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**Office of Economy, Transport and  
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Executive Director, Graham Hughes

**Transport and Infrastructure Policy & Funding**

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Dear Sirs,

**A14 Cambridgeshire to Huntingdon Examination  
Widths of PROW in the DCO**

This representation concerns the matter of widths of PROW in the DCO. This was originally raised by the County Council in REP2-159, and again in REP5-014. Highways England responded on the matter in REP5-029. The matter was also raised by the Cambridgeshire Local Access Forum in REP5-009.

The County Council has taken advice from Gregory Jones QC on the matter of including the widths of PROW in the DCO. This advice is provided in Annex 1 to this letter. Annex 2 contains the summary of Highways England's position, prepared by Pinsent Mason and referred to in Annex 1. The County Council considers that it may be helpful for the Examining Authority to consider this advice ahead of the next Issue Specific Hearing on the DCO scheduled for September 4.

The County Council is continuing to discuss the matter with Highways England. Progress with this will be recorded in the final Statement of Common Ground for 2 September.

Yours faithfully

**AJ Munro**  
A14 Project Manager – Cambridgeshire County Council



## Annex 1 – Advice from Gregory Jones QC

## **Specifying Widths of PROW in the A14 DCO**

1. Counsel was instructed specifically in the context of how the Public Path Orders Regulations 1993 (made under the Highways Act 1980) relate to a DCO.

### **Summary of Advice**

2. For the reasons more fully described below Counsel considers that:
  - a. S 120 of the Planning Act explicitly allows DCOs to apply, modify or exclude other statutory requirements. A DCO is therefore capable of including provisions which do not comply with statutory requirements extraneous to the Planning Act itself.
  - b. Pursuant to ss 120 and 136 of the Planning Act, a DCO may grant consent to create or stop up a public right of way. The DCO concerning improvements to the A14 does so with reference to Parts 1 and 2 of Schedule 4 of the DCO.
  - c. The Public Path Orders Regulations apply only to specific and defined orders under the Highways Act 1980. These orders are not the only means of creating a public right of way. The public right of way created under the DCO in question is not therefore subject to the requirements of the Public Paths Orders Regulations.
  - d. In his view there are good and obvious reasons why the Public Path Orders Regulations include the requirement that orders made under those regulations specify the width of rights of way. CCC would be well advised to seek that the DCO include the width of public rights of way created. If the DCO is meant to give consent for the construction or formation of a public right of way how can that consent be properly understood if there are no parameters indicating the extent of the width of the construction for which consent is granted?
  - e. Where regulations exist for which there is a good and obvious purpose, and where the DCO is not subject to those regulations the DCO should nevertheless be drafted so as to comply with their requirements unless there is a very good reason why not. There is both a legal and practical reasons

why the width should be specified either exactly or, at the very least, in terms of maximum and minimum parameters.

### **Relevant statutory provisions**

#### The Planning Act 2008

3. Part 1 of Schedule 5 to the Planning Act which specifies the matters for or relating to which a DCO may, in particular, make provision includes under (2) “*The creation, suspension or extinguishment of, or interference with, interests in or rights over land (including rights of navigation over water), compulsorily or by agreement*”. This includes public rights of way. S 120(3) as particularised by Part 1 of Schedule 5 therefore gives a DCO the power *inter alia* to create or stop up a right of way.
4. Where a right of way is extinguished an alternative right of way must therefore be provided.
5. S 120(5) makes clear that in doing so the DCO may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order and include any provision that appears to the Secretary of State to be necessary or expedient in consequence of a provision of the order or in connection with the order. Thus, even where the DCO makes provision for a right which would ordinarily be subject to other statutory requirements, those requirements can be modified or excluded.
6. There is therefore an express power under the Planning Act, exempting the DCO from statutory requirements relating to matters for which provisions in the order may be made.

#### The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (as amended)

7. Regulation 5(2)(k) states that an application for a DCO must be accompanied by:

“*where applicable, a plan identifying any new or altered means of access, stopping up of streets or roads or any diversions, extinguishments or creation of rights of way or public rights of navigation*” [underlining added].

This is the only relevant regulatory requirement relating to the creation of public rights of way under the Planning Act procedure itself. True, it does not *expressly* require that the plan identify the *width* of the rights to be created under the DCO. But how can a plan properly identify a “right” if one of the dimensions is absent from it? The requirement is to identify the “rights of way” not simply the route of a right of way.

#### The Highways Act 1980

8. The Public Path Orders Regulations (the Regulations) apply to public path creation, diversion and extinguishment orders. These are defined under s 1 of the Regulations as being orders made respectively under ss 26, 119 and 118 of the Highways Act 1980. The prescribed forms under s 2 of the Regulations relate specifically to these orders. They therefore relate only to the specific statutory orders set out above. They do not apply to public rights of way created at common law or to other orders creating public rights of way. The Public Path Orders Regulations do not, therefore, apply to DCOs.

