

THE PLANNING ACT 2008

**M4 (JUNCTIONS 3 TO 12) (SMART MOTORWAY) DEVELOPMENT CONSENT ORDER
APPLICATION**

TR010019

Written Summary of Issue Specific Hearing Dealing With the Draft Development Consent Order

Date: 12 February 2016

Venue: Holiday Inn Maidenhead/Windsor, Manor Lane, Maidenhead, West Berkshire, SL6 2RA

A. INTRODUCTION

1. This is the written summary of Highways England Company Limited ("Highways England") of the oral representations made by Highways England at the Issue Specific Hearing into the draft Development Consent Order ("dDCO") on 12 February 2016. This summary follows the items on the Examining Authority's agenda published for the draft Development Consent Order Issue Specific Hearing.

B. REPRESENTATIONS

1. General drafting issues

i. A number of Articles (e.g. A10, A14, A17, A19) refer to consents to be given by, for example, the street/highway authority or water or drainage authority within 6 weeks. Would it be more appropriate for this to be 30 working days?

- 1.1 Highways England stated that the time for deemed consent, as originally drafted, was 28 days but that this was extended to 6 weeks at the request of the London Borough of Hillingdon. Highways England maintains that the period should remain as 6 weeks as this option was aired at the previous Issue Specific Hearing relating to the dDCO, that took place on 19 November 2015.

- 1.2 Highways England requested that, were 30 days to be provided for by the Examining Authority in its dDCO, it should be 30 "business days" to reflect the defined terms in the dDCO.

ii. Requirement 9 does not include a deadline for the implementation of the landscaping scheme. We suggest the following words are added to clause (4): “*within one year of the commencement of operation of the authorised development*”.

- 1.3 Highways England stated that it was proposing to amend the current drafting such that where a landscaping scheme was required under sub-paragraph (1), a programme would simultaneously have to be submitted and approved. There will be consequential amendments to sub-paragraph (2) to reflect the need for the approved scheme to include a programme and sub-paragraph (4) to provide that the authorised development must be undertaken in line with the approved scheme and the approved programme.

iii. Requirement 26 does not include a deadline for the provision of the flood compensation scheme. Subject to any views of the Environment Agency, we suggest the following wording be inserted in clause (3) following “*provided*” and before “*in*”: “*prior to the commencement of operation of the authorised development*”.

- 1.4 Highways England confirmed that it was still in communication with the Environment Agency over the final wording of the requirement in the dDCO.

- 1.5 Highways England stated that two flood requirements had been included in the dDCO in error. Those requirements had subsequently been amalgamated and redrafted in light of wording

suggested by the Environment Agency. The wording for the flood compensation requirement has now been agreed with the Environment Agency, which requires the detailed compensation scheme to be approved prior to any works commencing in flood zone 3, as shown on Annex H to the Flood Risk Assessment.

2. Article 2 - definition of commence

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

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

So, based on the current PA2008 wording, the carrying out of any operation, whether material or not, would be enough to constitute commencement. As such, the ExA can no longer see any difference between "*commencement*" and "*carrying out*".

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

2.1 Highways England stated that the definition of "commence" has been removed as a result of clear indications from the Secretary of State on other DCO examinations that such a definition was undesirable as it left the possibility of certain works being undertaken pre-commencement and therefore without the requirements applying.

2.2 Highways England supports the Examining Authority's proposal and has amended the wording of the requirements so that they are triggered by commencement of the authorised development. However, as suggested, no definition of 'commence' has been provided in Article 2(1) of the dDCO, such that the definition in s.155 of the Planning Act 2008 will apply.

3. Article 2 - Definition of maintain

The ExA notes that HE has powers to maintain through its licence, and it is reasonable that those powers be explicitly stated in the DCO. We also note that the applicant's proposed wording has been

used before. However, the wording has to be appropriate for each specific DCO, and drafting standards change, so what has been acceptable in the past may not be acceptable now.

