

The Planning Inspectorate

Our ref: WA/2015/120640/10-L01

Int. Party ID: 10031668

Your ref: TR010019

Date: 11 February 2016

Dear Examining Authority,

**February Hearings (10 – 12 February 2016) – Requested DCO information
Development Consent Order Application M4 - Junctions 3-12 (Smart Motorway)**

Following the Examining Authority's (ExA) request to the local councils and the Environment Agency at the Issues Specific Hearings on the 10th February 2016, we wish to provide this note on our proposed draft amendments within the Development Consent Order (DCO) prior to Friday's hearing session on the draft DCO.

This overview outlines our current position on several areas including wording related to protective provisions, requirements and the discharge of requirements. We have been proactively liaising with Highways England on these matters and have reached agreement on several points of concern.

We are waiting for comments from Highways England on the wording of the FRA requirement and the maintenance provisions to be included in the protective provisions. It was confirmed by Highways England on 10th February that we should receive comments by today, 11th February, though at the time of sending this overview we have not as yet received them. We therefore hope to be in a position to provide further information on these issues in the hearing on 12th February.

DCO Protective Provisions

Following several exchanges with Highways England, we have agreed the wording noted in **Appendix 1** to be used for the protective provisions subject to additional wording being added relating to the maintenance of floodplain compensation areas.

The Environment Agency had initially sought to include maintenance provisions in a side agreement, a copy of which was sent to Highways England. However, Highways England was not agreeable to this and proposed including them in the protective provisions instead. It is the Environment Agency's preference for maintenance to be dealt with in a side agreement, however we have accepted that in this instance maintenance provisions can be incorporated into the protective provisions instead, provided that the wording is acceptable. Our concern with providing for maintenance in the protective provisions is that they do not 'run with the land' and a situation could arise

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in the future whereby no-one is responsible for complying with them. In this instance, however, we are less concerned than we might otherwise be due to the fact that it is highly unlikely that Highways England will cease to exist without a successor body and the nature of the development is such that it is highly unlikely that its' use will cease.

On the 9th February 2016 we provided Highways England with a list of the things that we wish the protective provisions to include if maintenance is to be dealt with in them. These are noted in **Appendix 2**.

We are waiting for Highways England to provide proposed draft wording for comment, which they have said they intend to do by today, 11th February. In order to avoid duplication we have not proposed our own wording.

DCO Requirements

Within the agendas for the Issue specific Hearing for the Environment (10th and 11th February 2016) and the draft DCO hearing (12th February 2016) the ExA has asked our position on several requirements noted in the draft DCO submitted for Deadline 5. We will address each of the questions at the hearings but also wish to summarise our comments prior to the hearing sessions.

Requirement 8 (CEMP) - As noted in our answers submitted for deadline 5 (8 January 2016) to the ExA second round of written questions, we support the ExA's suggested requirement wording as this provides further clarification on the details contained within the CEMP.

Requirement 12 (Contaminated land and groundwater) - As confirmed at the November hearing sessions and in the associated follow-up documentation submitted for deadlines 4 and 5, we are satisfied with the wording of requirement 12.

Requirement 14 (Surface Water Drainage) - This requirement relates specifically to surface water drainage. Under the Flood and Water Management Act 2010 surface water drainage is the responsibility of the Lead Local Flood Authorities (LLFA). The LLFA's are referenced in requirement 14 and we believe they are best placed to confirm if they wish to seek amendments to this requirement.

Requirement 24 (Biodiversity management strategy) - As confirmed at the November hearing sessions and in the associated follow-up documentation submitted for deadlines 4 and 5, we are satisfied with the wording of requirement 12.

Requirements 23 and 26 (Flood Risk) - We have concerns with the current wording for these requirements as detailed in our submission to the ExA for deadline 6 (29 January 2016). We are unclear why there are 2 separate requirements relating to flood risk and believe that the issues could be merged into one requirement. Several exchanges of correspondence have taken place between ourselves and Highways England. We continue to liaise with Highways England on the wording of the requirements.

On the 8th February 2016, the Environment Agency provided a further draft flood risk requirement to Highways England for their consideration. We would pose to the ExA and Highways England that our suggested requirement could become the 'new' requirement 23 and that requirement 26 be removed. A copy of our proposed wording is included within **Appendix 3**.

DCO Discharge of Requirements – Schedule 2, Part 2

Our concerns relating to the proposed discharge of requirements are noted in our letter to the ExA submitted for deadline 6.

In summary, we do not have a strong preference as to whether the discharging body is the Secretary of State (SoS) or a joint planning board of the local planning authorities.

