

NETWORK RAIL INFRASTRUCTURE LTD

WRITTEN REPRESENTATION

HIGHWAYS ENGLAND'S RESPONSE

PLANNING ACT 2008

INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010

**APPLICATION FOR THE M4 MOTORWAY (JUNCTIONS 3 TO 12) (SMART
MOTORWAY)**

DEVELOPMENT CONSENT ORDER (Reference TR010019)

WRITTEN REPRESENTATION OF NETWORK RAIL INFRASTRUCTURE LIMITED

1. DEFINITIONS

1.1 *In this written representation the words and phrases in column (1) below are given the meaning contained in column (2) below.*

***(1) Words and
Phrases***

(2) Meaning

1980 Act

Highways Act 1980

1990 Act

Town and Country Planning Act 1990

1993 Act

Railways Act 1993

2008 Act

Planning Act 2008

Acquisition Land

Plots:

- *22-22a;*
- *22-22b;*
- *22-24a;*
- *22-24b;*

- 27-12; and
- 27-13,

in the Book of Reference

| | |
|--------------------------|--|
| <i>Application</i> | <i>The application for the DCO dated 30 March 2015.</i> |
| <i>Authorised</i> | <i>The “authorised development” as defined in the Draft DCO Development</i> |
| <i>Book of Reference</i> | <i>The Book of Reference submitted with the Application</i> |
| <i>DCO</i> | <i>The proposed M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 201[*] which is the subject of the Application</i> |
| <i>DCLG Guidance</i> | <i>DCLG Guidance “Planning Act 2008: Guidance related to the procedures for compulsory acquisition” (September 2013)</i> |
| <i>Draft DCO</i> | <i>The draft DCO submitted with the Application</i> |
| <i>EHCR</i> | <i>The European Convention of Human Rights</i> |
| <i>Facility Owner</i> | <i>has the same meaning as in section 17(6) of the 1993 Act</i> |
| <i>Highways England</i> | <i>The Highways England Company Limited</i> |
| <i>Land Plans</i> | <i>The land plans submitted with the Application</i> |
| <i>Network</i> | <i>The railway network for which Network Rail is the Facility Owner</i> |
| <i>Network Licence</i> | <i>The network licence granted by the Secretary of State for Transport in exercise of his powers under Section 8 of the 1993 Act to Network Rail (then called Railtrack PLC) on 31st March 1994 as amended or modified from time to time, or any Network Licence granted to a successor of Network Rail, as the context permits;</i> |

Network Rail

Network Rail Infrastructure Limited

Network Rail Land

Plots:

- *02-16;*
- *02-17;*
- *02-18;*
- *04-06;*
- *04-08;*
- *04-10;*
- *10-07;*
- *10-08;*
- *10-09;*
- *22-22;*
- *22-22a;*
- *22-22b;*
- *22-23;*
- *22-23a;*
- *22-23b;*
- *22-24;*
- *22-24a;*
- *22-24b;*
- *22-25,*

part of 27-12 and part of 27-13 and possibly part of 22-21 in the Book of Reference

Network Rail Rights

Plots:

Land

- *27-14;*
- *27-15; and*
- *27-28,*

in the Book of Reference

OLE

Overhead Line Equipment (ie the overhead electric line used by electric locomotives)

Promoter

Highways England as the promoter of the Application

Railways

The five operational railway lines shown on Land Plan Sheets 2, 4, 10, 22 and 27

Split Land

Plots:

- *02-17;*
- *04-08;*
- *10-08;*
- *22-23; and*
- *22-24,*

in the Book of Reference

Statement of Reasons

The Statement of Reasons submitted with the Application

Temporary Possession Land

Plots:

- *02-06*

- 02-18
- 04-06
- 04-10
- 10-07
- 10-19
- 22-22; and
- 22-25,

in the Book of Reference

Undertaker

The Undertaker as described in the DCO

WRLtH

Network Rail's Western Rail Link to Heathrow scheme

1.2 *In this written representation references to Plots are references to Plots identified in the Book of Reference and the Land Plans.*

2. SUMMARY

2.1 *Subject to the proper protection of Network Rail's statutory undertaking, Network Rail does not object in principle to the making of the DCO. However at the time of submission of this document Network Rail's interests are not adequately protected and its objection is therefore sustained. Network Rail's objection is limited to those parts of the proposed DCO affecting its operational land and described in this representation.*

2.2 *Specifically, Network Rail objects to the following:*

2.2.1 *The making of the DCO in its current form as the adverse impacts of the Authorised Development would outweigh its benefits contrary to Section 104(7) of the 2008 Act.*

2.2.2 *The granting of powers of compulsory acquisition over the Network Rail Land. These would cause serious detriment to the carrying on of Network Rail's railway undertaking contrary to Sections 127 and 138 of the 2008 Act and it would not be in the public interest to grant such powers under Section 122 of the 2008 Act. The*

granting of these powers would also be contrary both to the purpose of Network Rail's Network Licence and run contrary to its duty to achieve that purpose.

2.2.3 *The current wording of the Draft DCO and the Application, including:*

- (a) *The absence of protective provisions in favour of Network Rail in a form acceptable to them.*
- (b) *The transfer of the benefit of the DCO pursuant to Article 8 of the Draft DCO.*
- (c) *The identification of Highways England as owner of land owned by Network Rail in the Book of Reference, in particular Plots 02-17, 04-08, 10-08, 22-23, 22-23a and 22-23b.*
- (d) *The non-delineation of Network Rail's interests in Plots 27-12 and 27-13.*

2.2.4 *The effects on the Authorised Development on the Railways including:*

- (a) *The potential for increased risk of vehicle incursion;*
- (b) *The potential for gantries to affect Network Rail's railway undertaking*
- (c) *The potential detrimental effect of Work 17 (Widening of Windsor Branch Railway underbridge) on the electrification of the Railway and the installation of OLE.*

2.2.5 *The potential effect of the Authorised Development on the proposed Western Rail Link to Heathrow (WRLtH).*

2.2.6 *Until the above issues are resolved to Network Rail's satisfaction the making of the DCO.*

Highways England Comment

2.2.6.1 Highways England notes that the above is a summary of Network Rail's concerns, and has provided a response on the detailed points made by Network Rail below.

3. POWERS OF COMPULSORY ACQUISITION

3.1 Land Ownership

3.1.1 *Network Rail is currently considering the accuracy of the Book of Reference.*

3.1.2 *From the information it has obtained to date, Network Rail offers the preliminary comments in relation to specific plots as set out in the Table at Annex 1.*

3.1.3 *In general the following themes emerge which are of concern to Network Rail:*

- (a) *Plots 27-12 and 27-13 make no attempt to delineate between the Interests of Network Rail, Highways England and Slough Borough Council. Network Rail owns the railway through these Plots, with Highways England owning, in certain places, parcels of land which appear to be bridge abutments. Network Rail is not aware that Highways England has any title to the land above the railway where the bridges are situated.*

Highways England Comment

3.1.3.2 Highways England have been in contact with Network Rail in order to review land ownership by requesting confirmation of land ownership in letters dated 23 October 2014 and 25 February 2015, to which a full response was received on 16 March 2015, which has been incorporated in the land referencing information.

3.1.3.3 The Table at Annex 1 has been updated with an additional column setting out Highways England's responses to each of Network Rail's preliminary comments.

