

**Application by Highways England**

**M4 Junctions 3 to 12 Smart Motorway**

**The Examining Authority's second written questions and requests for information**

**Issued on 11 December 2015**

**Section 8 Draft Development Consent Order**

**DCO8.1**      **General** (*where relevant*)

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.

## **DCO8.2 Preamble**

*“The application is for development which constitutes a nationally significant infrastructure project within sections 14(1)(h) and 22 of the Planning Act 2008, being the alteration and improvement of a highway which is wholly within England, in relation to which the Secretary of State is the highway authority, and the area of development of which is greater than 15 hectares.”*

No further questioning required ahead of applicant’s fourth dDCO to be provided to Deadline V.

**DCO8.3      A2**

*“commence” means...development other than operations consisting of site clearance, demolition work, archaeological investigations, investigations for the purpose of assessing ground conditions, remedial work in respect of any contamination or other adverse ground conditions, diversion and laying of services, habitat creation and species translocation, establishment of site offices and the laying of services, erection of any temporary means of enclosure, the temporary display of site notices or advertisements.*

No further questioning required ahead of applicant’s fourth dDCO to be provided to Deadline V.

**DCO 8.4      A2**

*“environmental statement” means the environmental statement submitted with the application for the Order, and certified as the environmental statement by the Secretary of State for the purposes of this Order.*

No further questioning required ahead of applicant’s fourth dDCO to be provided to Deadline V.

DCO8.5      A2

*“maintain” in relation to the authorised development includes to inspect, repair, adjust, alter, remove, clear, refurbish, reconstruct, decommission, replace and improve and any derivative of “maintain” is to be construed accordingly.*

In the applicant’s summary of case for the dDCO hearing submitted to Deadline IV REP4-006, it states that the proposed definition was included on the basis that it had been found acceptable in previously adopted DCO’s, (with examples cited); and that the definition codifies the ability of Highways England (HE) to do what it already has the power to do under its permitted development rights under the Town and Country Planning (General Permitted Development) (England) Order 2015 and the Highways Act 1980.

However if HE already has the powers to carry out these works, why is it necessary to include them within the definition of maintain in the dDCO?

With regard to the examples given from previously adopted DCOs, as stated at the Hearing, best practice in relation to the content of DCOs is evolving. In the recently issued decision on the Ferrybridge Multifuel 2 (FM2) Power Station Order, the definition of “maintain” was amended by the Secretary of State “to ensure clarity and consistency with previous Orders”, as follows:

*“maintain” includes (i) inspect, repair, adjust, alter, improve, refurbish, and (ii) in relation to a part of a work (but not the whole of a work) of the authorised development, remove, clear, demolish, decommission, reconstruct or replace; and “maintenance” and other cognate expressions are to be construed accordingly*

*Article 7 of the Ferrybridge Order states as follows:*

*“Power to maintain the authorised development*

*7.—(1) The undertaker may at any time maintain the authorised development, except to the extent that this Order (including the requirements), or an agreement made under this Order, provides otherwise.*

*(2) Paragraph (1) does not authorise any works—*

*(a) not assessed in the environmental statement;*

*(b) outside the Order limits; or*

*(c) which would result in the authorised development varying from the description in Schedule 1.”*

**We would suggest that HE adopt the above wording as a replacement to the definition under A2 and to replace the wording currently set out in A4 to the dDCO submitted to Deadline III REP3-005, in order to resolve the matter by and to more precisely restrict the scope of maintenance.**

1. It is acknowledged that Highways England already has the powers to carry out the works included in the definition of maintain, in relation to the existing highway network, constructed and operated pursuant to the Highways Act 1980. However, a DCO for the Scheme would result in a new and different regime for this section of the M4 motorway. Therefore, these powers have been expressly included in the definition of "maintain" to remove any doubt that Highways England has the powers and to make clear on the face of the Order the extent of these powers rather than have any doubt as to the extent of such powers.

