

Application by Highways England for an Order Granting Development Consent for the M4 Junctions 3 to 12 Smart Motorway (Case ref. TR010019)

Agenda for issue specific hearing dealing with matters relating to the draft Development Consent Order

On 14 January 2016 interested parties and others were notified that an issue specific hearing dealing with matters relating to the draft Development Consent Order (dDCO) would take place on **Friday 12 February 2016** at the **Holiday Inn Maidenhead/Windsor, Manor Lane, Maidenhead, West Berkshire, SL6 2RA**. The hearing room will be available from 9.30am and the hearing will commence at 10.00am. It is expected to close before 12 noon. In order to ensure that those attending the hearing can make the best use of the time, we have prepared an agenda as attached.

All interested parties are welcome to attend the hearing. In consideration of its purpose however, it follows that the hearing will be of interest mainly to those organisations who have a direct contribution to the drafting of the Order, and its implementation should it be granted.

Administrative arrangements

If you did not do so by the pre-notified deadline, it is vital for parties intending to attend to now give prior notice to the case team of who will attend, who will speak and which points they wish to address. In accordance with Rule 14(3) of the Infrastructure Planning (Examination Procedure) Rules 2010 (as amended), any oral representations should be based on representations previously made in writing by the particular participant.

Please provide your interested party reference number in any communication and mark it for the attention of the M4 Junctions 3 to 12 Smart Motorway case team.

Agenda for issue specific hearing dealing with the draft Development Consent Order (dDCO)

10.00am, 12 February 2016

1 General drafting issues

- i. A number of Articles (e.g. A10, A14, A17, A19) refer to consents to be given by, for example, the street/highway authority or water or drainage authority within 6 weeks. Would it be more appropriate for this to be 30 working days?
- ii. Requirement 9 does not include a deadline for the implementation of the landscaping scheme. We suggest the following words are added to clause (4): "*within one year of the commencement of operation of the authorised development*".
- iii. Requirement 26 does not include a deadline for the provision of the flood compensation scheme. Subject to any views of the Environment Agency, we suggest the following wording be inserted in clause (3) following "*provided*" and before "*in*": "*prior to the commencement of operation of the authorised development*".

2 Article 2 - definition of commence

The Examining Authority (ExA) find Highways England's (HE) approach on this point hard to understand. The initial situation was that there was a definition of commencement with certain exclusions, and we queried the scope of some of those exclusions. In response, HE proposed to make a distinction between "*commencement*" (to be used for some requirements) and "*carrying out*" (to be used for others), on the basis that "*carrying out*" was "*more stringent*" than "*commencement*" (First round question [FRQ] response to DCO question 8.3, and second round question [SRQ] response para 5.2.2), and that some requirements required more protection than others. However, the applicant has now removed the definition of "*commence*", with all its exclusions, and used "*carry out*" throughout the requirements (with the exception of R23, which still uses commence).

The s155 Planning Act 2008 (PA2008) definition of commencement is "*the earliest date on which any material operation comprised in, or carried out for the purposes of, the development begins to be carried out*". "*Material operation*" means *any operation except an operation of a prescribed description*", and there are currently no prescribed exceptions.

So, based on the current PA2008 wording, the carrying out of any operation, whether material or not, would be enough to constitute commencement.

As such, the ExA can no longer see any difference between "*commencement*" and "*carrying out*".

- Would it not therefore be clearer to have all requirements triggered by commencement, as that is the formulation typically used in previous DCOs?

3 Article 2 - definition of maintain

The ExA notes that HE has powers to maintain through its licence, and it is reasonable that those powers be explicitly stated in the DCO. We also note that the applicant's proposed wording has been used before. However, the wording has to be appropriate for each specific DCO, and drafting standards change, so what has been acceptable in the past may not be acceptable now.