3.1.3.4 It is accepted that Network Rail own the railway in plots 27-12 and 27-13, and that it would provide clarity to provide a further qualification of interests. The Secretary of State for Transport retains a caution over the bridges in these parcels, as a beneficiary of rights contained in a deed of grant dated 14 April 2014. As highway authority of the motorway, it is considered that Highways England (which is now a separate organisation to the Secretary of State for Transport) holds an ownership interest over the highway, highway furniture (gantries, signage etc.) and bridge structure.

3.1.3.5 The Book of Reference (Application Document Reference 4-3) will be updated with the appropriate qualification and provided alongside the submitted documents for Deadline III.

(a) *Freehold title is also claimed by Highways England in respect of road over rail bridges at Plots 02-17, 04-08, 10-08, 22-23, 22-23a and 22-23b. Again Network Rail is not aware that Highways England has any title to the land above the railway where the motorway bridges are situated, although they may have the right to build and maintain bridges there.*

Highways England Comment

3.1.3.6 The inclusion of a party in the “Owner or Reputed Owner” column in the Book of Reference does not necessarily specify a party claiming a freehold title, but identifies potential or reputed owners in land.

3.1.3.7 In the case of plots 02-17, 04-08, 10-08, 22-23, 22-23a and 22-23b it is understood that Network Rail owns the freehold land, and that Highways England hold rights to construct a bridge over this land. However, as highway authority of the motorway, Highways England holds an ownership interest over the highway, highway furniture (gantries, signage etc.) and the bridge structure.

3.1.3.8 Plots 02-17, 04-08, 10-08 and 22-23 have been identified for permanent acquisition at highway level, and temporary use only below. Plots 22-23a and 22-23b have been identified for permanent acquisition

(c) *Network Rail is checking its records but it is not currently aware of any evidence of the dedication highway across the bridges referred to in (a) and (b) above such as might give rise to a fee simple determinable by the operation of Section 263 or 265 of the 1980 Act.*

Highways England Comment

3.1.3.9 The highway carried by the bridges in each case is highway maintainable at the public expense. The bridges themselves are owned and maintained by Highways England.

3.1.3.10 This is plainly the case since Network Rail is not attempting to exercise any control on the right of the public to pass and re-pass over the bridges. As such, they are plainly highway. They are maintained by Highways England at the public expense. However, the estate of the company is a fee simple absolute, since the road was (until recently) in the ownership of a Crown Body.

(d) *Without prejudice to the above, and Network Rail's general objection to the granting of powers of compulsory acquisition over its land, there is a lack of consistency between the way that road over rail bridges are treated in the Book of Reference:*

(i) *Plots 02-17, 04-08 and 10-08 appear to seek to make a clear distinction between these plots, which have a road over them in respect of which unrestricted powers to acquire or use would apply to the road but not the railway under it, and the adjacent plots where there is railway where powers are limited to temporary possession.*

Highways England Comment

3.1.3.11 Plots 02-17, 04-08 and 10-08 are identified as required for "unrestricted powers to acquire or use land at motorway level, powers limited to temporary use of land below motorway level". The adjacent plots (namely 02-16, 02-18, 04-06, 04-10, 10-07, 10-09) are identified as required for temporary use only.

(ii) *Although Plots 22-23 and 22-24 are divided to make it clear that unrestricted powers to acquire or use would only apply to the road over the bridge (but not the railway under it) this distinction is not carried through into other Plots owned by Network Rail. Plots 22-22a, 22-22b, 22-23a, 22-23b, 22-24a and 22-24b are all shown as carrying unrestricted powers to acquire or use, notwithstanding that this land does not appear to fall within Highways England's title.*

Highways England Comment

3.1.3.12 Plots 22-23 and 22-24 are identified as required for “*unrestricted powers to acquire or use land at motorway level, powers limited to temporary use of land below motorway level*”.

3.1.3.13 It is understood that Network Rail owns the freehold in plots 22-23a and 22-23b at ground level, and that Highways England owns the freehold in the bridge over this land. As highway authority of the motorway, Highways England owns the highway, highway furniture (gantries, signage etc.) and the bridge structure. The Statement of Reasons notes that these plots are required as follows “*Land within existing motorway boundaries retained for construction and operation of the scheme*”.

3.1.3.14 Plots 22-22a, 22-22b, 22-24a and 22-24b are understood to be owned (freehold) by Network Rail and recorded as such in the Book of Reference. These plots are identified as required for permanent acquisition, and the Statement of Reasons notes the reason for this requirement as follows “*Land required for widening Windsor Branch Railway underbridge*”. The ownership sought is not so as to interfere with the operation of the railway, and is tempered by the proposed protective provisions in any event.

(iii) *In respect of Plots 27-12 and 27-13 the whole of the land is shown with unrestricted powers to acquire or use whether or not there is a railway, bridge abutment or bridge deck in place.*

Highways England Comment

3.1.3.15 Plots 27-12 and 27-13 are identified as required for permanent acquisition and the Statement of Reasons lists the reason for its acquisition as “*Land within existing motorway boundaries retained for construction and operation of the Scheme*”. It is accepted that these plots have not been treated consistently with other Network Rail land, but should be read that only land within the existing motorway boundary will be affected, and it is not intended to compulsorily acquire Network Rail owned land.

3.1.3.16 The Land Plans (Application Document Reference 2-2) and Book of Reference have been updated to reflect the above changes to Plots 27-12 and 27-13.

3.2 Powers sought by the Promoter

3.2.1 *The Draft DCO contains powers which affect the Network Rail Land which is owned by Network Rail, and the Network Rail Rights Land in which Network Rail has rights. In particular the Draft DCO would authorise:*

(a) *In respect of the Acquisition Land:*

- (i) *Compulsory acquisition of the land; and*
- (ii) *Compulsory acquisition of rights in and the imposition of restrictive covenants affecting the land;*
- (iii) *The overriding of easements and other rights; and*
- (iv) *The extinguishment of all private rights;*

(b) *In respect of the Temporary Possession Land:*

- (i) *The taking of temporary possession;*
- (ii) *The removal of buildings and construction of temporary works;*
- (iii) *Compulsory acquisition of rights in and the imposition of restrictive covenants affecting the land;*
- (iv) *The overriding of easements and other rights; and*
- (v) *The extinguishment of all private rights;*

(c) *In respect of the Split Land*

- (i) *The powers described in paragraph (a) above in respect of the motorway level; and*
- (ii) *The powers described in paragraph (b) above in respect of the land below the motorway level.*

(d) *In respect of the Network Rail Rights Land the powers described in paragraph (a) above.*

3.2.2 *When considering whether or not to make a development consent order conferring powers of compulsory acquisition in respect of land which is owned by statutory undertakers or in which statutory undertakers have rights the key tests are set out in Sections 122, 127 and 138 of the 2008 Act. These tests have not been met and accordingly the powers should not be granted.*

Highways England Comment

3.2.2.1 Highways England notes that the above is a summary of Network Rail's concerns, and has provided a response on the detailed points made by Network Rail below.

3.3 *Section 122 of the 2008 Act*

3.3.1 *Section 122 of the 2008 Act sets out the principal test for the Secretary of State in determining whether or not to include powers of compulsory acquisition in a development consent order.*

3.3.2 *Section 122 states as follows:*

122 Purpose for which compulsory acquisition may be authorised

(1) An order granting development consent may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met.

(2) The condition is that the land—

(a) is required for the development to which the development consent relates,

(b) is required to facilitate or is incidental to that development, or (c)...

(3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.