In either case we would wish to see included within Part 2 of Schedule 2 a provision specifying that where consultation is required in relation to the discharge of a requirement, the Secretary of State has a set time period within which it must consult. Our reasons for seeking this inclusion are noted within our deadline 6 submission (pages 4 and 5).

Our suggested amendment to the DCO is to add a new paragraph 2(3) to Part 2 of Schedule 2 to read as follows:

2(3) If the requirement specifies that consultation with a requirement consultee is required, the discharging authority shall issue the consultation to the requirement consultee within 3 business days of receipt of the application.

The current paragraph 2(3) of Part 2, Schedule 2 would then become paragraph 2(4) of Part 2, Schedule 2.

The proposed additional wording is based on similar wording found in other DCOs. For example, the Hinkley Point C New Nuclear Power Station DCO, the North Killingholme Power Project DCO and the Thames Tideway Tunnel DCO.

Appendix 1

Agreed Protective Provision wording subject to additional satisfactory provisions being added relating to the maintenance of hydraulic links

PART 1

For the Protection of the Environment Agency

1.—(1) The following provisions shall apply for the protection of the Agency unless otherwise agreed in writing between the undertaker and the Agency.

(2) In this part of this Schedule—

“the Agency” means the Environment Agency; and

“relevant navigation” has the same meaning as in Article 16 of the Order (Powers in relation to relevant navigations or watercourses);

2.—(1) If, in the exercise of the powers conferred by this Order, the undertaker requires interference with or obstruction of the free, uninterrupted access of the Agency to a relevant navigation or other main river, it must give the Agency 56 days' written notice of that requirement.

(2) Where construction and operation of the authorised development reasonably requires interference with or obstruction of the free, uninterrupted access of the Agency to a relevant navigation or other main river and it is not possible for the undertaker to give the Agency the notice required under sub-paragraph (1), a suitable alternative access, to be agreed with the Agency, will be provided prior to and for the duration of any such interference.

3.—(1) If, in the exercise of the powers conferred by this Order, the undertaker acquires any interest of the Agency in any land or requires the interference with, or removal of, any of the Agency's apparatus, it must give the Agency 56 day's written notice before any interest is acquired or any apparatus is removed.

Appendix 2

The Environment Agency has confirmed that the maintenance of hydraulic links can be provided for in the protective provisions provided that they provide for the following:

1. a retention, inspection and maintenance plan (the Maintenance Plan) for the hydraulic links to be approved by the Environment Agency in writing before any material operations of the authorised works are undertaken in the Flood Zone (Flood Zone 3 plus a 20% allowance in climate change);
2. the Maintenance Plan to provide that the cost of the retention, inspection and maintenance is met by the undertaker (or any successors);
3. the Maintenance Plan to be complied with;
4. the Environment Agency to have reasonable access to the hydraulic links at all times to ensure that the Maintenance Plan is being complied with;
5. the Environment Agency to be able to serve notice if the Maintenance Plan is not satisfactorily complied with;
6. the Environment Agency to be able to undertake any work detailed in a notice if the notice is not complied with (or straight away in emergency);
7. the Environment Agency to be able to recover costs if it undertakes the work required in the notice;
8. the Maintenance Plan to be able to be amended if there is mutual agreement between the undertaker and the Environment Agency; and
9. that unless otherwise agreed by the Environment Agency, any land on which the hydraulic links are situated must not be sold unless subject to a covenant in a form that the Environment Agency has approved, binding the successors in title to perform maintenance of the hydraulic links as set out in the Maintenance Plan.

Appendix 3

The Environment Agency's suggested flood risk requirement wording to replace requirements 23 and 26 as noted in the Deadline 5 draft DCO. This wording was provided to Highways England on 8th February 2016.

“23 (1) No part of the authorised development is to be carried out until a detailed flood compensation scheme has been submitted to and approved in writing by the Secretary of State, in consultation with the Environment Agency and the relevant planning authorities

(2) The flood compensation scheme must:

(a) be substantially in accordance with the outline flood compensation scheme in the Flood Risk Assessment

(b) provide compensation to ensure that the authorised development will not increase flood risk for all flood events up to and including the 1% AEP (annual exceedance probability) plus an appropriate allowance for climate change

(c) provide for phasing of the provision of flood compensation in accordance with any phasing of the construction of the authorised works

(3) The authorised development and flood compensation must be provided in accordance with the approved detailed flood compensation scheme

(4) No part of the Order land situated in Flood Zone 3 including appropriate allowance for climate change is to be used for storage, except as shown in the Flood Risk Assessment.”

The Flood Risk Assessment will need to be defined.