The applicant suggests that not all maintenance work which would be covered by their wording has been assessed in the Environmental Statement (ES). This argument would appear to strengthen the case for wording which restricts work to that which has been assessed in the ES to be used. It is accepted that the power to maintain applies to the authorised development such that maintenance outside the order limits is unlikely to be authorised. However the suggestion that *"works that would result in the authorised development varying from the description in Schedule 1 to the DCO could not be deemed to be maintenance"* is not clear since the proposed definition includes the right to *"inspect, repair, adjust, alter, remove, clear, refurbish, reconstruct, decommission, replace and improve"* the authorised development. Several of these could lead to substantial changes, unless there is some limit imposed within the DCO.

- The ExA proposes the definition used in the East Midlands Gateway Rail Freight Interchange DCO recently approved by the Secretary of State for Transport and seeks the applicant's views:

"maintain" includes inspect, repair, adjust, alter, remove, clear, refurbish, reconstruct, decommission, demolish, replace or improve unless that activity would result in a significant environmental effect not assessed in the environmental statement and any derivative of "maintain" must be construed accordingly;

4. Article 6 – Power to deviate

As drafted A6 allows for a deviation of 0.5m upwards. With the change to the height of lighting columns now proposed, Requirement 19 allows for lighting to be up to 1m higher than existing.

- Should the provision for vertical deviation be amended in A6?

5. Article 48(2) – Procedure in relation to certain refusals etc

In the event that the Secretary of State (SoS) accepts the role of discharge authority for the DCO requirements, it will be a matter for him as to whether 8 weeks provides sufficient time.

- i. Are the local authorities content with the arrangements set out in the applicant's explanatory note¹.

We note that in para 15.1 of the Explanatory Note it is stated that a "single body sign-off" is required for the purposes of consistency.

- ii. With regard to the approach suggested by the ExA for a service level agreement with the local planning authorities to enable them to set up a joint board to deal with the discharge of requirements, would this not provide a "single body sign off"?
- iii. Do the local authorities have any comments on this and the way in which such a body could work?

6. Schedule 2 - Requirements

There is currently no requirement within the dDCO which deals with the Enhanced Noise Mitigation Study.

- How would the implementation of this be secured?

7. Requirement 5 – Carriageway surfacing

The ExA notes the response to environment SRQ 4.7.5. However, much of the applicant's case in relation to noise impact depends on the use of a low noise surfacing material, and therefore some assurance that this mitigation measure will be secured into the future is sought. We accept that manufacturers may change the type of material available, but this is covered by the wording in the second sentence of the requirement which allows for other forms of material to be used.

The ExA consider that the wording of R5 should be changed as follows. Insert after the final sentence:

"Any re-surfacing of the carriageway comprised in Work No1a and 1b, or any slip road, will use a low noise surfacing material with similar (or improved) noise reduction properties to the TSCS unless otherwise approved by the Secretary of State."

Comments from the parties are sought.

8. Requirement 8 – Construction Environmental Management Plan (CEMP)

We note the applicant's argument that a requirement for the CEMP to be substantially in accordance with the outline CEMP should be adequate.

- i. However, are the local authorities satisfied that the outline CEMP covers in sufficient depth the matters which are listed in the ExA's proposed detailed requirement?

¹ Available here: <http://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/projects/TR010019/Events/Deadline%20V%20-%2008-01-2016/Highways%20England%206.zip>

The applicant states that all the matters listed in the suggested requirement are covered either in the CEMP or in other requirements.

- ii. Can the applicant please prepare a table for submission at the hearing which identifies in detail the requirement or section of the CEMP in which each of the matters is covered?

Requirement 11 of the EMGRFI DCO also sets out in detail those matters to be covered in the CEMP.

- iii. Can the applicant please comment on the appropriateness of this form of wording in the M4 dDCO?

9. Requirement 22 – Acoustic barriers

The ExA notes that HE has a duty to maintain the strategic road network including the noise management scheme in accordance with its licence. However, the ExA is concerned that there are examples of boundary and acoustic fencing throughout the application site which are not in a satisfactory condition despite this duty.

- If a party is not satisfied that fencing has been properly maintained, what redress would there be if maintenance is secured solely by means of the applicant's licence?

10. Protective provisions

- Have all protective provisions been agreed between the relevant undertakers, including South East Water?