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

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

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

- 3.1 Under the dDCO, the works to be undertaken as part of the authorised development are constrained by the terms of the dDCO and the drawings accompanying the application, as previously explained in the responses to the Examining Authority’s first and second written questions. Those limits form the Rochdale Envelope of the environmental assessment undertaken for the Scheme, beyond which the works cannot go.
- 3.2 In addition to the power to maintain provided under the terms of the dDCO, the undertaker for the Scheme is a highways authority and, as such, has maintenance duties and powers, both under s.41 of the Highways Act 1980 and under the Town and Country Planning (General Permitted Development) (England) Order 2015 (“GPDO”). To the extent that maintenance is development, the undertaker is constrained by Article 3(10) of the GPDO, which provides that development that constitutes environmental impact assessment (“EIA”) development does not constitute permitted development under the GPDO.
- 3.3 As Highways England explained at the ISH, the wording proposed for the definition of maintain does not reflect how the EIA for the Scheme is undertaken. It is not the case that the environmental effects of the Scheme as purely as assessed in the Environmental Statement (“ES”). The ES itself is not the end of the EIA; the EIA for the project concludes at the point at which the Secretary of State makes his decision, and includes all of the environmental information submitted up to that date.

Consequently, the wording proposed would constrain the development to a period prior to the completion of the EIA for the Scheme.

4. Article 6 – Power to deviate

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

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

4.1 Highways England stated that the proposed amendment was not necessary and the current wording was appropriate. The 1m deviation only relates to the installation of lighting columns; an activity which is itself already constrained by requirement 19 of the dDCO and the tag list at the end of Schedule 1 to the DCO.

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

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

5.1 Highways England agrees that the principle of discharge by the Secretary of State, and the mechanism for how that discharge will occur, is a matter for the Secretary of State.

i. Are the local authorities content with the arrangements set out in the applicant’s explanatory note.

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

ii. With regard to the approach suggested by the ExA for a service level agreement with the local planning authorities to enable them to set up a joint board to deal with the discharge of requirements, would this not provide a “single body sign off”?

5.2 Highways England stated that no local planning authorities had indicated a positive wish to be part of a joint body under a service level agreement for joint discharge.

5.3 Further, there is currently no procedure set out under guidance for setting up or running a joint planning body. It is unclear how such an approach would work in practice and where the resource and financial burden would lie.

5.4 Highways England stated that the involvement of 11 separate local planning authorities as part of a joint body would not necessarily simplify or speed up the process. However, Highways England also noted that it reasons for opposing the discharge of requirements by a joint planning board went beyond the need to have discharge by a single body, as explained at Section 15 of the Explanatory Note on the Discharge of Requirements, submitted at Deadline V (REP5-002).

iii. Do the local authorities have any comments on this and the way in which such a body could work?

- 5.5 In response to issues raised by a number of local planning authorities, Highways England reiterated that it would be the body carrying out consultation during the requirements discharge process, as opposed to the Secretary of State. Highways England made clear that the Secretary of State has the option to undertake consultation if he or she feels it is appropriate, but Highways England does not propose to prescribe that the Secretary of State must undertake such consultation.
- 5.6 Further, Highways England is of the view that further specification in Schedule 2 of the means by which that consultation is undertaken is neither required, nor appropriate. The wording of Schedule 2, Part 2 makes clear that a summary of consultation undertaken must be supplied to the Secretary of State and that responses to consultation will be reflected and implemented in the scheme submitted for discharge unless it is not reasonable, feasible or appropriate to do so.
- 5.7 Highways England stated that it was willing to include wording in the dDCO to make clear that, if the terms of consultation were not taken forward in the Scheme, the consultation report provided to the Secretary of State must provide reasons as to why they were not. That drafting has been reflected in the dDCO submitted to the Examining Authority on 15 February 2016.
- 5.8 Highways England noted the point raised by the Environment Agency that a situation could arise whereby, as a result of other consultees making suggestions, it would be unaware of the final form of the scheme submitted for approval by the Secretary of State. Highways England confirmed that it would include drafting in Part 2 of Schedule 2 to provide for the summary report on consultation, which includes reasons as to why any consultation responses were not taking forward in the final submitted scheme, to be submitted to relevant consultees, as well as the Secretary of State. That drafting has been reflected in the dDCO submitted to the Examining Authority on 15 February 2016. However, Highways England noted that it was not appropriate or proportionate for this to be the first step in another round of consultation as this could lead to a situation of perpetual rounds of consultation, adding delay and cost to the delivery of the Scheme.