#### Wildlife and Countryside Act 1981

9. Pursuant to ss 53(2)(a) and 53(3)(a)(iii) of the Wildlife and Countryside Act 1981, as soon as reasonably practicable after the coming into operation of any statutory instrument (which includes a DCO) modifications must be made to the Definitive Map so that it shows a new right of way has been created. The modification is intended to reflect the right that has been created, not to determine that right.
10. The applicable regulations are the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (as amended). Pursuant to Regulation 4 and Schedule 2 of those regulations a modification to the Definitive Map must specify the width of any new right of way created.
11. A DCO may apply, modify or exclude a statutory requirement relating to any matter for which provision may be made in the order. How exactly a DCO interacts with another legislative scheme will depend on the wording of the DCO and the statutory provision in question. Whilst it may be necessary for the DCO to be worded so as explicitly to oust other statutory provisions, a court may well take the view as a matter of statutory interpretation that a particular DCO does not always need

expressly to exempt the development for which it grants consent from those requirements, having regard to the overall purpose of the DCO regime under the Planning Act is to provide a one-stop shop.

12. Whilst certain statutory requirements may not apply to DCOs as a matter of law, in practice where the Planning Act and any applicable regulations are silent regarding requirements for which there is a parallel statutory regime, it will often be necessary to provide for those requirements on the face of the DCO.
13. The creation, extinguishment and modification of public rights of way under a DCO is separate from the creation of such rights of way under other statutes such as the Highways Act 1980. There are therefore no regulations prescribing the form of a public right of way granted by a DCO. However, whilst the Public Path Orders Regulations do not apply to DCOs, there are obvious and good reasons why such Orders should include the width of a right of way. It is important that the width of a public right of way be specified not only for the purposes of enforcement by CCC but also so that landowners and members of the public are aware of the extent of the proposed right of way and any consent for its construction. Indeed, pursuant to the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (as amended) a modification to the Definitive Map and Statement to include a new right of way must specify the width of that right of way. It is therefore logical to include on the face of the DCO the widths of the rights of way granted. It enables landowners and users of the public right of way to identify its extent and the Council to record the extent of that right of way on the Definitive Map and Statement.
14. Turning attention to the specific DCO in question, this grants consent for public rights of way by reference to column (4) of Schedule 4 and the access plans there referred to. This is supplemented by Article 24, which also requires that the relevant sections of alternative public rights of way identified in column (4) be provided before the extinguishment of the rights of way identified in column (1) of Schedule 4.
15. The DCO grants consent to construct those public rights of way. Article 24(2)(b) requires that before public rights of way are extinguished the undertaker must “*have provided the relevant alternative section of public right of way identified in columns (4) of Parts 1 and 2 of Schedule 4 and Shown on the rights of way and access plans.*” This seems to imply that the *right* of way will be provided (and thus created) at some future time. This must be before the other rights of way specified are

extinguished.

16. The DCO therefore appears to grant consent for the construction of the public rights of way, rather than granting the public rights of way themselves. This is consistent with Article 5(1) which grants consent for the authorized development to be carried out within the Order limits and Schedule 1 which specifies the works to take place. Schedule 1 then makes reference to Schedule 4, column 4 headed “new highway to be substituted/provided”. Only once they have been constructed do the rights themselves come into existence. Once the right of way has been set out and opened to the public the rights crystalize and the public highways (including public rights of way) assume their legal status as such.<sup>1</sup> However, as stated above this means that the consent for construction of “way” is granted by the DCO without there being any indication of the width of the construction for which consent is granted. The only physical limit on the potential width of the path is the Order limits of the scheme itself, but given the scale of the overall project this unlikely to give a very useful indication of the proposed extent of any particular right of way.

17. Article 11(1) states,

*“Subject to paragraphs (6), (7) and (8), any highway (other than a trunk road or special road) to be constructed under this Order must be completed to the reasonable satisfaction of the local highway authority in whose area the highway lies and, unless otherwise agreed in writing with the local highway authority”*

18. This power seems to simply give the local highway authority a control of consent over the nature of the construction. It is predicated on the basis that the right to construct a “highway” of some sort has been granted consent under the DCO, the “control” in article 11 relates to the “completion” of that which has already been approved, i.e. that it be completed in a way which satisfies the local highways authority. This obviously begs the question as to what is the dimension of the highway which has already been consented for construction under the order which must be completed to the satisfaction of the local highways authority? Counsel was not convinced that this power would enable the local highways authority to reject the construction of the proposed highway on the basis of the extent of its proposed width.

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<sup>1</sup> See *Parker v Nottinghamshire C.C and the Secretary of State for Environment Food and Rural Affairs* [2009] EWHC 229 (Admin) at [38].