3.3.3 *The first part of this test is that the land is “required” for the development. This word is not defined in the 2008 Act, however Paragraph 11 of the DCLG Guidance states in relation to Section 122(2)(a):*

“...the applicant should be able to demonstrate to the satisfaction of the Secretary of State that the land in question is needed for the development for which consent is sought. The Secretary of State will need to be satisfied that the land to be acquired is no more than is reasonably required for the purposes of the development.”

Paragraph 11 continues in relation to Section 122(2)(b):

“An example might be the acquisition of land for the purposes of landscaping the project. In such a case the Secretary of State will need to be satisfied that the development could only be landscaped to a satisfactory standard if the land in question were to be compulsorily acquired, and that the land to be taken is no more than is reasonably necessary for that purpose, and that is proportionate.”

3.3.4 *The word “required” in Section 122 of the 2008 Act also mirrors the wording of Section 226(1)(a) of the 1990 Act (as that Section was originally enacted). The meaning of that word was considered by the Court of Appeal in Sharkey v Secretary of State for the Environment (1992) 63 P. & C.R. 332 where McGowan LJ stated:*

“...the local authority do not have to go so far as to show that the compulsory purchase is indispensable to the carrying out of the activity or the achieving of the purpose; or, to use another similar expression, that it is essential. On the other hand, I do not find the word ‘desirable’ satisfactory, because it could be mistaken for ‘convenient’, which clearly, in my judgment, is not sufficient. I believe the word ‘required’ here means ‘necessary in the circumstances of the case’.”

Although Sharkey related to a different piece of legislation, in light of the DCLG Guidance set out above it would seem reasonable to conclude that the word “required” in Section 122(1)(a) and (b) should be interpreted in the same manner.

Highways England Comment

3.3.4.1 Highways England does not dispute that this records the current state of the law in relation to compulsory acquisition under the Planning Act 2008.

3.3.5 *The Secretary of State must also be satisfied that there is a “compelling case in the public interest” for the land to be acquired compulsorily. Paragraph 13 of the DCLG Guidance states:*

“For this condition to be met, the Secretary of State will need to be persuaded that there is compelling evidence that the public benefits that would be derived from the compulsory acquisition will outweigh the private loss that would be suffered by those whose land is to be acquired. Parliament has always taken the view that land should only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss.”

Highways England Comment

3.3.5.1 Highways England does not dispute that this records the current state of the law in relation to compulsory acquisition under the Planning Act 2008.

3.3.6 *Paragraphs 14 to 16 of the DCLG Guidance continue by explaining that “...the Secretary of State will weigh up the public benefits that a scheme will bring against any private loss to those affected by compulsory acquisition.” When addressing the question of whether to grant powers of compulsory acquisition the decision maker is also bound to have regard to Article 1 of the First Protocol of ECHR (protection of property).*

Highways England Comment

3.3.6.1 Highways England does not dispute that this records the current state of the law in relation to compulsory acquisition under the Planning Act 2008.

3.3.7 *As land belonging to a statutory undertaker for the purposes of their undertaking, the Network Rail Land is land belonging to a statutory undertaker and is a special species of land. This is recognised by the special protection applied to*

such land by virtue of Section 127 of the 2008 Act (see section 3.4 below). These protections are necessary because such undertakings provide a public service. The public interest test in Section 122(3) of the 2008 Act therefore falls to be determined not just by weighing the public benefits of the scheme against the private loss of Network Rail, but also against the public dis-benefits caused by the disruption of Network Rail's undertaking, which are inseparable from Network Rail's private interest.

Highways England Comment

3.3.7.1 Highways England recognises that land belong to Network Rail is subject to protection under sections 127 and 138 of the Planning Act 2008. As such, Highways England will make applications to the Secretary of State under sections 127 and 138 of the Planning Act 2008 shortly.

3.3.8 *The Draft DCO contains powers which would allow the permanent compulsory acquisition of parts of two operational railways (see Plots 22-22a, 22-22b, 22-23a, 22-23b, 22-24a, 22-24b 27-12 and 27-13). In the case of Plots 27-12 and 27-13 this would certainly have the effect of severing the linear railway. In the case of Plots 22-22a, 22-22b, 22-23a, 22-23b, 22-24a and 22-24b it may also have this effect; the narrowing of Network Rail's ownership would be likely to lead to disruption and delay to the railway line.*

Highways England Comment

3.3.8.1 Plots 27-12 and 27-13 are shown in error as permanent acquisition only it is not intended to permanently acquire Network Rail owned land in this location. Unrestricted powers to use or acquire the land are needed only at motorway level on the bridges over the railway. At railway level the required powers are limited to temporary use only, for inspection and possible refurbishment of the bridges. Plots 27-12 and 27-13 are incorrectly coloured on Land Plan 27. They should have been plotted separately and coloured grey and green based on the locations of highways. An updated Land Plan is attached at Appendix A to this response, and include additional plots 27-12a, 27-12b, 27-12c, 27-12d, 27-12e, 27-12f, 27-13a, 27-13b, 27-12c and 27-12d to replace 27-12 and 27-13.

3.3.8.2 Plots 22-22a, 22-22b, 22-23a, 22-23b, 22-24a and 22-24b are required for the widening of Windsor Railway Underbridge. The extent of permanent acquisition is shown to include the bridge substructure.

3.3.8.3 However, Highways England does not consider that the acquisition of Plots 27-12 and 27-13 will have the effect of severing the linear railway, nor does Highways England agree that the acquisition of Plots 22-22a, 22-22b, 22-23a, 22-23b, 22-24a and 22-24b may also have this effect. Highways England does not agree that the acquisition of the plots is likely to lead to disruption and delay to the railway line as every plot is subject to Network Rail's standard protective provisions, which have been included within the DCO.

3.3.8.4 Paragraph 23 of the proposed protective provisions (Schedule 9, Part 3 of the draft DCO) for the benefit of Network Rail enables the extent of acquisition to be controlled by Network Rail so far as reasonable. As such, the concern raised by Network Rail is unfounded.

3.3.9 *The Draft DCO contains powers which could have the effect of closing the Railway for a period of several years. For example Articles 29 and 30 of the Draft DCO would allow the Promoter to take temporary possession of the Temporary Possession Land and the Split Land and to remain in possession for a period of over six years. This would severely disrupt the four major railway routes, and this would have severe adverse consequences for the wider economy.*

Highways England Comment

3.3.9.1 Highways England has included Network Rail's standard protective provisions within the DCO at Schedule 9, Part 3. Paragraph 23 of Schedule 9, Part 3 of the draft DCO ensures that Highways England cannot exercise the powers conferred by articles 29 and 30 unless the exercise of such powers is with the reasonable consent of Network Rail.

3.3.9.2 Highways England considers that the requirement of Network Rail's reasonable consent to exercise most of the relevant powers contained

within the draft DCO in respect of any railway property should be sufficient to provide comfort to Network Rail.

3.3.9.3 The full text of paragraph 23, Schedule 9, Part 3 of the draft DCO is as follows:

23.—(1) The undertaker must not exercise the powers conferred by articles 19 (authority to survey and investigate land), 20 (compulsory acquisition of land), 22 (compulsory acquisition of rights), 24 (private rights over land), 26 (acquisition of subsoil or air-space only), 28 (rights under or over streets), 29 (temporary use of land for carrying out the authorised development), 30 (temporary use of land for maintaining the authorised development), 31 (statutory undertakers) or the powers conferred by section 11(3) (powers of entry) of the 1965 Act in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.

(2) The undertaker must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Network Rail.

(3) The undertaker must not exercise the powers conferred by sections 271 (extinguishment of rights of statutory undertakers: preliminary notices) or 272 (extinguishment of rights of telecommunications code system operators: preliminary notices) of the 1990 Act, or article 31 (statutory undertakers), in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.