2. Highways England has included the above definition of maintain as it has been found to be acceptable to the decision maker for this Scheme - Secretary of State for Transport - on previous highway schemes. These include the A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014 and the A160/A180 (Port of Immingham Improvement Development Consent Order 2015), which have included similar definitions. As such, it is an appropriately precedented form of words for the current Scheme.
3. Highways England considers that Article 7(2) of the Ferrybridge Order is not appropriate for the following reasons and accordingly is not required to be included in the definition of maintain:
  - 3.1 the drafting included in sub-paragraph 7(2)(a) above is not appropriate as not all maintenance works required for highway maintenance will actually be specified in the Environmental Statement ("**ES**") (Application Document Reference 6-1), but the ability to maintain the M4 motorway in the same fashion as the existing network is critical to its safe and efficient operation;
  - 3.2 in any event, maintenance works outside the Order limits would be illegal and therefore it is not necessary to explicitly state that these are not authorised; and
  - 3.3 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. Accordingly, it is not necessary to include the drafting at sub-paragraph 7(2)(c) above.

**DCO8.6      A2**

*“relevant planning authority” means the local planning authority for the land in question.*

No further questioning required ahead of applicant’s fourth dDCO to be provided to Deadline V.



**DCO8.7      A2**

*“Secretary of State” means the Secretary of State for Transport.*

No further questioning required ahead of applicant’s fourth dDCO to be provided to Deadline V.

**DCO8.8      A3(2)**

*For the purposes of the authorised development, development consent granted by this Order is to include and permit the alteration, removal, clearance, refurbishment, reconstruction, decommissioning and demolition of any buildings or other structures within the Order limits to the extent that they relate to, are required by or are incidental to the carrying out of the authorised development.*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.

**DCO8.9      A3(4)**

*The numbered works comprised in the authorised development are to be constructed within the limits specified in article 6 (power to deviate).*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.

**DCO8.10      A6**

*...these maximum limits do not apply where it is demonstrated to the Secretary of State's satisfaction that a deviation in excess of these limits would not give rise to any materially new or materially worse adverse environmental effects from those assessed in the environmental statement.*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.

**DCO8.11      A14(6)**

*If a street authority which receives an application for consent under paragraph 14(5) fails to notify the undertaker of its decision before the end of the period of 28 days beginning with the date on which the application was made, it is deemed to have granted consent.*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.

**DCO8.12      A15**

*The undertaker may for the purposes of the authorised development form and lay out means of access, or improve existing means of access at such locations within the Order limits as the undertaker reasonably requires for the purposes of the authorised development.*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.

**DCO8.13      A16**

*Powers in relation to relevant navigations or watercourses.*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.

**DCO8.14      A17 (9)**

*If a person under paragraph (3) receives an application for consent and fails to notify the undertaker of its decision before the end of the period of 28 days beginning with the date on which the application was made, the person is deemed to have granted consent.*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.



**DCO8.15      A19(6)**

*If a highway authority under paragraph (4)(a) or a street authority under (4)(b) receives an application for consent and fails to notify the undertaker of its decision before the end of the period of 28 days beginning with the date on which the application was made, the highway authority or street authority, as relevant, is deemed to have granted consent.*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.

**DCO8.16      A41**

*Operational land for purposes of the 1990 Act.*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.

**DCO8.17      A42**

*...in relation to a nuisance falling within paragraphs (c), (d), (e), (fb), (g), (ga) and (h) of section 79(1) (statutory nuisances and inspections thereof).*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.

**DCO8.18      A45**

*Certification of plans etc.*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.

**DCO8.19      A49 (2)**

*Schedule 11 (procedure for discharge of requirements) shall have effect in relation to all agreements or approvals granted, refused or withheld in relation to requirements.*

No further questioning required ahead of applicant's fourth dDCO and associated note to be provided to Deadline V.

## DCO8.20      **General**

### *All drafting in Schedule 2*

There is clearly a fine line between a variation of the DCO pursuant to the procedure in the Planning Act 2006 and “*the provision of flexibility within the approved order limits*”, as HE suggests. HE also suggests that this flexibility is with “*the terms of the DCO expressing, **and limiting**, the extent of the flexibility that is acceptable*” (para 12.3.2, emphasis added).