19. Nowhere, either in the DCO itself or the access plans is the width of the public rights of way granted by the DCO specified. The issue would be capable of being overcome if the widths were specified in the schedule to the DCO, or if *maxima* widths were set out in the DCO which could indicate the minimum and maximum parameters of the width of the PROW.
20. No public right of way will crystalize until the public right of way has been set out and completed to the reasonable satisfaction of the local highway authority. But as has been stated, it seems doubtful that the local highways authority could refuse to approve the construction of the right of way on the basis that it was either too wide or too narrow. However, if it could, then a major aspect of the project for which consent was granted under the DCO could be jeopardized.
21. Highways England's apparent practice (see the table of DCOs set out under 3.6.2 of the Advice dated 22 July 2015 provided by Pinsent Masons) is to specify the width of the public rights of way granted by the DCO *after* the DCO has come into force. However, as Pinsent Mason's table of DCOs makes clear, some previous DCOs have been drafted in such a way as to set out the width of public rights of ways for which the order grants consent. There is certainly, therefore, no legal barrier to doing so.
22. Highways England does not appear to dispute that it will, at some stage, be necessary to determine and specify the width of the public rights of way for which consent is granted. Rather the issue appears to be when those widths should be specified.
23. Counsel disagrees with Highways England's position, at 3.10 of the Pinsent Masons Advice, that there is "*no... practical reason why the widths of ROW should be specified in the DCO and shown on the Plans*". In his view, it is advantageous for a DCO to specify the widths of the public rights of way for which it grants consent. As set out above, CCC is required pursuant to the Wildlife and Countryside Act 1981 to specify the widths of the public rights of way created by virtue of the DCO when modifying the Definitive Map. This can be most simply and efficiently achieved if the DCO itself specifies the width of those public rights of way.

24. Highways England suggest the use of an '*appropriate mechanism for confirming the width of the rights of way in order to enable CCC to fulfill its statutory duty to maintain an accurate record of rights of way in the Definitive Map and Statement*' (3.9 of the Pinsent Masons Advice). Counsel noted the use of the word "*confirming*" used in the Pinsent Masons Advice Note. How can CCC "confirm" a right if the extent of that right has yet to be properly determined.
25. What is the DCO giving consent for when it grants consent for the construction of various public rights of way? How can the proposed public right of way be properly said to have been identified, if there is no indication on the plan or the wording of the DCO as to how wide the proposed "way" is intended to be?
26. A DCO specifying the widths of the rights of way for which it consent grants consent on its face has the benefit not only of procedural simplicity, but also of legal certainty; the public are made aware at the earliest possible opportunity of the extent of the rights of way to be created under the DCO. It seems to Counsel that as currently proposed there is a real risk of unfairness. When should a person object to a proposed PROW on the basis that it will either be too wide or not wide enough? If he turns up at the DCO examination he will presumably be told that the widths have yet to be determined. What if the outcome of this objection has "knock on" effects for other parts of the DCO? Presumably, if he objects to the modification of the definitive map he will be told that the rights were granted consent by the DCO. As the example of the Knottingley Power Plant Order 2015 (referred to at paragraphs 3.6.6 and 3.6.7 of the Pinsent Masons Advice) demonstrates, the width of a public right of way may be material to an objection to the DCO. This is therefore a very good reason why the DCO itself should specify the width of the public rights of way for which consent is granted. It enables the public to make submissions, should they see fit, regarding the correct widths of those rights.
27. Specifying the widths of public rights of way on the face of the DCO accords with the purpose of the DCO procedure. The Planning Act was introduced to create a one-stop shop. As much information regarding the scheme as possible, and in particular information regarding the extent of any legal rights to be created, should be clear from the face of the DCO itself. Counsel advises that he can see no real practical justification for delaying specifying the widths of the rights of ways. The DCO process should be 'frontloaded' so that the DCO contains all of the requisite

information for the matters for which consent is granted. Given that Highways England do not appear to dispute the necessity in determining the widths of the rights of way to be granted consent these should be determined sooner rather than later and included in the Draft DCO.

28. Thus, whilst the wording of the DCO as it stands grants consent for public rights of way and there are no regulations which apply specifically so as to require that the DCO specify the widths of those public rights of way, for the reasons set out above CCC would be prudent in seeking to ensure that the widths of any public rights of way granted by the DCO are specified on the face of the order.