6. Schedule 2 - Requirements

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

- **How would the implementation of this be secured?**

- 6.1 Highways England explained that requirement 22 has been amended to secure the provision of acoustic barriers in the locations shown on the Environmental Masterplan, which is a document to be certified as part of the DCO. The Environmental Masterplan has been updated to include the barriers proposed as part of the Enhanced Noise Mitigation Study, such that those barriers are now secured pursuant to requirement 22. An amended version of the Environmental Masterplan has been provided to the Examination as part of the Deadline VII submission on 17 February 2016. Highways England confirmed there would be consequential amendments to requirement 22 subparagraph (3) as a result of these changes.

7. Requirement 5 – Carriageway surfacing

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

The ExA consider that the wording of R5 should be changed as follows. Insert after the final sentence: *“Any re-surfacing of the carriageway comprised in Work No1a and 1b, or any slip road, will use a low noise surfacing material with similar (or improved) noise reduction properties to the TSCS unless otherwise approved by the Secretary of State.”* Comments from the parties are sought.

- 7.1 Highways England submitted that the issue raised was already addressed in requirement 5, which requires that where an alternative surface to Thin Surface Course System is to be approved by the Secretary of State for installation as part of the authorised development, it is required to have similar noise attenuation properties to Thin Surface Course System.
- 7.2 Highways England confirmed that it would include an obligation under requirement 5 to maintain the low noise surfacing for 15 years. However, it does not consider it to be appropriate to constrain the M4 in perpetuity in terms of the surfacing to be used. For example, it may be that in the future it is no longer a policy supported by Highways England, the material may not be available, it may no longer be economical, or circumstances may have changed on the Strategic Road Network such that it is no longer necessary or appropriate.
- 7.3 Highways England stated that it was unwilling to adopt the language suggested by the Examining Authority as it could create an obligation to repeatedly return to the Secretary of State for approval in perpetuity that could unnecessarily increase delay and cost.
- 7.4 Whilst Highways England accepts that this may reduce the weight that the Examining Authority can give to the benefit resulting from the provision of low noise surfacing, Highways England clarified that the requirement as drafted would not necessarily mean that the noise attenuation properties of the surface would end after 15 years, as any resurfacing that does take place within the 15 year period, such as after 13 years, would extend the life of the low noise surfacing further.

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

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

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

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

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

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

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

8.2 Highways England confirmed that it was formulating a table to show the matters raised in the Examining Authority's question, which has been provided to the Examination at Appendix A to this summary, as part of the Deadline VII submission on 17 February 2016.

8.3 Highways England reiterated that, in terms of the delivery of environmental mitigation, the DCO, the CEMP and its daughter documents need to be read together. If the drafting for the CEMP requirement in the EMGRFI DCO were to be adopted, if any of the measures listed in the requirement 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, many of which are subject to requirements in Schedule 2 of the DCO, as shown in the table at Appendix A of this summary.

8.4 Further, Highways England reiterates its comments made in response to question 8.25 of the Examining Authority's Second Written Questions. In that response, Highways England explained that the suggested drafting for requirement 8(2) provided above is not appropriate in this case.

9. Requirement 22 – Acoustic barriers

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

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

9.1 Highways England has provided a detailed response on the operation of its strategic licence in relation to its duty to maintain the Strategic Road Network at question F2(iv) of summary of the Water section of the Environment Issue Specific Hearing. For the reasons provided in that response, Highways England does not believe it is necessary to provide a specific maintenance requirement as part of requirement 22.