However, it is not clear that the flexibility being given is limited in any way. There appears to be no wording in the dDCO which limits the power to seek variations in R3 and R6, for example. Similarly, the ability to seek variations from the standards in R10 and R11 does not appear to be limited in any way.

R5 does, in terms, have a limit placed upon it (the new material must have similar qualities to TSCS), so is more likely to be acceptable.

### **Can the applicant please explain how they consider the flexibility to be limited in the way they suggest in these other requirements?**

1. Whilst not expressly stated in the requirements, the flexibility provided for in the requirements is limited. This is a concept well understood and precedented in planning law since it applies to all outline planning permissions, which do not then go further in limiting flexibility, and which are subject to an identical assessment regime. For the Scheme, additional constraints are not required because the following overriding principles apply in this case:
  - 1.1 the development must be within the Order limits, which is the physical, three dimensional envelope assessed by the ES within which development would occur;
  - 1.2 the power to deviate, provided for in Article 6 of the dDCO, is limited;
  - 1.3 the scope of the power of deviation was specifically assessed by Highways England's expert professional team (see paragraphs 5.10.1 and 5.10.2 of the ES (Application Document Reference 6-1) and considered the worst case 'Rochdale Envelope' within such limits;
  - 1.4 it is not possible for the final Scheme to go beyond the envelope assessed in the Environmental Impact Assessment (“EIA”) that is reported in the ES, being the Rochdale Envelope;
  - 1.5 the requirements listed in Schedule 2 to the dDCO can only be used to allow development authorised by the DCO. It would not be lawful for an authority to authorise works going beyond the scope of the DCO as governed by the limits of deviation shown on the Works Plans and described in Article 6 of the dDCO. Accordingly, it would be impossible to authorise works that fell outside the scope of what had been assessed in the ES, and consequently approved under the DCO; and
  - 1.6 the plans, and the ability to deviate within the scope provided for in those plans interpreted in line with the dDCO is the foundation upon which the EIA has rested. As such, variants of the Scheme that are possible within the powers of deviation were in the mind of the expert professional assessors in performing their assessment.

2. It is critical to delivery of a major infrastructure project in the nature of the Scheme that an ability to deviate and vary within assessed limits is given. Otherwise, it is not possible to refine or improve the project and necessary changes cannot be made without a new application. This principle has long been recognised in the drafting of Special Acts, statutory orders and outline planning permissions. It is not controversial and has not been the subject to legal challenge.
3. Critically, this approach does not circumvent the variation procedures laid out by law since the powers granted provide the limits of the consented Scheme. It is a consent for a scheme comprising flexibility, whereby the limits of such flexibility are capable of variation under the Planning Act 2008, not an ability to circumvent those variation procedures.
4. Finally, the flexibility allowed for under the requirements is subject always to approval by the Secretary of State as the ultimate decision maker. If he deems an amendment to be a material change to the Scheme going beyond the powers contained in the DCO, he will require Highways England to make a formal application to vary the DCO, or cause the works to continue within their existing scope.

#### Requirement 3

5. Requirement 3 provides that the authorised development is carried out in accordance with plans approved by the Secretary of State. In the event that there are any deviations from these approved plans, no authorised development may commence until details of the layout, scale, siting, design, dimension and external appearance of the alternate works have been submitted to and approved by the Secretary of State. Therefore, the scope of deviation under this requirement is limited in that the variations to the authorised development must fall within the assessed Order limits and limits of deviation, and furthermore must be approved before works can commence.

#### Requirement 6

6. Requirement 6 provides that the authorised development must be carried out in accordance with the approved plans submitted with the application, unless otherwise approved by the Secretary of State. Therefore, the flexibility allowed pursuant to the requirement is subject always to final approval by the Secretary of State as the ultimate decision maker under the requirements. If the Secretary of State deems the amendment sought to be a material change to the Scheme going beyond the powers contained in the DCO, he will require Highways England to make a formal application to vary the DCO, or cause the works to continue within their existing scope.
7. The power to amend the approved plans, provided for in requirement 6, is limited as the altered development must accord with the limits of deviation in the DCO and the Order limits.