## Annex 2 – Note from Pinsent Mason

# Highways England A14 Cambridge to Huntingdon Improvement Scheme Interaction between the DCO and the Definitive Map

22 July 2015

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## 1. EXECUTIVE SUMMARY

- *Cambridgeshire County Council suggests that the draft Development Consent Order and Rights of Way and Access Plans should show the widths of rights of way which are proposed to be created or diverted by the Order, and that the route of these rights of way / non-motorised user provision should be shown within the highway boundary in order to enable an accurate record of the Definitive Map to be kept.*
- *Highways England is not legally required to show the widths of rights of way in the draft Development Consent Order as the Public Path Orders Regulations 1993 do not apply to the Planning Act 2008 regime; whilst the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (as amended) require an application for development consent to identify altered or extinguished rights of way, they do not require widths of rights of way provision to be specified.*
- *Our research shows that it is not usual practice within the Planning Act 2008 regime for the widths of rights of way to be specified in development consent orders.*
- *It is not the role of the draft Development Consent Order to provide exact details of design, and it would not be possible for it to do so, given the sequencing of the development consent process and the detailed design process.*
- *Rights of way shown on the Rights of Way and Access Plans terminate at the highway boundary. Non-motorised user provision will thenceforth continue within the highway boundary.*
- *Section 53(3)(a) of the Wildlife and Countryside Act 1981 makes clear that modifications to the Definitive Map must be completed by the surveying authority after a statutory instrument (such as a development consent order) is made, and such modifications must be in compliance with the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (as amended). The Rights of Way and Access Plans are part of the application for the Development Consent Order and are not submitted under these Regulations, but are required to comply with the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009.*
- *It is therefore Cambridgeshire County Council's duty to modify the Definitive Map and Statement. The Development Consent Order and Rights of Way and Access Plans do not and cannot modify the Definitive Map, and therefore do not need to show the level of detail requested by Cambridgeshire County Council.*
- *Highways England will share detailed plans with Cambridgeshire County Council at the detailed design stage to enable the Council to determine the widths of rights of way and the routes of NMU provision within the highway boundary, and to carry out any necessary modifications to the Definitive Map and Statement.*

# Highways England A14 Cambridge to Huntingdon Improvement Scheme Interaction between the DCO and the Definitive Map

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## 2. INTRODUCTION

- 2.1 A draft Development Consent Order ("**DCO**") was submitted to the Planning Inspectorate, as part of the application by Highways England for a DCO for the A14 Cambridge to Huntingdon Improvement Scheme ("**the Scheme**"), under the Planning Act 2008 ("**PA08**"). A revised version of the draft DCO (document reference HE/A14/EX/59) was submitted at Deadline 4 of the Examination of the application.
- 2.2 Accompanying this application were plans and drawings prescribed by the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (as amended) ("**the APFP Regulations**"). This note considers the Rights of Way and Access Plans ("**the Plans**") prescribed by Regulation 5(k) of these Regulations and submitted to the Planning Inspectorate as part of Highways England's application for development consent for the Scheme (as examination document reference APP-114, application document reference 2.5).
- 2.3 Cambridgeshire County Council ("**CCC**") has submitted a written representation ("**WR**") (examination document reference REP2-159) to the Examining Authority, detailing a number of concerns in relation to the provision of public rights of way ("**ROW**") as part of the Scheme, and how such provision is promoted within the draft DCO and the Plans.
- 2.4 The purpose of this note is to address the issue, as raised in CCC's WR<sup>1</sup>, that the DCO and Plans, as currently drafted, will not provide a basis on which CCC can adequately fulfil its statutory duty to maintain records of the routes of public ROW within its survey area, where such records are to be made in the form of the Definitive Map and Statement, in accordance with the requirements of the Wildlife and Countryside Act 1981 ("**WCA81**") (as amended). CCC's concerns on this point are summarised as follows:
- i) the widths of ROW proposed to be created or diverted should be set out in the DCO or on the Plans, as required by the Public Path Orders Regulations 1993 (SI 1993/11) (see CCC's WR paragraph 15.3.1); and
  - ii) the routes of ROW and non-motorised user ("**NMU**") facilities within the highway boundary should be shown on the Plans (see CCC's WR paragraphs 15.2.7 to 15.2.9).
- 2.5 Although these concerns were dealt with in Highways England's responses to CCC's WR (examination document reference REP4-011, application document reference HE/A14/EX/49), this note expands on the reasoning expressed in that document to explain why Highways England's approach in relation to ROW and NMU provision within the draft DCO and the Plans is considered to be correct.

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<sup>1</sup> CCC's WR also raises other issues, which are beyond the scope of this note. For instance, CCC's WR includes queries about the specific routes of certain ROW; Highways England's response to those queries is set out in Report 1 of its Response to Written Representations (examination document reference REP4-01, application document reference HE/A14/EX/49), its Response to the Joint Local Impact Report (examination document reference REP4-019, application document reference HE/A14/EX/57) and in its Errata submission (examination document reference APP773, application document reference HE/A14/EX/14). CCC's WR also queries which body will be responsible for the maintenance of routes which carry both private means of access and public ROW; Highways England's comments on this point will be submitted at Deadline 7 (19 August 2015) of the Examination.

# Highways England

## A14 Cambridge to Huntingdon Improvement Scheme

### Interaction between the DCO and the Definitive Map

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2.6 The note deals with each of these concerns in turn, and then considers the legal position generally as to the interaction between the draft DCO and the keeping of an accurate Definitive Map and Statement.