10. Protective provisions

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

- 10.1 Highways England stated that the protective provisions relating to National Grid had been agreed.
- 10.2 Highways England stated that the protective provisions relating to South East Water were essentially agreed, subject to final confirmation from South East Water.
- 10.3 Highways England stated that the protective provisions relating to the British Pipeline Agency have been sent to the British Pipeline Agency for review and approval.
- 10.4 Highways England stated that amendments to the protective provisions relating to Thames Water have been sent to Thames Water for review. As discussed during the Issue Specific Hearing into Compulsory Acquisition, there remains some dispute as to what should be required, under those protective provisions.
- 10.5 Highways England stated that the protective provisions relating to Network Rail have been sent back to Network Rail with comments on their suggested amendments. Highways England commented that Network Rail had initially agreed to the suggested protective provisions in the relevant representation made by Network Rail, but that Network Rail had subsequently sought to resile from that position.
- 10.6 Highways England stated that the protective provisions relating to the Environment Agency were agreed in principle, subject to final wording on maintenance of hydraulic links being agreed.
- 10.7 The protective provisions as agreed or in the form proposed by Highways England, as stated above, were included at Schedule 9 of the dDCO submitted to the Examining Authority on 15 February 2016.

Further Questions

11. The London Borough of Hillingdon has raised the issue that there is currently no provision for consultation with local authorities in requirements 4, 6, 11, 12 and 24.

- 11.1 Highways England stated that it was happy to include appropriate wording in these requirements to give effect to provision for consultation. That wording was reflected in the draft DCO provided to the Examining Authority on 15 February 2016.

12. Please could Highways England provide comments on the email submitted by Buckinghamshire County Council relating to requirement 14.

- 12.1 Highways England has provided a detailed response on the need for a requirement in relation to maintenance of the drainage system during the Water section of the Issue Specific Hearing into the

Environment. As explained in detail in response to question F2(iv) of that hearing, Highways England submits that it is appropriate to rely on the provisions of its Strategic Licence and its duty under s.41 of the Highways Act 1980 in relation to this matter.

12.2 Consequently, Highways England does not believe it is necessary to provide a specific maintenance requirement as part of requirement 14, and does not support the drafting proposed by Buckinghamshire County Council.

13. The local planning authorities have raised an issue about the costs of the consultation process and their use of resources. Our understanding is that under the proposed procedures, Highways England would be carrying out the consultation with the statutory consultees. Is that correct?

13.1 Highways England stated that the London Borough of Hillingdon had not made clear to it under which legal power it proposed Highways England would pay the London Borough of Hillingdon for non-statutory consultation. Nor had the London Borough of Hillingdon made clear to Highways England under which legal power it proposed the London Borough of Hillingdon could receive such payment, where it to take place.

13.2 Further, Highways England stated that, whilst it appreciates that the local planning authorities will give their consultation responses due consideration, there is a fundamental difference between the level of work required to be undertaken by a local authority in being consulted as part of the discharge process, and having to consider all aspects of a proposal as the decision-making body.

13.3 Highways England reiterated that it is a publicly funded body in the same way that the London Borough of Hillingdon is and that caution must therefore be exercised in relation to validating the expenditure of public funds.

14. In relation to Schedule part 3, 1(3)(c), can Highways England explain what is meant by "materially new or materially worse"? Can a definition be provided?

14.1 Highways England stated that "materiality" was a question of subjective planning judgment and that there was therefore no need to include a definition. To provide a definition would be to usurp the discretion of the decision makers. The judgement as to what is material should remain with the Secretary of State.

14.2 Whilst Highways England is not aware that this language has been consent to date, it notes that the same wording is proposed in Schedule 2 to the A14, Cambridge to Huntingdon Improvement Scheme DCO Application, which is currently before the Secretary of State for approval.

15. In relation to Schedule 12, Article 48, can you confirm that Schedule 12 is to apply for any approval apart from those listed in Schedule 2?

