

The Planning Inspectorate
National Infrastructure Directorate

Our ref: WA/2015/120640/11-L01
Int. Party ID: 10031668

Your ref: TR010019

Date: 25 February 2016

Dear Examining Authority,

**Deadline 8 (29 February 2016) – Comments on details submitted for deadline 7.
Development Consent Order Application M4 - Junctions 3-12 (Smart Motorway)**

The following remarks summarise our position with regards to the above scheme and are set out under the following headings:

- 1.0 Flood Risk
- 2.0 Draft Development Consent Order

1.0 Flood Risk

- 1.1 As noted in our deadline 7 response, in principle, the Environment Agency supports proposals to improve national infrastructure. We are pleased that Highways England (HE) have undertaken significant work in relation to fluvial flood risk since the last hearings in November 2015.
- 1.2 Upon reviewing the January 2016 version of the flood risk assessment (FRA) we were satisfied with the updated principles of the FRA and the outline floodplain compensation (FpC) scheme. However, we had some outstanding concerns relating to the proposed FpC scheme and particular site locations including E6-B1 at Junction 8/9. These concerns were noted within our deadline 6 response.
- 1.3 We have reviewed the latest FRA document (revision February 2016) with regards to our remit. We are pleased to note that the latest February 2016 FRA addresses the concerns we raised in previous correspondence. We now have no objection to this scheme on fluvial flood risk grounds subject to the inclusion of the agreed DCO requirement wording.
- 1.4 Furthermore, we are pleased to inform the ExA that we have agreed the wording of a flood risk requirement, relating to fluvial flood risk and a floodplain compensation scheme. This has been included within the ExA's draft DCO wording.



2.0 Draft Development Consent Order

- 2.1 We are pleased that Highways England has agreed to certain notice provisions requested by the Environment Agency. These primarily relate to access to main rivers and interference with apparatus and a written notice period of 8 weeks is being proposed. However, following the hearings we continued to liaise with Highways England on the particular wording of protective provisions for the Environment Agency.
- 2.2 On 15 February 2016 we provided amendments to the applicant on their latest draft these. We understand that this was the same date that highways England submitted a revised draft DCO. Our preferred protective provision wording is noted in **Appendix 1** – should the ExA have any queries why we require the wording as noted in appendix 1 please feel free to contact us.
- 2.3 We wish to provide the following remarks on the draft DCO requirement wording.
- 2.3.1 **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.
- 2.3.2 **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.
- 2.3.3 **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.
- 2.3.4 **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.
- 2.3.5 **Requirements 23** (Flood Risk) – We are satisfied with the latest flood risk requirement wording as noted in the current draft DCO wording.
- 2.4 **DCO Discharge of Requirements – Schedule 2, Part 2**
- 2.4.1 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.
- 2.4.2 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.

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

2.4.4 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.

2.5 We understand that Highways England are proposing to liaise with the parties referenced in the requirements prior to submitting a summary and request to discharge the requirement to the SoS. Additionally, within the current requirement wording it is noted that the SoS may, if they wish to do so, also consult the relevant party. This is termed by the applicant as a 'dual consultation' process. As a note of record we have informed the applicant that any post-permission consultation by the applicant and/or their consultants may fall within our cost recovery service and an appropriate cost recovery agreement would be set-up between the HE and the Environment Agency under the current processes. Our cost recovery process is in accordance with recent government ministerial statements. It applies to the public, charities and government agencies. For clarity, in this instance consultations directly from the SoS will not fall within our cost recovery service.

If you have any queries please feel free to contact me.

Yours faithfully

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Appendix 1

Protective Provision Wording – Not currently agreed – EA preferred wording

(Red Text – denotes amendments to the protective wording provided by HE. When relevant footnotes provide a brief explanation as to why we seek the change)

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;

~~“HL works”~~ **“Flood Protection Works (FPW)”¹** means any watercourse and includes any land which provides or is expected to provide flood storage capacity for any watercourse and any bank, wall, embankment, outfall or other structure, or any appliance, constructed or used for land drainage or flood defence; and

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

2.—(1) Where, in the exercise of the powers conferred by this Order, the undertaker proposes to interfere with or obstruct access by the Agency to a relevant navigation or other main river, it must give the Agency 56 days' written notice of that requirement.