(4) The undertaker must not under the powers of this Order acquire or use, or acquire new rights over, any railway property except with the consent of Network Rail.

(5) Where Network Rail is asked to give its consent or agreement under this paragraph, such consent or agreement must not be unreasonably withheld but may be given subject to reasonable conditions.

3.3.10 *The consequences of granting the powers of compulsory acquisition set out in the Draft DCO would therefore potentially be very severe both in terms of public and private loss. It follows that the test set out in Section 122 has not been satisfied in respect of the Network Rail Land and the Network Rail Rights Land and that the powers of compulsory acquisition which the Promoter is seeking in relation to this land should not be granted.*

Highways England Comment

- 3.3.10.1 Highways England repeats the response to paragraph 3.3.9 above: Network Rail is protected by the inclusion of its standard protective provisions in the draft DCO.
- 3.3.10.2 On that basis, Highways England does not agree that the test in Section 122, that there is a compelling case in the public interest for the land to be acquired compulsorily, is not met.
- 3.3.10.3 The requirement for the specific plots relevant to Network Rail is set out in response to paragraph 3.3.8 above. Chapter 7F of the Statement of Reasons (Application Document 4.1) submitted with the Application addresses the Scheme's compelling case in the public interest:

7.1.41 A Planning Statement accompanies the Application (Doc. ref. 7.1). In addition to the information set out above, the Planning Statement explains how the Scheme:

- a) contributes to the improvement of national networks as sought by policy;
- b) contributes to the delivery of local strategic development as set out in the identified development plan;
- c) has addressed the potential for environmental impacts; and
- d) satisfies the planning balance.

7.1.42 The Planning Statement provides an extensive review of these matters and so they are not repeated here. The Planning Statement demonstrates that there is a very strong and compelling case for the Scheme to be delivered. The need for the Scheme is, thereby, established.

7.1.43 There is also a compelling case in the public interest to include compulsory acquisition powers in the DCO, the exercise of which (and the associated interference with the rights of those with an interest in the land over which the powers of compulsory acquisition are to be exercised) are necessary and proportionate because:

- a) there is an established need and a compelling case for the Scheme to come forward, as described at paragraphs 7.1.41 and 7.1.42 of this Statement;
- b) the powers of compulsory acquisition (in respect of powers of permanent or temporary acquisition of land, or the acquisition of rights only) are no more than are necessary for

delivery of the Scheme, as described in sections 7.B and 7.C of this Statement;

c) the land over which powers of compulsory acquisition are sought is no larger in extent than is necessary for delivery of the Scheme and all land to be subject to compulsory acquisition has an identified purpose in delivering the Scheme, as provided in Table 2;

d) there are no alternatives to the Scheme that would reduce the amount of land that is to be subject to powers of compulsory acquisition, as described at paragraph 7.1.33 of this Statement; and

e) the inclusion of powers of compulsory acquisition in the DCO at the outset (i.e. at Application) is appropriate for a Scheme such as this, as provided for at paragraph 25 of the Guidance and described at paragraph 7.1.11 of this Statement.

3.4 *Section 127 of the 2008 Act*

3.4.1 *Compulsory Acquisition of Statutory Undertakers' Land*

(a) *Section 127 contains provisions conveying special protection for statutory undertakers' land by introducing a special test which must be applied by the Secretary of State before powers of compulsory acquisition are granted. Under Section 127(1):*

(1) This section applies in relation to land ("statutory undertakers' land") if—

(a) the land has been acquired by statutory undertakers for the purposes of their undertaking,

(b) a representation has been made about an application for an order granting development consent before the completion of the examination of the application, and the representation has not been withdrawn, and

(c) as a result of the representation the Secretary of State is satisfied that—

(i) the land is used for the purposes of carrying on the statutory undertakers' undertaking, or

(ii) an interest in the land is held for those purposes.

- (b) *It is clear that Section 127 of the 2008 is engaged:*
- (i) *Statutory undertaker is defined in Section 127(8) of the 2008 Act by reference to Section 8 of the Acquisition of Land Act 1981. Section 8(1)(a) of the 1981 Act includes: “any person authorised by any enactment to construct, work or carry on... any railway... undertaking”. Network Rail, as successor to the Company, is authorised to carry on the railway undertaking.*
 - (ii) *Network Rail has made a representation in respect of the Application.*
 - (iii) *Network Rail is the owner of the Network Rail Land and operates the railway undertakings comprised in the Railways. The Railways continue to be used for rail traffic. It follows that Network Rail is also a statutory undertaker within the meaning of Section 127(8) of the 2008 Act.*

Highways England Comment

3.4.1.2 Highways England agrees that section 127 of the Planning Act 2008 is engaged. As noted in the response to paragraph 3.3.7 above, Highways England intends to make an application to the Secretary of State under section 127 shortly.

(c) *Under Sections 127(2) and (3) a development consent order “may include provision authorising the compulsory acquisition of statutory undertakers' land only to the extent that the Secretary of State is satisfied” that one of the following is satisfied:*

(3) *...the nature and situation of the land are such that—*

(a) *it can be purchased and not replaced without serious detriment to the carrying on of the undertaking, or*

(b) *if purchased it can be replaced by other land belonging to, or available for acquisition by, the undertakers without serious detriment to the carrying on of the undertaking.*

- (d) *Sections 127(2) and (3) apply to:*
- (i) *The power in Article 20 of the Proposed DCO to compulsorily acquire the Acquisition Land and the part of the Split Land which is at motorway level;*
 - (ii) *The power in Articles 29 and 30 of the Proposed DCO to take temporary possession of the Temporary Possession Land and the part of the Split Land which is below motorway level.*

Highways England Comment

- 3.4.1.3 As noted in Highways England's response to paragraph 3.3.9 above, the exercise of the powers in Articles 20, 29 and 30 are subject to paragraph 23, Part 3, Schedule 9 and can only be exercised with the consent of Network Rail.
- 3.4.1.4 As noted in the response to paragraph 3.3.7 above, Highways England intends to make an application to the Secretary of State under section 127 shortly.
- (e) *Permanent acquisition or the taking of temporary possession of parts of Network Rail's operational Railways pursuant to the DCO would severely interrupt rail service. The Draft DCO does not provide adequate safeguards to minimise disruption to services. The granting of these powers would therefore cause serious detriment to the carrying on of Network Rail's undertaking (see paragraphs 3.3.8 and 3.3.9 above).*

Highways England Comment

- 3.4.1.5 Highways England considers that the draft DCO provides sufficient safeguards as it incorporates Network Rail's standard protective provisions. Highways England confirms that it has made no amendments to the protective provisions in Schedule 9, Part 3 since 8 July 2015.
- 3.4.1.6 On 8 July 2015, Network Rail confirmed that "Network Rail is content with the protective provisions in the draft Order being in the same form as for previous Highways England schemes" (Appendix

B. As such, Network Rail's written representation is not consistent with its earlier submission.

3.4.1.7 On 9 July 2015, Network Rail submitted a section 56 representation to the Examining Authority (Appendix C), which stated:

"There are standard protective provisions for the benefit of Network Rail which are well precedented in TWA Orders and now in DCOs. Prior to submission of the application, Network Rail was in contact with the promoter regarding the appropriate form that these provisions should take and is pleased to see that these have been incorporated within the draft Order. Network Rail would like to highlight to the Examining Authority the absolute need for these protective provisions to remain included in a DCO where Network Rail's operational infrastructure is affected by the proposal."