### 3. WIDTHS OF RIGHTS OF WAY

3.1 On the issue of whether or not the draft DCO and/or the Plans should show the widths of ROW, Highways England's response to CCC's WR was as follows:

*"The Public Path Orders Regulations 1993 were formulated pursuant to Part VIII of and Schedule 6 to the Highways Act 1980, and thus do not apply to Development Consent Orders under the Planning Act 2008. Furthermore, it has not been usual practice for Development Consent Orders made under the Planning Act 2008 regime to include widths of new public rights of way. Highways England will continue to discuss this issue with Cambridgeshire County Council to agree an appropriate mechanism for confirming these details and to enable CCC to comply with its statutory duties" (paragraphs 4.5.13 to 4.5.15).*

3.2 Within this response, Highways England identified two key reasons for not showing the widths of ROW within the draft DCO and/or the Plans: (i) it is not legally required; and (ii) it is not usual practice. In addition, given the sequencing of the development consent process and the design process for the scheme, Highways England is of the view that it would not be practicable to specify such matters in the DCO and/or the Plans. These three reasons are expanded upon below:

### 3.3 Legal Position: Highways Act 1980/Acquisition of Land Act 1981

3.3.1 Part VIII of the Highways Act 1980 ("**HA80**") deals with the stopping up and diversions of footpaths, bridleways, and restricted byways, primarily through section 118 (stopping up) and section 119 (diversions). Section 26 deals with the creation of footpaths, bridleways and restricted byways.

3.3.2 All three of these sections make reference to the fact that such creation, stopping up, or diversions cannot take place unless either a public path creation order, public path diversion order or public path extinguishment order (as the case may be) is made and confirmed by the Council (or in the case of an opposed Order, confirmed by the Secretary of State). All three sections set out that such Orders must be in "*such form as may be prescribed by regulations made by the Secretary of State*".

3.3.3 Such regulations were made by the Secretary of State and these are the Public Path Orders Regulations 1993 ("**the Regulations**"). The relevant provisions within the Regulations are set out below:

- (a) The preamble to the Regulations sets out that they were made by the Secretary of State for the Environment in exercise of the powers conferred on him by sections 26, 28(2), 118 and 119 of, and paragraphs 1, 3 and 4 of Schedule 6 to, the Highways Act 1980 and section 32 of the Acquisition of Land Act 1981.

# Highways England A14 Cambridge to Huntingdon Improvement Scheme Interaction between the DCO and the Definitive Map

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- (b) Regulation 2 of the Regulations sets out that “*an order shall be in the appropriate form set out in Schedule 1 to these Regulations, or in a form substantially to the like effect*”.
  - (c) The forms of order within Schedule 1 to the Regulations include reference to the need for a description of the position, length and *width* of the ROW which is proposed to be created, diverted or stopped up.
  - (d) Regulation 1 of the Regulations defines an ‘order’ for the purposes of the Regulations as “*a public path creation order, a public path diversion order, a public path extinguishment order or an acquisition extinguishment order, and includes an order revoking or varying any such order*”.
  - (e) As noted above, the HA80 uses these terms within s.26, s.118 and s.119, however the relationship between these sections and the Regulations is made clear by Regulation 1, which further defines a public path creation order, a public path diversion order and a public path extinguishment order as orders made by reference to the above-mentioned sections of the HA80.
- 3.3.4 The position is similar in respect of a local authority’s duties under the WCA81: parallel provisions in the form of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 also prescribe a mechanism by which a local authority may maintain the Definitive Map and Statement for its area.
- 3.3.5 Returning to the Public Path Orders Regulations 1993, however, which CCC suggests should apply to the draft DCO for the Scheme, it is clear from the preamble to the Regulations that they only apply to Orders made under the Highways Act 1980 or the Acquisition of Land Act 1981 (“**ALA81**”). There is no reference to the Planning Act 2008 within the Regulations.
- 3.3.6 Section 32 of the ALA81 (to which the Regulations also apply as set out above) provides for the stopping up of ROW in pursuance of a compulsory purchase order. A ‘compulsory purchase order’ for the purposes of the ALA81, is defined by section 7 of the ALA81 as an order made under section 2(1) of that Act. Thus, in the context of compulsory acquisition, these Regulations apply only to the stopping up of ROW in relation to orders made under the ALA81.
- 3.3.7 It is recognised that many of the rights of way creation, diversions and extinguishments (stopping ups) that are proposed by the Scheme would take place on land that Highways England proposes to acquire compulsorily.
- 3.3.8 However, whilst there are a number of provisions in the ALA81 which are specifically applied to orders made under the PA08, it is clear from the explanation above that the Regulations made under the HA80 and the ALA81 do not apply to orders made under PA 2008, even where such orders may contain powers of compulsory acquisition. Similarly, the parallel provisions in the Wildlife and Countryside (Definitive Maps and Statements)

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Regulations 1993 have no application to orders made under the PA08. In summary therefore, the Regulations apply only to orders made under the HA80 and the ALA81, and not to orders such as the draft DCO which (if made) would be made under the PA08. There is therefore no legal obligation for a draft DCO to comply with these Regulations.

### 3.4 Legal Position: Planning Act 2008/Draft DCO

3.4.1 The footpaths and bridleways proposed as part of the Scheme are included in the descriptions of Works in Schedule 1 to the draft DCO, and therefore form part of the authorised development that would be authorised by article 5 of the DCO (if the DCO is made by the Secretary of State). The legal authority for the ROW is therefore derived from the DCO. The inclusion of this authority within the DCO fully accords with the scope of matters that may be included in a DCO as set out in section 120 of the PA08.

3.4.2 There is no requirement within the APFP Regulations for details of the widths of ROW to be provided in an application for development consent.