- 15.1 Highways England confirmed that the Examining Authority's assertion was correct, except in relation to requirement 16, which is to be discharged by the relevant planning authority, as it relates to one specific construction compound, and therefore falls within the procedure under Schedule 12.
- 15.2 Highways England stated that the 5 week consent period was appropriate because the consents required in Schedule 12 are much more limited than those in Schedule 2, and relate, for example to consents by a street authority or for the discharge of water.
- 15.3 Highways England stated that, in relation to paragraph 4(1) of Schedule 12, a 6 week appeal period would be appropriate. That drafting has been reflected in the dDCO submitted to the Examining Authority on 15 February 2016.

16. Queries in relation to the CEMP.

- 16.1 In relation to the Examining Authority's queries raised at the DCO ISH, please see the table below.

	Examining Authority's Query	Highways England Response
1.	CEMP 12.3.1 refers to "BPM"; can you please explain this term in practice?	<p>"BPM" is defined in the Glossary to the CEMP and refers to Best Practicable Means. It is a widely used term, particularly with regards to noise pollution. The Environmental Protection Act 1990 Act defines BPM as</p> <ul style="list-style-type: none"> • Having regard to the current state of technical knowledge; • The local conditions and circumstances; • The financial implications; • The means to be employed include the design, installation, maintenance and manner and periods of operation and plant and machinery, and the design, construction and maintenance of buildings and structures; and • BPM is only to apply only so far as compatible with any duty imposed by law.
2.	CEMP 12.3.1(c) refers to noise insulation "if deemed to be required"; by whom would it be "deemed" to be required?	A detailed response on the previous requirements in the CEMP in relation to noise insulation has been provided in response to the Examining Authority's question 5 on Noise.
3.	The CEMP has no details on control of the lighting scheme except for those contained in 5.6.8; is this sufficient to control lighting to be provided at construction compounds?	<p>In addition, 9.3.9 (d) states that: "the use of construction lighting is to comply with the Institute of Lighting Professionals Guidance Notes for the Reduction of Obtrusive Light GN01 (2011) and the provisions of BS 5489, Code of Practice for the Design of Road Lighting (BSI, 2013a), to minimise obtrusive light as set out in paragraphs 5.6.7 and 5.6.8, where applicable".</p> <p>In addition, 9.4.10 states that: "the Contractor will be required to avoid construction lighting and use directional lighting to avoid causing disturbance to bats using sensitive roosts and foraging habitat, particularly during the period</p>

		<p>May to September”.</p> <p>In addition, 9.4.16 states that: “construction/site lighting will use directional lamps, so that light-spill to the watercourses and their banks is avoided”.</p>
4.	CEMP 9.3.9; what control will there be over the contractor so that it "avoid(s) the use of lighting"?	<p>9.3.9(d) now reads: “the use of construction lighting is to comply with the Institute of Lighting Professionals Guidance Notes for the Reduction of Obtrusive Light GN01 (2011) and the provisions of BS 5489, Code of Practice for the Design of Road Lighting (BSI, 2013a), to minimise obtrusive light as set out in paragraphs 5.6.7 and 5.7.7, where applicable”.</p> <p>This imposes a more objective set of guidelines upon the contractor in relation to their use of lighting.</p>
5.	CEMP 10.2.3; does the contaminated land report deal with contaminated land water? Where will contaminated ground water from construction works be dealt with?	<p>Paragraph 10.2.3 of the CEMP has been revised to clarify that the risk assessment to be completed by the Contractor in the event of significant contamination not identified in the ES being identified will cover contaminated groundwater elements.</p>
6.	Requirement 16 deals with a written scheme of investigation and part 2 and 3 refer to construction compound 5; should this be cross-referenced in the CEMP?	<p>Highways England can confirm that reference to requirement 16 has been included at paragraph 7.3.10 in the CEMP.</p>
7.	Requirement 11; should this be cross-referenced in the CEMP?	<p>Highways England can confirm that reference to requirement 11 has been included at paragraph 9.2.2 in the CEMP.</p>