#### Requirement 10

8. Requirement 10 provides for departures from the standard practice (detailed within Highways England's Manual of Contract Documents for Highway Works, Volume 1 – Specification for Highway Works (consolidated edition, November 2005, as amended as at May 2014). Departures from this standard practice may be required in the following circumstances:
  - 8.1 where temporary fencing is not covered by BS 1722;
  - 8.2 in relation to the type of material to be used, for instance where the class of wood for a particular application differs from that provided for in the standard practice;

- 8.3 where a different height is required than is provided for in the Highways Construction Details ("HCD"); and
- 8.4 where a variation to foundation design, from that provided for in the HCD, is required due to site constraints.
9. The drafting of requirement 10 is similar to requirement 6 (Fencing) of the A160/A180 (Port of Immingham Improvement) Development Consent Order 2015 and requirement 6 of the A556 (Knutsford to Bowden Improvement) Development Consent Order 2014. As such, it is a precedented approach to the provision of fencing on highways schemes, which has previously been approved by the Secretary of State for Transport.
10. The power to depart from the standard practice is subject to approval by the Secretary of State.
11. As a matter of principle, in this respect departure from standards is a technical matter for Highways England, which should be a matter of safety and efficiency only. For the purpose of the consent of the Scheme, the issue is simply whether the effects of a relaxation are acceptable in planning terms and are within the assessed Scheme.

#### Requirement 11

12. Requirement 11 provides for departures from the guidance provided that such variations are agreed by the Secretary of State, following consultation with Natural England. It may be that the guidance documents detailed in requirement 11 are superseded and other methods are considered to be best practice or that in a particular instance Natural England advise of a different approach they wish to be adopted. That would still constitute a departure from the specified guidance. However, in particular circumstances it may be acceptable or even beneficial to depart from the standard.
13. The drafting of requirement 11 is the same as requirement 7 (Ecological Mitigation) of the A556 (Knutsford to Bowden Improvement) Development Consent Order 2014. As such, it is a precedented approach to the provision of ecological mitigation on highways schemes, which has previously been approved by the Secretary of State for Transport.



*3 Except where the authorised development is carried out in accordance with the plans listed in requirement 4, no authorised development may commence until details of the layout, scale, siting, design, dimensions and external appearance of Works No. 7a, 8c, 9b, 10c, 11c, 12e, 13c, 14c, 17, 19c, 20c, 22c, 24g, 24j and 25, earthworks and retaining structures comprised in the authorised development so far as they do not accord with the development shown in the plans listed in requirement 6 have been submitted to and approved by the relevant planning authority. The authorised development must be carried out in accordance with the details shown in the plans listed in requirement 6 or approved under this requirement.*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.

**DCO8.22 R6(2)**

*6(1) The authorised development must be carried out in accordance with the approved plans submitted with the application (unless otherwise approved by the relevant planning authority and provided that the altered development accords with the principles of the engineering and design report and falls within the Order limits) as follows:*

*6(2) Where any alternative details are approved pursuant to this requirement or requirements 3 or 20, those details are to be deemed to be substituted for the corresponding approved details set out above.*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.

**DCO8.23 R5**

*5 Where any carriageway comprised in Work No. 1a and 1b, or any slip road is to be resurfaced as part of the authorised works, thin surface course is to be provided, unless otherwise approved by the relevant planning authority.*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.

**DCO8.24 R7**

*7.—(1) No part of the authorised development is to be carried out...*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.

**DCO8.25 R8**

8.—(1) *No part of the authorised development is to be carried out...*

8.—(3) *The undertaker may modify the CEMP at any time---*

Having regard to concerns raised in written submissions and at the issue specific hearing dealing with matters relating to the environment by local authorities about the lack of detail in the early version of the CEMP, can the applicant consider incorporating further detail into R9? The ExA's suggested requirement is largely based on that adopted in R8 of The Cornwall Council (A30 Temple to Higher Carblake Improvement) Order February 2015.