3.4.3 It is therefore a matter for the applicant's discretion, when applying for a DCO, whether the widths of the ROW to be provided by the scheme are shown within the DCO application (albeit that the ultimate decision on the form of the Order, if made, is a matter for the Secretary of State).

3.4.4 As set out below, it is not usual practice within the PA08 regime (and therefore not the usual practice of the Secretary of State) to prescribe the widths of ROW in a DCO, and in Highways England's view it would not be practicable to do so in the DCO for the Scheme, given the current stage of the design process in relation to the DCO process. The fact that the detailed design process necessarily follows on from the consenting process for the Scheme means that the detail of matters such as the widths of ROW cannot sensibly be fixed in advance of the detailed design being arrived at and so in advance of the DCO for the Scheme being made.

3.5 In conclusion, therefore, there is no legal obligation on Highways England to provide details of the widths of ROW provision within the DCO or the Plans.

### 3.6 Planning Act 2008 Regime: Usual Practice

3.6.1 A review of the 39 DCOs made to date has been undertaken. This review demonstrates that it is not usual practice for DCOs to prescribe the widths of the various ROW and NMU facilities created and authorised through DCOs made under the PA08 ("**Relevant Provision**").

3.6.2 The results of this review (focusing on Relevant Provisions in the 39 made DCOs ("**Orders**") are summarised in the table below:

**Highways England**  
**A14 Cambridge to Huntingdon Improvement Scheme**  
**Interaction between the DCO and the Definitive Map**

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Order	Order does not prescribe the width of the Relevant Provision	Order does not contain a Relevant Provision	Order prescribes the width of the Relevant Provision
A160/A180 (Port of Immingham Improvement) Development Consent Order 2015	✓		
The Cornwall Council (A30 Temple to Higher Carblake Improvement) Order 2015	✓		
The A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014	✓		
The Able Marine Energy Park Development Consent Order 2014	✓		
The Brechfa Forest West Wind Farm Order 2013	✓		
The Burbo Bank Extension Offshore Wind Farm Order 2014		✓	
The Clocaenog Forest Wind Farm Order 2014	✓		
The Daventry International Rail Freight Interchange Alteration Order 2014	✓		
The Dogger Bank Creyke Beck Offshore Wind Farm Order 2015	✓		
The East Anglia ONE Offshore Wind Farm Order 2014	✓		
The East Northamptonshire Resource Management Facility Order 2013		✓	
The Galloper Wind Farm Order 2013	✓		
The Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013			✓
The Hinkley Point C (Nuclear Generating Station) Order 2013	✓		
The Hornsea One Offshore Wind Farm Order 2014	✓		

**Highways England**  
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Order	Order does not prescribe the width of the Relevant Provision	Order does not contain a Relevant Provision	Order prescribes the width of the Relevant Provision
The Network Rail (Ipswich Chord) Order 2012	✓		
The Kentish Flats Extension Order 2013		✓	
The National Grid (King's Lynn B Power Station Connection) Order 2013	✓		
The Knottingley Power Plant Order 2015			✓
The M1 Junction 10a (Grade Separation) Order 2013	✓		
The Northumberland County Council (A1 – South East Northumberland Link Road (Morpeth Northern Bypass)) Development Consent Order 2015			✓
The Network Rail (North Doncaster Chord) Order 2012	✓		
The North Killingholme (Generating Station) Order 2014	✓		
The National Grid (North London Reinforcement Project) Order 2014	✓		
The Norfolk County Council (Norwich Northern Distributor Road (A1067 to A47(T))) Order 2015	✓		
The North Blyth Biomass Power Station Order 2013		✓	
The Preesall Underground Gas Storage Facility Order 2015	✓		
The Rampion Offshore Wind Farm Order 2014	✓		
The Network Rail (Redditch Branch Enhancement) Order 2013	✓		
The Rookery South (Resource Recovery Facility) Order 2011	✓		
The South Hook Combined Heat and Power Plant	✓		

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Order	Order does not prescribe the width of the Relevant Provision	Order does not contain a Relevant Provision	Order prescribes the width of the Relevant Provision
Order 2014			
The Network Rail (Norton Bridge Area Improvements) Order 2014	✓		
The Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014	✓		
The Swansea Bay Tidal Generating Station Order 2015	✓		
The Triton Knoll Offshore Wind Farm Order 2013		✓	
The Walney Extension Offshore Wind Farm Order 2014	✓		
The White Moss Landfill Order 2015		✓	
The Willington C Gas Pipeline Order 2014	✓		
The Central Bedfordshire Council (Woodside Link Houghton Regis) Development Consent Order 2014	✓		