3.4.1.8 Highways England continues to discuss protective provisions with Network Rail and it is hoped that the discussions will enable Network Rail to withdraw their representation.

(f) *The established system of railway possessions under the Network Code provides a far more suitable and balanced mechanism under which these works may be carried out. It is essential that the any closure of the Railways necessitated by the Authorised Development is of a very limited duration (ie limited to a matter of days and not years). As a general principle, the taking of the Network Rail Land should only be with Network Rail's permission, under their supervision and for such period of time as Network Rail stipulates.*

Highways England Comment

3.4.1.9 As noted in the responses above, the draft DCO incorporates Network Rail's standard protective provisions. This ensures that the relevant powers within the draft DCO can only be exercised with the consent of Network Rail.

3.4.1.10 Paragraph 24, Part 3, Schedule 9 of the draft DCO provides that Highways England "must, before commencing construction of any

specified work, supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration under article 47 (arbitration)".

3.4.1.11 Paragraph 25, Part 3, Schedule 9 of the draft DCO provides that specified works must be constructed "(a) with all reasonable dispatch in accordance with the plans approved or deemed to have been approved..." and "(b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer".

3.4.1.12 On that basis, Highways England is compliant with the "general principle" set out by Network Rail above.

(g) *Network Rail is very concerned that at the time of submission of this document the Promoter has not yet provided sufficient information for Network Rail to commence its internal clearance process, not obtained any of the necessary engineering approval agreements that would be necessary in order to carry out the works.*

Highways England Comment

3.4.1.13 The status of the Scheme design at the time of the Application was preliminary. As part of the preliminary design, Highways England prepared Approval In Principle ("AIP") documents for each of the affected structures. The AIP for Windsor Railway Bridge, dated August 2015, was submitted to Network Rail for review. In a response dated 20 October 2015, Network Rail Asset Protection Engineer wrote "Network Rail has no objection in principle to the above submission". This letter is at Appendix D to this response.

3.4.1.14 The detailed design team will seek approval from Network Rail's Asset Protection Team, where necessary and in accordance with Network Rail's standard protective provisions.

(h) *The Draft DCO contains a number of powers to acquire land both permanently and temporarily which are subject to this test, including*

Articles 20 (compulsory acquisition of land), 26 (acquisition of subsoil or airspace only), 28 (rights under or over streets), 29 (temporary use of land for carrying out the authorised development, 30 (temporary use of land for maintaining the authorised development) and 31 (statutory undertakers). In light of the issues referred to above Network Rail considers that these powers cannot be taken without serious detriment to the carrying on of its railway undertaking and it therefore objects to these powers applying to the Network Rail Land.

Highways England Comment

3.4.1.15 As set out in the Statement of Reasons (Application Document Reference 4.1) which accompanied the Application, the relevant plots and powers are required for the development of the Scheme.

3.4.1.16 However, as noted above, Highways England has incorporated Network Rail's standard protective provisions into the draft DCO. The powers to acquire land under Articles 20, 26, 28, 29, 30 and 31 may only be exercised with the consent of Network Rail, such consent not to be unreasonably withheld, but may be given subject to reasonable conditions.

(i) *Network Rail is also particularly concerned about Article 31 which relates to the compulsory acquisition of statutory undertakers' land. This power appears to override Article 29(8) which prevents the permanent acquisition of the Temporary Possession Land and the part of the Split Land below motorway level. The Draft DCO as drafted would therefore allow the compulsory acquisition of the Temporary Possession Land and the and the part of the Split Land below motorway level.*

Highways England Comment

3.4.1.17 Highways England has reviewed the draft DCO in light of Network Rail's comments and considers that Article 31 is a limited power, constrained by explicit reference to the protective provisions in Schedule 9.

3.4.1.18 As noted above, Part 3 of Schedule 9 of the draft DCO prevents the exercise of powers of compulsory acquisition by Highways England without the reasonable consent of Network Rail.

3.4.2 *Compulsory Acquisition of New Rights over Statutory Undertakers' Land*

(a) *Under Sections 127(5) and (6) a development consent order “may include provision authorising the compulsory acquisition of a right over statutory undertakers' land by the creation of a new right over land only to the extent that the Secretary of State is satisfied” that one of the following is satisfied:*

(6) *...that the nature and situation of the land are such that—*

(a) *the right can be purchased without serious detriment to the carrying on of the undertaking, or*

(b) *any detriment to the carrying on of the undertaking, in consequence of the acquisition of the right, can be made good by the undertakers by the use of other land belonging to or available for acquisition by them.*

(b) *Sections 127(5) and (6) apply to the power in Article 22 of the Draft Order, which would allow the Undertaker to acquire new rights in or impose restrictive covenants over any part of the Network Rail Land.*

Highways England Comment

3.4.2.2 Highways England agrees that sections 127(5) and (6) apply to the power in Article 22 of the draft DCO. However, paragraph 23, Schedule 9, Part 3 of the draft DCO applies to limit the power of compulsory acquisition by requiring Network Rail's consent.

3.4.2.3 The nature of the proposed works, as set out above, and the inclusion of protective measures in the draft DCO means that the Secretary of State can be confident that Network Rail's rights, whilst subject to interference, will not be affected to the detriment of its ability to carry out its undertaking.

- (c) *The taking of unspecified rights over the Network Rail Land in the uncontrolled way provided for by the Draft DCO would be likely to have detrimental impacts on Network Rail's statutory undertaking (see Paragraph 3.3.1(e) above). The extent and nature of these impacts is uncertain, but due to the wide discretion which is afforded by the Draft DCO they could be very severe indeed.*

Highways England Comment

- 3.4.2.4 The submission of Network Rail misrepresents the proposed powers, which would be constrained by the proposed protective provisions. This is explained in greater detail above.

- (d) *Network Rail is also very concerned for the potential for the reintroduction of settlement of Network Rail embankments which could arise due to the loads imposed during and following the road embankment construction.*

Highways England Comment

- 3.4.2.5 Highways England confirms that the Scheme does not incorporate works directly to the Network Rail embankments.

- 3.4.2.6 Furthermore, Highways England will continue to liaise with Network Rail throughout the detailed design stage. This will provide Network Rail with the opportunity to review and approve design proposals, for any works have the potential to impact on their embankments, prior to the construction of the Scheme in accordance with Network Rail's standard protective provisions which are incorporated into Part 3 of Schedule 9 of the draft DCO.

- (e) *The Draft DCO contains a number of powers to acquire rights which are subject to this test, including Articles 15 (access to works), 17 (discharge of water), 18 (protective works to buildings), 19 (authority to survey and investigate land), 2 (compulsory acquisition of rights), 31 (statutory undertakers), 32 (Apparatus and rights of statutory undertakers in stopped up streets) 38 (felling and lopping of trees).*

Highways England Comment

- 3.4.2.7 Highways England has included Network Rail's standard protective provisions within the DCO at Schedule 9, Part 3.
- 3.4.2.8 The powers within the DCO are subject to paragraph 23(2) and (4) of Network Rail's standard protective provisions, which require Network Rail's permission to if pedestrian or vehicle access to any railway property is to be prevented; or if any railway property is to be acquired, used or subject to new rights over.
- 3.4.2.9 Articles 19, 22 and 31 are explicitly subject to paragraph 23(1) of the protective provisions, and Highways England may only exercise the powers contained therein with the consent of Network Rail.
- 3.4.2.10 In relation to Articles 17 and 38, Highways England does not consider that Network Rail's undertaking is affected by the powers contained therein. Further, Article 32 is provided for the protection of statutory undertakers. Network Rail is requested to particularise their concerns in relation to these articles.
- 3.4.2.11 Articles 15 and 18 are not included in the powers specifically controlled by paragraph 23(1) of Network Rail's standard protective provisions. If requested to do so by Network Rail, Highways England would have no concerns in relation to making explicit reference to Articles 15 and 18 in paragraph 23(1) of Part 3 of Schedule 9 to the draft DCO.