**Construction environmental management plan**

8.-(1) *No authorised development must commence until a CEMP, substantially in accordance with the outline Construction Environmental Management Plan, annexed to the outline EMP (dated ?), has been submitted to and approved by the Secretary of State, in consultation with the Environment Agency [and the relevant local planning authority, TBC].*

(2) *The CEMP must include—*

- (a) *measures to mitigate the effects of noise and vibration during construction;*
- (b) *measures to mitigate the effects of dust and emissions during construction;*
- (c) *measures to mitigate the effects of lighting during construction;*
- (d) *measures to control and manage surface water during construction;*
- (e) *measures to control and manage site waste management;*
- (f) *measures to control and manage access by construction traffic;*
- (g) *traffic management measures, including provision for the mitigation of the effects of the authorised development on traffic in combination with the effects of the concurrent construction of any other major developments, including HS2 and HEX;*
- (h) *measures to mitigate any interruption of access to businesses, including agricultural holdings;*
- (i) *measures to control and manage the potential effects of contaminants and pollutants;*
- (j) *measures to mitigate the effects of construction activities on health and safety;*
- (k) *measures to exclude fish from watercourses;*
- (l) *measures to mitigate the construction effects on any sensitive ecological receptors;*
- (m) *measures to mitigate the construction effects on archaeology and cultural heritage;*
- (n) *landscape and visual mitigation;*
- (o) *measures for the protection of any European or nationally protected species from activities associated with the authorised development;*

- (p) *repeat surveys to be undertaken to confirm the presence of any European or nationally protected species where necessary;*
  - (q) *measures to mitigate the effects of the activities associated with the authorised development on European or nationally protected species and identified in the surveys required by sub-paragraph (p);*
  - (r) *a programme for implementation of the proposed measures required by sub-paragraphs (o), (p) and (q); and*
  - (s) *details of those measures.*
- (3) *The construction of the authorised development must be carried out in accordance with the CEMP.*
  - (4) *Upon completion of construction of the authorised development the CEMP must be converted into the HEMP.*
  - (5) *The authorised development must be operated and maintained in accordance with the HEMP.*
1. Highways England confirms that the relevant local planning authorities will be consulted on the CEMP and has amended requirement 8(1) accordingly in the dDCO submitted at Deadline V.
  2. However, the suggested drafting for requirement 8(2) provided above is not appropriate in this case. The measures listed above will be included in the outline CEMP and to include them in the statutory instrument would be otiose. Their inclusion in the DCO would be poor drafting practice since the effect is duplication. It is sufficient that the outline CEMP provides certainty as to its own content.
  3. The CEMP is required to be substantially in accordance with the outline CEMP. That requirement is more stringent than the drafting of requirement 18 (Construction environmental management plan) in The Norfolk County Council (Norwich Northern Distributor Road (A1607 to A47(T)) Order 2015, which merely requires that the CEMP reflects the draft CEMP, and represents the most recent drafting of a CEMP requirement for a highways scheme that has been found to be acceptable to the Secretary of State.
  4. Furthermore, the CEMP is required to be approved by the Secretary of State, in consultation with the Environment Agency and the relevant local planning authorities. Therefore, the Secretary of State, Environment Agency and relevant local planning authorities all have an opportunity to ensure that the measures detailed in the outline CEMP are included in the CEMP. Any aggrieved regulator could judicially review the decision of the Secretary of State to approve the CEMP if they felt it did not substantially accord with the outline CEMP.
  5. The requirement for the CEMP to be "substantially in accordance" with the Outline CEMP is a well precedented approach, which has been accepted by the Environment Agency and other bodies on recent DCOs, such as the North Killingholme (Generating Station) Order 2014.
  6. If the proposed drafting for requirement 8 above were to be adopted, if any of the measures listed in sub-paragraph 8(2) were not covered by the CEMP the undertaker would be in breach of the terms of the DCO which is a punishable offence. This would be despite the fact that some of the measures listed were provided, but were secured by way of requirement, as opposed to the provisions of the CEMP. This is the case with many of the mitigation

measures listed in the proposed drafting above, many of which are subject to requirements in Schedule 2 of the DCO.