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- 3.6.3 This table shows that of the 39 Orders made under the PA08 a total of 33 grant consent for a Relevant Provision.
- 3.6.4 Out of these 33 Orders; 30 do not prescribe the width of the Relevant Provision and 3 Orders do so prescribe.
- 3.6.5 In two of the three Orders that do prescribe the width of a Relevant Provision (Morpeth Northern Bypass and Heysham M6 Link Road), the Relevant Provision is contained within the highway boundary. The implications and necessity of this are addressed in section 4 of this note.
- 3.6.6 The remaining Order that prescribes the width of a Relevant Provision is the Knottingley Power Plant Order 2015 ("**the Knottingley Order**"). The Relevant Provision can be found in Schedule 1 (Authorised Development) of the Knottingley Order and is comprised in Work No.9 "*alternative private track/temporary bridleway along the southern boundary of Work No. 1 from Blackburn Lane to Southmoor Lane, at least five metres wide and being gated at either end.*"
- 3.6.7 The prescription of the width of the Relevant Provision in the Knottingley Order can be distinguished from that being suggested by CCC. In the Knottingley Order the prescription was recommended by the Examining Authority for that Order on the basis that it would overcome specific objections relating to access to agricultural land surrounding that site by farm vehicles in the circumstances of that Order. As such, the particular circumstances relating to the treatment of the Relevant Provision in the Knottingley Order are not of general application. Highways England notes that CCC's WR does not rely on those circumstances and that CCC's request for the DCO for the Scheme to specify the widths of NMU routes and ROW is made with the specific objective of enabling CCC to update the Definitive Map and Statement in accordance with its statutory obligations as a local highway authority.
- 3.6.8 This review shows that the usual practice (30 out of 33 made Orders containing a Relevant Provision) for Orders made under the PA08 is to not prescribe the width of any Relevant Provision.
- 3.7 In conclusion, therefore, as set out in Highways England's response to CCC's WR, there is no legal or best practice obligation on Highways England to specify the widths of ROW within the DCO or the Plans.
- 3.8 **Practicalities of Design**
- 3.8.1 Together, the DCO and Plans inform the Examining Authority of the ROW and NMU provision which is proposed to be created by the DCO (based on the proposed linear routes of NMU/ROW provision). As explained above, the ROW/NMU provision forms part of the works which would be authorised if the DCO was made by the Secretary of State. It is not the function of the DCO to prescribe the exact design details of the ROW provision that is proposed to be created or diverted by the Order. There is also no requirement in the APFP Regulations for the widths of such facilities to be shown within the Plans.

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3.8.2 Furthermore, the ROW provision within the Scheme has been environmentally assessed on the basis of these ROW routes and implicit in that environmental impact assessment is an acknowledgement that the details of this provision would evolve over a number of years, within the parameters defined in the assessment. The Examining Authority is therefore able to form a view on the impact of these routes based on these parameters, i.e. the 'Rochdale Envelope'. Accordingly, the assessment addresses a worst case scenario, in which the precise details of the widths of the ROW do not need to be specified.

3.8.3 The exact specification of the ROW provision will be informed by the detailed design process, and Highways England considers that it is reasonable for this to be the case and therefore accepts that matters such as the specification of the widths of NMU/ROW provision are beyond the scope of the DCO and Plans.

3.9 However, as stated in Highways England's Response to CCC's WR, Highways England will agree with CCC an appropriate mechanism for confirming the details of the widths of ROW in order to enable CCC to fulfil its statutory duty to maintain an accurate record of ROW in the Definitive Map and Statement. The exact specification of ROW will be part of the detailed design process, and as set out in Highways England's response to CCC's WR (as reiterated above), Highways England will consult with CCC to agree the design of these ROW.

3.10 In conclusion, on the issue of the widths of ROW, there is no legal, best practice or practical reason why the widths of ROW should be specified in the DCO and shown on the Plans.

#### 4. **SHOWING ROUTES OF ROW AND NMU FACILITIES WITHIN THE HIGHWAY BOUNDARY**

4.1 In its WR, CCC queried Highways England's identification of public ROW and private means of access ("**PMA**") up to and within the highway boundary. Highways England's response to CCC's WR on this point was as follows:

*"All land within highway boundaries would form part of the highway and include any provisions being made for equestrians, pedestrians or cyclists within the highway boundary. The details of such provision would be agreed with CCC and shown on plans produced at detailed design stage after the development consent order is made (if the application is successful). These plans would form the basis of any maintenance agreements between Highways England and CCC.*

*"Within the DCO the terms used for new PROWs created outside trunk road and side road boundaries are Footpath, Bridleway and Cycle Track. The same facilities where provided within a highway boundary are referred to as Footway, Equestrian Track and Cycle Way and form part of that highway, not separate highways in their own right.*

*Highways England would consult with CCC to agree the exact extent of CCC's future maintenance responsibilities at each highway location." (paragraphs 4.5.16 to 4.5.18)*

4.2 CCC also suggested that the route of ROW and non-motorised user ("**NMU**") facilities within the highway boundary should be shown on the Plans (see CCC's WR paragraphs 15.2.7 to 15.2.9).