(f) *The Statement of Matters makes no reference to Section 127, and no justification has therefore been given or made out for the acquisition of the Network Rail Land. Accordingly no case has been made out that the land can be purchased without serious detriment to the carrying on of the undertaking and the powers which are being sought in relation to Network Rail's interests in the Network Rail Land should not be granted.*

Highways England Comment

- 3.4.2.12 Highways England will make an application to the Secretary of State pursuant to section 127 of the Planning Act 2008 shortly. As noted

in the response to 3.3.10 above, the Statement of Reasons sets out the justification for compulsory acquisition of Network Rail's land and/or interests.

3.4.2.13 The nature of the proposed works, as set out above, and the inclusion of protective measures in the draft DCO means that the Secretary of State can be confident that the Scheme will not cause serious detriment to Network Rail's ability to carry out its undertaking.

3.5 *Section 138 of the 2008 Act*

3.5.1 *Section 138 contains a special test which must be applied by the Secretary of State before powers of compulsory acquisition are granted which would extinguish a right or way, or a right of laying down, erecting, continuing or maintaining apparatus on, under or over land” where that right is vested in a statutory undertaker for the purposes of their statutory undertaking. Under Section 138(4):*

(4) The order may include provision for the extinguishment of the relevant right, or the removal of the relevant apparatus, only if the Secretary of State is satisfied that the extinguishment or removal is necessary for the purpose of carrying out the development to which the order relates.

3.5.2 *The Draft DCO contains a number of powers to extinguish rights, including Articles 13 (permanent stopping up of streets and private means of access), 23 (power to override easements and other rights), 25 (private rights over land) and 31 (statutory undertakers).*

3.5.3 *Although the Statement of Matters makes reference to Section 138, no justification has been made out for the removal of Network Rail's rights in the Network Rail land or the Network Rail Rights Land. Accordingly no case has been made out that the extinguishment of Network Rail's rights is necessary to allow the development to proceed and the powers which are being sought in relation to Network Rail's interests in the Network Rail Rights Land should not be granted.*

Highways England Comment

- 3.5.3.1 Articles 25 and 31 are subject to paragraph 23, Schedule 9, Part 3 of the draft DCO, which applies to limit the power of compulsory acquisition by requiring Network Rail's consent. To the extent that Article 13 applies to Network Rail's land, the article is subject to Article 32 of the draft DCO. Article 23 relates to overriding easements and other rights, none of which are affected in respect of Network Rail such that the article is not of relevance in this consideration.
- 3.5.3.2 Section 138 of the Planning Act 2008 makes provision for circumstances where a proposed development consent order provides for rights benefitting statutory undertakers to be extinguished and for their apparatus to be removed. To an extent these provisions overlap with those of section 127 of the Planning Act 2008 in that a right in land is included in the concept of land. The provisions of section 138 allow the extinguishment of relevant rights - being rights of way and rights to install, keep and maintain apparatus - and the removal of apparatus. However, this is only permitted where the Secretary of State concludes that it is necessary to do so.
- 3.5.3.3 Section 138 of the Planning Act 2008 is not addressed in the Statement of Reasons. Highways England will make an application to the Secretary of State pursuant to section 138 of the Planning Act 2008 shortly. As noted in the response to 3.3.10 above, the Statement of Reasons sets out the justification for compulsory acquisition of Network Rail's land and/or interests.
- 3.5.3.4 The nature of the proposed works, as set out above, and the inclusion of protective measures in the draft DCO means that the Secretary of State can be confident that the Scheme will not cause serious detriment to Network Rail's ability to carry out its undertaking.

3.6 *Network Licence*

- 3.6.1 *Network Rail operates under the Network Licence, which was made under Section 8 of the 1993 Act.*

- 3.6.2 *Under Part III, Part A, Clause 1 of the Network Licence the purpose of the Licence is (amongst other things) to secure the operation and maintenance, improvement, enhancement and development of the Network in accordance with best practice and in a timely, efficient and economical manner. This is both in respect of the quality and capability of the Network and in the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the Network. Clause 2 of the Network Licence places Network Rail under a duty to achieve this purpose.*
- 3.6.3 *The granting of compulsory powers over the Railway is contrary to both the purpose of the Network Licence and Network Rail's duty to achieve that purpose.*

Highways England Comment

- 3.6.3.1 Network Rail's licence governs its relationship with its regulator and with the public. As such, it is not possible for the grant of powers sanctioned by Parliament via a DCO to be contrary to the licence of Network Rail. The representation has not correctly stated the position under Network Rail's licence.
- 3.6.3.2 Furthermore, Network Rail's licence specifically envisages the grant of powers of compulsory acquisition over its land. This is contained in Condition 7 of the licence, which allows the disposal of Network Rail's property "under any enactment". This refers to compulsory acquisition. Network Rail is then protected by ss127 and 138 PA 2008.
- 3.6.3.3 Highways England has included Network Rail's standard protective provisions within the DCO at Schedule 9, Part 3.
- 3.6.3.4 Highways England considers that the requirement of Network Rail's reasonable consent to exercise most of the relevant powers contained within the draft DCO in respect of any railway property should be sufficient to provide comfort to Network Rail.
- 3.6.3.5 For these reasons, Highways England disagrees that the granting of compulsory powers over the Railway is contrary to either the purpose

of the Network Licence, or Network Rail's duty to achieve that purpose.

4. THE DCO

4.1 Protective Provisions

4.1.1 Network Rail has standard protective provisions which it requires to be included in any development consent order or Transport and Works Act order which is likely to affect its railway undertaking. Although the precise detail of protective provisions needs to be agreed on each occasion, a useful starting point is the protective provisions contained in the A160/A180 (Port of Immingham Improvement) Development Consent Order 2015.

4.1.2 Network Rail's protective provisions are designed to balance the needs of the Undertaker against the operational requirements of Network Rail's undertaking. The protective provisions deal with issues such as the restriction of the powers of the Undertaker to exercise powers of compulsory acquisition except with the consent of Network Rail, the approval of plans, the carrying out of protective works and damage and obstruction arising from the works.

4.1.3 The Draft DCO contains protective provisions in favour of Network Rail which broadly conform with these standard protective provisions, however there remain some outstanding issues with the drafting which will need to be resolved. Unless and until such time as such protective provisions are included in the DCO in a form approved by Network Rail, Network Rail must sustain in the strongest possible terms its objection to the making of the DCO.

Highways England Comment

4.1.3.1 The draft DCO incorporates Network Rail's standard protective provisions. Highways England confirms that it has made no amendments to the protective provisions in Schedule 9, Part 3 since 8 July 2015.

4.1.3.2 On 8 July 2015, Network Rail confirmed that "Network Rail is content with the protective provisions in the draft Order being in the same form as for previous Highways England schemes" (Appendix

B). As such, Network Rail's written representation is not consistent with its earlier submission.