DCO8.26 R13

*(5)(b) no activities requiring a protected species licence are to continue until a scheme of protection and mitigation measures for the protected species has been submitted to, and approved by, Natural England and the relevant planning authority.*

No further questioning required ahead of applicant's fourth dDCO to be provided to Deadline V.



**DCO8.27      A36**

*36 The undertaker may operate and maintain authorised works.*

**This Article appears to duplicate the provisions of A3 (Operation) and A4 (Maintenance). Is it necessary for A36 to be retained?**

1. Highways England agrees that Article 36 is a duplication of the provisions of Article 3 (Operation) and Article 4 (Maintenance). Accordingly, Article 36 has been deleted from the latest version of the dDCO submitted at Deadline V.

*Acoustic barriers*

- 22.—(1) *No part of the authorised development is to be commenced until details of a scheme to install or replace acoustic barriers in the locations shown on figure 12.2 contained within the environmental statement has been submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authorities.*
- (2) *The acoustic barriers installed in accordance with the scheme approved in paragraph (1) must—*
- (a) *match adjacent retained acoustic barriers so far as possible; and*
- (b) *be compliant with any engineering requirements governing the form of acoustic barriers which may be installed.*
- (3) *The approved noise management scheme must be implemented before and maintained during construction of the authorised development.*

It has become clear that there is existing fencing along the boundary of the M4 which does not provide adequate acoustic or visual barriers for adjoining residential properties and other sensitive receptors. The applicant has indicated that any barriers which have been included in the noise assessment as acoustic barriers and which are found to be not fit for purpose will be replaced with acoustic barriers.

- ***Can the applicant clarify the criteria to be used to assess whether a barrier is not fit for purpose?***
  - ***Is R22 adequate to secure the replacement of acoustic barriers which do not meet this criteria?***
  - ***Is there a typing error in R22(3)? Should this refer to operation rather than construction?***
1. Highways England confirms that the existing acoustic barriers (which are not intended to be replaced as part of the enhanced noise mitigation strategy) will be inspected to ensure that:
- 1.1 they are of the necessary reflective and absorptive type;
- 1.2 they comply with requirements of the Specification for Highway Works CI.2504; and
- 1.3 there are no gaps, holes or loose panels or posts.
2. Should any of the foregoing criteria be met, the acoustic barrier will be regarded as being not fit for purpose in accordance with the Specification for Highway Works CI.2504 and will be replaced.
3. A further sub-paragraph has been added to requirement 22 to secure the replacement of existing acoustic barriers in the locations shown on figure 12.2 of the ES, which are found no longer to be fit for purpose. The additional provision included in the dDCO submitted at Deadline V is set out below for ease of reference:

*22(3) Where the barriers as shown by the pink line on figure 12.2 contained within the environmental statement are found not to be fit for purpose as acoustic barriers of equivalent*

*standard to the requirements for acoustic barriers set out in the Specification for Highway Works CI.2504 or as amended whether by reason of:*

*(a) their state of repair; or*

*(b) their original design,*

*the Scheme referred to in sub-paragraph 1 shall provide for their removal and replacement with acoustic barriers consistent with the requirements for acoustic barriers set out in the Specification for Highway Works CI.2504 or as amended..*

4. Highways England confirms that the previous requirement 22(3) (now requirement 22(4) in the dDCO submitted at Deadline V) should refer only to operation of the Scheme and has been amended as follows: "*The approved noise management scheme must be implemented before operation of the authorised development*".
5. The reference to maintained has been removed from requirement 22(4) of the dDCO as Highways England has a strategic network maintenance regime that secures the maintenance of the noise management scheme, including the acoustic barriers. Following installation, the acoustic barriers are regularly monitored using a variety of tests and will be maintained to a high standard. Replacement will be scheduled once the performance of the barriers is no longer satisfactory. Highways England has a duty to maintain the strategic road network as outlined in 4.2(b) and 4.2(g) of its licence, submitted at Deadline IV (REP4-005, Appendix C), and section 41 of the Highways Act 1980. To this end, Highways England has in place a governance process for the identification, prioritisation and funding of maintenance schemes. Therefore Highways England does not consider that an additional requirement is needed within the Draft DCO to cover the maintenance and replacement of the acoustic barriers.

