considers that the current provisions of the draft Order are appropriate for the A14 to be de-trunked as necessary.