4.1.3.3 On 9 July 2015, Network Rail submitted a section 56 representation to the Examining Authority (Appendix C), which stated:

There are standard protective provisions for the benefit of Network Rail which are well precedented in TWA Orders and now in DCOs. Prior to submission of the application, Network Rail was in contact with the promoter regarding the appropriate form that these provisions should take and is pleased to see that these have been incorporated within the draft Order. Network Rail would like to highlight to the Examining Authority the absolute need for these protective provisions to remain included in a DCO where Network Rail's operational infrastructure is affected by the proposal.

4.1.3.4 Highways England continues to discuss protective provisions with Network Rail and it is hoped that the discussions will enable Network Rail to withdraw their representation.

4.2 *Transfer of the Benefit of the DCO*

4.2.1 *Article 8 of the Draft DCO authorises the transfer of any or all of the benefit of the provisions of the DCO to a third party either permanently or for a limited period. Under article 8(3) the exercise by that person of such benefits and rights is subject to "the same restrictions, liabilities and obligations as would apply" under the DCO.*

4.2.2 *Network Rail is concerned in relation to the open-ended nature of this power and considers that the following principles should apply:*

- (a) *The consent of the Secretary of State should be required for any transfer;*
- (b) *Any transfer of powers which affect Network Rail's undertaking should only be made to another competent authority approved by Network Rail;*
- (c) *Any transferee should expressly be subject to all restrictions, liabilities, and obligations (including those under contract) as the Undertaker.*

Article 8(3) goes some way towards this position, but does not appear to extend to contractual restrictions, liabilities, and obligations.

- (d) *Where the benefit of the Order is transferred for only a limited period (rather than permanently) under Article 8(1)(b) Network Rail considers that the Order should expressly state that the obligations on the undertaker will continue upon transfer, albeit that they will also be enforceable against the Lessee.*

Highways England Comment

4.2.2.2 When the Highways Agency was an executive agency of the Secretary of State, the requirement for the consent of the Secretary of State was not necessary or appropriate. Now that the Highways Agency has become Highways England and changed status to a Government owned company, Highways England will include appropriate wording in the revised draft DCO which is being submitted at Deadline III providing that the consent of the Secretary of State is required for transfers of the benefit of the DCO. It will then be for the Secretary of State to decide upon the suitability or competence of any proposed transferee.

4.2.2.3 It is to be expected that any contractual obligations that Highways England enters into towards Network Rail will provide that any assignment of its benefit will be subject to the assignee entering into a deed of covenant towards Network Rail.

4.3 *Calcott – Land Plan 2*

4.3.1 *The Railway shown on Land Plan 2 is affected by:*

- (a) *Works 1a and 1b (Improvements including the making of the hard shoulder into a running lane);*
- (b) *Works 2a and 2b (Realignment of J12 on and off bound slip roads.*
- (c) *The installation of Gantry Type 3 over railway*

4.3.2 *Network Rail is concerned about the potential for increased risk of vehicle incursion as a result of these works and requires further information about the gantry to ensure that its construction and operation will not affect Network Rail's railway undertaking. It is also seeking details of the realignment of the slip roads.*

4.3.3 *There have been no discussions between Network Rail and Highways England about these proposals which have the potential to severely affect the Railway in this location. Highways England should contact Network Rail's Asset Protection about these works.*

Highways England Comment

4.3.3.1 The road restraints at the approaches and departures to Western Region Theale Railway Bridge will be subject to assessment and upgrading as required to protect the railway from the risk of vehicle incursion.

4.3.3.2 Highways England confirm that no structural alterations are proposed for this bridge. Access under the bridge and at railway level is requested for inspection and possible refurbishment only.

4.3.3.3 On sheet 2 of the Works Plans (Application Document Reference 2-3), a work area for a "Gantry Type 3" is shown as crossing Network Rail Land (plot number 2-18) Highways England confirm that this is an error and that no access on to Network Rail land is required for construction of the gantry.

4.3.3.4 Pursuant to paragraph 24(1) of Schedule 9 to the draft DCO submitted to the Examining Authority at Deadline II, Highways England must, before commencing construction of any specified work, supply to Network Rail proper and sufficient plans of that work for approval by Network Rail.

4.3.3.5 With regard to any safety concerns relating to the increased risk of vehicle incursion, the Hazard Log Report (Annex E of the Engineering and Design Report (Application Document Reference 7-4) reviews this particular hazard (H149 - vehicle drifts off carriageway) and states:

The hazard analysis work undertaken to SGAR3 leads to the conclusion that, based on the all lane running (“ALR”) design requirements, the M4 J3-12 Sm scheme is likely to be no worse in terms of safety performance than the baseline due to:

- *A reduction in risk for 13 of the 17 highest scoring existing motorway hazards (i.e. those with a risk score of E08/S08 and above), due to a controlled environment being provided through a combination of regularly spaced mandatory speed signals, speed enforcement, and comprehensive Closed Circuit Television (“CCTV”) coverage.*
- *One highest scoring new hazard is introduced (H152 Vehicle recovered from ERA – (E8.00)).*
- *Two existing highest scoring hazard increase in risk:*
 - *H135 Vehicle stops in running lane - Off peak (Event) (E07.50 to E08.00)*
 - *H149 Vehicle drifts off carriageway (i.e. leaving the carriageway as a result of the road environment) (E08.00 to E08.10)”*

4.3.3.6 The hazard ‘Vehicle drifts off carriageway’ is a typical single vehicle collision. Monitoring of the M42 hard shoulder running (“HSR”) scheme showed that single vehicle collisions reduced significantly with the introduction of 4 lane variable mandatory speed limits (“4L VMSL”) (see Annex F of the Hazard Log Report, Annex E of the EDR). Hazard log scoring for the hazard ‘Vehicle drifts off carriageway’ for HSR schemes such as Birmingham Box Phase 3, which covers the M6 J5 – J8 section, therefore assign a high risk reduction score of -0.4, which equates to a 70% reduction, for this hazard (Source: Hazard Log Report (M6 J5 to J6 Bromford and Gravelly Hill Viaducts Section – June 2014)).

4.3.3.7 The generic ALR safety report (section 6.2.3 of the Managed Motorways All Lane Running Generic Safety report Ref:

<http://assets.highways.gov.uk/specialist-information/knowledge-compendium/2011-13-knowledge-programme/MM-ALR%20generic%20safety%20report%20final.pdf>) states that for the hazard ‘Vehicle drifts off carriageway (i.e. leaving the carriageway as a result of road environment)’ no change in risk is expected from the introduction of ALR compared to a baseline dual three lane motorway (“D3M”) without motorway incident detection and automatic signalling (“MIDAS”). This is because, although traffic is travelling closer to the edge of the carriageway, most of this traffic will be during the peak periods, when traffic will be subject to a controlled environment.

4.3.3.8 Highways England has contacted Network Rail’s Asset Protection and entered into a Basic Asset Protection Agreement with regards to works which may impact Great Western Railway’s infrastructure near junction 12. This is included as Appendix E to this response.