We note the applicant's submissions that there is insufficient space within the boundaries of the application to introduce the use of SuDs. However, Buckinghamshire County Council and LB Hill identify land outside the confines of the site which could be used to introduce SuDs in to the scheme. The National Networks National Policy Statement (NN NPS) para 5.230 states that the project should adhere to any National standards for sustainable drainage systems. Whilst it is recognised in the NN NPS that it may not be feasible to adopt the most sustainable approach, the land identified by the local authorities represents opportunities to upgrade the approach which has currently been adopted.

**Can the applicant and local authorities identify a mechanism through the DCO whereby the drainage system could be upgraded through the use of off-site land either through an appropriate requirement or the use of a Development Consent Obligation?**

1. The use of off-site land for drainage is not an "upgrade" since the Scheme design is already appropriate in the context of a motorway. It is an appropriate response as already proposed and offsite land is not appropriately used in this context.
2. Highways England confirms that some sustainable urban drainage system ("SuDS") measures are incorporated into the drainage strategy for the Scheme for example comprising soakaways, oversized pipes and chambers that will function to provide attenuation and a degree of treatment to highway runoff, particularly at emergency refuge areas ("ERAs"). These components have been selected from the wide variety of components/approaches available on the basis of site specific constraints and rank at number 4 (of 7) in the SuDS hierarchy that is set out in Policy 5.13 of the London Plan. A key constraint within the Order limits is space. As the drainage strategy seeks to include all drainage components within the Order limits, above ground SuDS measures requiring significant land-take, such as swales, reed beds and ponds, are not feasible within the Order limits.
3. Land areas, beyond the Order limits, have been offered to provide over ground SuDS measures by Buckinghamshire County Council and London Borough of Hillingdon. However, at present, Highways England does not have powers over the offered land, nor has the land been assessed as part of the Scheme's EIA. Moreover, there are no agreements in place with local authorities in respect of the land, no s253 Agreement or acquisition by private treaty which would enable the land to be used outside the Scheme. Further, the use of such land for above ground SuDS drainage solutions which is outside the confines of both the Scheme, and land under Highways England's control, creates maintenance and management issues, which would be an additional burden on the public purse. As such, Highways England do not intend to utilise off-site land for SuDS.
4. The proposed drainage solution for the Scheme achieves compliance with the standards for drainage set out in the Highways England's Design Manual for Roads and Bridges (Volume 4, Section 2, Part 3, HD33/06 Surface and Sub-surface Drainage Systems for Highways), which provides the design standard applicable to roads in England, including the M4. The drainage solution, described within the Drainage Strategy Report (Application Document Reference 7-5, APP 123) incorporates below ground SuDs features that can be delivered within the Order limits without unnecessary land take. Acquiring additional land to incorporate such SuDS features would increase the costs of the Scheme and would undermine one of the benefits of the smart motorway scheme as opposed to widening alternatives, in that a smart motorway scheme increases capacity whilst minimising additional land required.

5. Furthermore, the use of off-site land, as proposed by Buckinghamshire County Council and London Borough of Hillingdon, for above ground SuDS drainage solutions would require vegetation, including trees, to be cleared in some instances. This would potentially increase the visual impact of the Scheme and would prevent other uses of these areas coming forward.
6. Highways England therefore concludes that it is not necessary or feasible to use the lands offered by Buckinghamshire County Council and London Borough of Hillingdon to accommodate sustainable drainage with swales, reed beds and ponds.