(2) Except in cases or urgency where the undertaker interferes with or obstructs access by 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 subparagraph (1), a suitable alternative access, must be provided prior to and for the duration of any such interference.

3.— If, in the exercise of the powers conferred by this Order, the undertaker acquires any interest of the Agency in any land or proposes to interfere with, or remove, any of the Agency's apparatus, it must give the Agency 56 day's written notice before any such interest is acquired or any apparatus is interfered with or removed.

4.— The undertaker must **retain, inspect and** maintain any **FPW** work comprised in or affected by the authorised development in accordance with a retention, inspection and maintenance plan to be prepared by the undertaker as part of the flood compensation scheme to be approved under requirement 22.

5. - The undertaker must allow the Agency reasonable access to any FPW work comprised in or affected by the authorised development at all reasonable times for the purposes of ascertaining whether the undertaker is complying with the provisions of paragraph 4.

¹ We would suggest an alternative definition given that the overarching term contains far more than hydraulic links – it relates to the entire flood water compensation areas, hydraulic links, flow routes, etc...

6.The undertaker must not dispose of any of its interests in the land on which the FPW works are situated without first having procured that its successor or successors in title tender to the Agency a duly perfected covenant (in a form agreed by the Agency acting reasonably and without delay) binding such successors in title and any subsequent successors in title to observe and perform the obligations on the part of the undertaker set out in the retention, inspection and maintenance plan in relation to the acquired land.²

7.—(1) Where maintenance of any FPW works specified in the approved maintenance plan is not carried out to the reasonable satisfaction of the Agency, the Agency may by notice require the undertaker to carry out the maintenance in question to such extent as the Agency reasonably requires.

(2) If, within a reasonable period being not less than 28 days beginning with the date on which a notice in respect of any FPW work is served under sub-paragraph (1) the undertaker has failed to begin taking steps to comply with the reasonable requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the Agency may do what is necessary for such compliance and may recover any expenditure reasonably incurred by it in so doing from the undertaker.

(3) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (2), the Agency must not, except in a case of urgency, exercise the powers of sub-paragraph (2) until the dispute has been finally determined.

8. If by reason of the construction of the authorised development or of the failure of any such works the efficiency of any FPW work is impaired, or any such FPW work is otherwise damaged, so as to require remedial action, such impairment or damage must be made good by the undertaker to the reasonable satisfaction of the Agency and if the undertaker fails to do so, the Agency may make good the same and recover the expenditure reasonably incurred by it in doing so from the undertaker.

9.—(1) The undertaker must indemnify the Agency in respect of all costs, charges and expenses which it may reasonably incur or which it may sustain—

(a) in the examination or approval of plans or other matter under this Part of this Schedule; and

(b) in the inspection of the construction of FPW works required by the Agency under this Part of this Schedule.

~~(2) The maximum amount payable to the Agency under sub-paragraph(1)(a) or (b) is to be the same as would have been payable to the Agency in accordance with~~

² We request this additional wording to ensure that if land associated with the FPW is sold or transferred to another party or in the unlikely event that Highways England (in one form or another) cease to exist, that appropriate measures and actions will be in place to retain, inspect and maintain the floodplain compensation areas and associated links to ensure that flood risk will not be increased in the locality.

~~the scale of charges for pre-application advice and land drainage consent applications published on the Agency's website from time to time.~~³

10. The fact that any work or thing has been executed or done in accordance with a plan approved or deemed to have been approved by the Agency, or to its satisfaction, does not (in the absence of negligence on the part of the Agency, its officers, contractors or agents) relieve the undertaker from any liability under the provisions of this Part of this Schedule.

11. Any dispute arising between the undertaker and the Agency under this Part of this Schedule is to be determined in accordance with article 46 of the Order.

³ We seek the removal of this paragraph as the indemnity is already qualified in sections 7, 8 and 9 of this wording - it only relates to costs, charges and expenses that we (the Environment Agency) may reasonably incur or sustain following a period of notice provided to the applicant to undertake the work. Furthermore, this paragraph is not consistent with our protective provisions in other DCOs which do not specify a maximum amount payable.