4.4 *Pingewood – Land Plan 4*

4.4.1 *The Railway shown on Land Plan 4 is affected by:*

- (a) *Works 1a and 1b (Improvements including making the hard shoulder a running lane).*
- (b) *The installation of emergency refuge area eastbound just after the railway.*

4.4.2 *Network Rail is concerned about the potential for increased risk of vehicle incursion as a result of these works and requires further information about the gantry and new westbound emergency refuge area to ensure that their construction and operation will not affect Network Rail’s railway undertaking.*

4.4.3 *There have been no discussions between Network Rail and Highways England about these proposals which have the potential to severely affect the Railway in this location. Highways England should contact Network Rail’s Asset Protection about these works.*

Highways England Comment

- 4.4.3.1 The road restraints at the approaches and departures to Mortimer Line Railway Bridge will be subject to assessment and upgrading as required to protect the railway from the risk of vehicle incursion.
- 4.4.3.2 Highways England confirm that no structural alterations are proposed for this bridge. Access under the bridge and at railway level is requested for inspection and possible refurbishment only.
- 4.4.3.3 Pursuant to paragraph 24(1) of Schedule 9 to the draft DCO submitted to the Examining Authority at Deadline II, Highways England must, before commencing construction of any specified work, supply to Network Rail proper and sufficient plans of that work for approval by Network Rail. .
- 4.4.3.4 Highways England has addressed safety concerns relating to vehicle incursion in its response to paragraph 4.3.3 above.

4.5 *Wokingham – Land Plan 10*

4.5.1 *The Railway shown on Land Plan 10 is affected by:*

- (a) *Works 1a and 1b (improvements including making the hard shoulder a running lane).*
- (b) *Work 5a (realignment of off-slip beginning at a point over the Railway).*

4.5.2 *Network Rail is concerned about the potential for increased risk of vehicle incursion as a result of these works. It is also seeking details of the realignment of the off-slip road.*

4.5.3 *There have been no discussions between Network Rail and Highways England about these proposals which have the potential to severely affect the Railway in this location. Highways England should contact Network Rail's Asset Protection about these works.*

Highways England Comment

- 4.5.3.1 The road restraints at the approaches and departures to Southern Region Winnersh Railway Bridge will be subject to assessment and upgrading as required to protect the railway from the risk of vehicle incursion.
- 4.5.3.2 Highways England confirm that no structural alterations are proposed for this bridge. Access under the bridge and at railway level is requested for inspection and possible refurbishment only.
- 4.5.3.3 Pursuant to paragraph 24(1) of Schedule 9 to the draft DCO submitted to the Examining Authority at Deadline II, Highways England must, before commencing construction of any specified work, supply to Network Rail proper and sufficient plans of that work for approval by Network Rail. .
- 4.5.3.4 Highways England has addressed safety concerns relating to vehicle incursion in its response to paragraph 4.3.3 above.

4.6 *Chalvey– Land Plan 22*

4.6.1 *The Railway shown on Land Plan 22 is affected by:*

- (a) *Works 1a and 1b (Improvements including making the hard shoulder a running lane).*
- (b) *Works 16b and 16c (Realignment of Junction 6 east and west bound junction on and off slips over railway).*
- (c) *Work 17 (Widening of Windsor Branch Railway underbridge “ to south side of the existing bridge at the location shown... including widening of foundations, substructure and bridge deck to accommodate works 16b and 16c”).*

4.6.2 *Network Rail is concerned about the potential for increased risk of vehicle incursion as a result of these works. It is also seeking details of the realignment of the off-slip road.*

4.6.3 *Discussions have taken place between Highways England and Network Rail and Highways England has entered into a Basic Asset Protection Agreement in relation to these works, in particular to enable Network Rail to develop a structures Approval in Principle in respect of the bridge-widening comprised in Work 17.*

4.6.4 *Network Rail remains concerned about Work 17, and that it may prejudice the planned electrification of this Railway which would involve the installation of OLE. Highways England is resisting a design of Work 17 that would make provision to allow OLE supports to be attached to the underside of the bridge. The proper spacing of supports for OLE is operationally critical to the Railway and Network Rail is concerned that provision should be made to enable OLE to be installed safely and efficiently under the widened bridge (ie along the longer length of railway covered over by the new bridge).*

Highways England Comment

4.6.4.1 Road restraints at the realigned eastbound on-slip will be upgraded and connected to the existing Sistema barriers at the north side of the bridge. A high containment H4a parapet will be provided at the widened southern side of the bridge with fully compliant road restraint transitions on the approach and departure ends of the structure.

4.6.4.2 The AIP for Windsor Railway Bridge, dated August 2015, has been submitted to Network Rail for review. In a response dated 20 October 2015 Network Rail Asset Protection Engineer wrote “Network Rail has no objection in principle to the above submission”. This letter is at Appendix D to this response.

4.6.4.3 Highways England have reviewed Network Rail’s electrification proposal and consider that fixing wire supporting structures to the existing structure would disadvantage future inspection and maintenance of the bridge. Network Rail should note that the existing piers periodically require concrete repairs due to leakage of the deck joints. Planning of the next concrete repair scheme is currently underway and is likely to take place in advance of the Scheme as a separate project.

4.6.4.4 Highways England would welcome further discussions on this when more information on the electrification design becomes available to ensure the implications of the electrification scheme on the maintenance and proposed widening of the bridge are fully understood.

4.6.4.5 Highways England has addressed safety concerns relating to vehicle incursion in its response to paragraph 4.3.3 above.

4.7 *M4/M25– Land Plan 27*

4.7.1 *The Railway shown on Land Plan 27 is affected by Works 1a and 1b (improvements including making the hard shoulder a running lane).*

4.7.2 *Network Rail is concerned about the potential for increased risk of vehicle incursion as a result of these works.*

4.7.3 *There have been no discussions between Network Rail and Highways England about these proposals which have the potential to severely affect the Railway in this location. Highways England should contact Network Rail’s Asset Protection about these works.*

Highways England Comment

4.7.3.1 Highways England confirm that no structural alterations are proposed for the railway bridges at M4 junction 4b. Access under the bridges and at railway level is requested for inspection and possible refurbishment only.

4.7.3.2 Pursuant to paragraph 24(1) of Schedule 9 to the draft DCO submitted to the Examining Authority at Deadline II, Highways England must, before commencing construction of any specified work, supply to Network Rail proper and sufficient plans of that work for approval by Network Rail. .

4.7.3.3 Highways England has addressed safety concerns relating to vehicle incursion in its response to paragraph 4.3.3 above.

4.8 *Western Rail Link to Heathrow (WRLtH)*

- 4.8.1 *Network Rail is currently developing plans for a new rail tunnel leaving the Great Western main line between Langley and Iver to London Heathrow, allowing passengers to travel to the airport from Reading via Slough without going into Paddington station. Although the precise route has yet to be determined, it is likely that the WRLtH will cross the M4 west of the Iver South Sludge Dewatering Centre (shown on Land Plan 26 as “Iver South SDW”).*
- 4.8.2 *Initial public consultation has been undertaken in relation to the WRLtH project, and Network Rail’s anticipated timetable would see works starting and completed on site within Network Rail’s Control Period 6 (2019 – 2024).*
- 4.8.3 *Network Rail is concerned about potential conflicts between the Authorised Development and the WRLtH and is seeking:*
- (a) Indicative dates of construction of the Authorised Development west of Junction 4B (especially in respect of the demolition of Old Slade Lane).*
 - (b) The planned diversionary route between the M40 and M4 in order to identify where they are similar to forecast WRLtH construction routes.*
 - (c) Any planned diversionary routes which follow Hollow Hill Lane.*
 - (d) Any planned diversionary routes which would contain forecast construction traffic.*
- 4.8.4 *Network Rail is seeking assurances to ensure that Highways England will work with it to ensure that potential conflicts can be identified and solutions and mitigation measures developed.*

Highways England Comment

- 4.8.4.1 Pursuant to paragraph 24(1) of Schedule 9 to the draft DCO submitted to the Examining Authority at Deadline II, Highways England must, before commencing construction of any specified work, supply to Network Rail proper and sufficient plans of that work for approval by Network Rail.