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- 4.3 The implicit point underlying Highways England's response (as cited at paragraph 4.1 above) is that, as is shown on the Plans, the termination point of the new/diverted ROW is the highway boundary. The Plans therefore show the full extent of the proposed route of these ROW.
- 4.4 Once these ROW meet the highway boundary – shown on the Plans as 'proposed side road boundary' or 'proposed trunk road boundary' the ROW provision will (in many cases) continue within the highway boundary in the form of the NMU facilities which are proposed to be provided by Highways England within the highway boundary. To clarify, this means that within the highway boundary the Plans do not show separate ROW provision, as the NMU facilities will form part of the highway – the NMU facilities are not separate ROW. These NMU facilities are not shown on the Plans as separate new highway proposed to be created because the proposed new highway that these facilities are adjacent to, when created pursuant to the DCO, will include the NMU provision, as specified in Schedule 1 to the draft DCO (and authorised by article 5). The NMU provision will therefore be established by the DCO (which, if made, will be a statutory instrument).
- 4.5 At this stage in the design process, the precise details of the new and/or improved highways and their accompanying NMU facilities are not known beyond that which is set out in the documents submitted to accompany the application for the Scheme and which are illustrated for information purposes in the General Arrangement Drawings (examination document reference APP12, application document reference 5.2).
- 4.6 Together, the DCO and Plans inform the Examining Authority that the NMU provision is proposed to be created within the highway boundary. If the DCO is made, the NMU provision within the highway boundary would form part of the works authorised by the DCO. However, it is not the function of the DCO to prescribe the exact design details of what is contained within the highway boundary. There is also no requirement in the APFP Regulations that the details of such NMU facilities should be shown within the Plans.
- 4.7 The exact specification of the NMU provision within the highway boundary will be part of the detailed design process, and as set out in Highways England's response to CCC's WR (as reiterated above), Highways England will consult with CCC to agree the design of these facilities and, related to this, to determine the exact extent of CCC's future maintenance responsibilities at each location.

### 5. INTERACTION BETWEEN THE DCO, THE PLANS AND THE DEFINITIVE MAP

- 5.1 It is not the function of the Plans to show all NMU routes. The function of the Plans is set out in Regulation 5(k) of the APFP Regulations as:

*"a plan identifying any new or altered means of access, stopping up of streets or roads or any diversions, extinguishments or creation of rights of way or public rights of navigation"*

- 5.2 The role of the Plans is therefore twofold:

- to show existing public ROW on which the scheme will have an impact, in that it will require them to be stopped up and/or diverted; and

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- to show new public ROW (including new NMU routes) which, as part of the scheme, will be created outside the highway boundary.

5.3 It is therefore not the role or function of the Plans to provide for the definitive position of all ROW forming part of the Scheme, i.e. the function of the Plans is not to provide details of the exact modifications required to update the Definitive Map in accordance with the requirements of the WCA81, as suggested by CCC.

5.4 Furthermore, neither the PA08 nor the APFP Regulations make provision for the Plans to be a means of informing modifications to the Definitive Map.

5.5 This position is made clearer on consideration of section 53 of the WCA81. Section 53(2)b of the WCA81 sets out that the 'surveying authority' (in this case CCC) must:

*"keep the [definitive] map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event."*

5.6 The 'events' referenced in subsection 2(b) are set out in section 53(3)(a), and for the purposes of this note most particularly include:

*"(a) the coming into operation of any enactment or instrument, or any other event, whereby—*

*(i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;*

*(ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or*

*(iii) a new right of way has been created over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path (defined as footpath or bridleway) or a restricted byway;"*

5.7 As a statutory instrument, the DCO is an 'instrument' capable of authorising each of the changes to ROW described in section 53(3)(a)(i)-(iii).

5.8 The making of the DCO would therefore be an 'event' after which CCC would be obliged to review the Definitive Map. It is therefore clear that the DCO and the Plans themselves would not be what changes the Definitive Map.

5.9 The onus would therefore be on CCC to make the Definitive Map modification Orders that would enable the modification of the Definitive Map after the DCO is made. Whilst they might trigger it, neither the DCO nor the Plans fulfil that function.

5.10 It should also be noted that the Definitive Map and any modification order relating to it must comply with the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (as amended). Regulations 1 to 4 of those Regulations set out that they apply to Rights of Way and modification orders that derive from Part III of the

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WCA81 which includes section 53 WCA81 – therefore they also apply after the event of a DCO being made, but not before.

- 5.11 Furthermore, the Plans do not comply with these Regulations, nor do they need to, given that the APFP Regulations make no reference to these Regulations. Even if it was said that they do, because the Plans do not comply with the Regulations, they would not constitute an appropriate form of modification to the Definitive Map, and CCC would be required to make a new Modification Order.
- 5.12 It is clear therefore that the DCO and Plans fulfil a different function to the Definitive Map, and that the ROW provision shown within them does not constitute a change to the Definitive Map and does not require consistency with the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (as amended). It will be incumbent on CCC to make the changes to the Definitive Map and Statement once and after the DCO is made.
- 5.13 As confirmed in Highways England's response to CCC's WR, Highways England will share detailed plans with CCC at the detailed design stage to enable CCC to carry out any necessary modifications to the Definitive Map and Statement in compliance with its statutory obligations to review and update the same.

**Pinsent Masons LLP**

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