

ENVIRONMENT AGENCY

DEADLINE VII WRITTEN REPRESENTATIONS

HIGHWAYS ENGLAND'S RESPONSE

As requested we wish to summarise our contributions at the issue specific hearings on the environment (10 and 11 February 2016) and the draft development consent order (12 February 2016). Our comments are set out under the following hearings:

- 1.0 Flood Risk*
- 2.0 Water Quality – HRA and Comments by South East Water*
- 3.0 Draft Development Consent Order*

1.0 Flood Risk

- 1.1 In principle, the Environment Agency supports to improve national infrastructure. As noted in our deadline 6 (27 January 2016) letter to the Examining Authority (ExA) we did review the updated flood risk assessment (FRA) submitted by the applicant for deadline 5 (* January 2016). As explained at the issue specific hearings 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 Generally with in the January version of the FRA we were satisfied with the update 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 are noted in our deadline 6 response.*
- 1.3 At the hearings Highways England informed the ExA that further works was being undertaken to clearly demonstrate that the proposed scheme could provide full FpC to ensure that flood waters would not be impeded or displaced and subsequently the scheme would not be increasing flood risk. HE stated that these additional revisions would be included within the updated FRA submitted for deadline 7.*
- 1.4 On Monday 15 February 2016 Highways England provided us with a preliminary copy of the updated FRA (revision date February 2016). We have reviewed this document with regards to our remit and our 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.*
- 1.5 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. A draft of the wording is noted in appendix 1. Highways England confirmed their acceptance of our latest wording on 16 February 2016. We understand that this revised wording will be included within an updated DCO to be submitted for deadline 7.*

Highways England Response

- 1.1.1 Highways England is pleased to note that the Deadline VII submission of the Flood Risk Assessment ("FRA") satisfies all of the Environment Agency's requirements and that the Environment Agency now confirms that they have*

no objection to the Scheme on fluvial flood risk grounds. Highways England is also pleased to confirm agreement on the wording of Requirement 23 relating to fluvial flood risk and confirm that this revised wording was included in the updated DCO submitted on 15 February 2016.

2.0 Water Quality – Review of the HRA and South East Water’s response

- 2.1 *The ExA informed those in attendance at the hearings that they had received correspondence from South East Water relating to the applicant’s Hydrological Risk Assessment (HRA). As confirmed at the hearings, the Environment Agency’s position relating groundwater quality has not changed. However, our role and remit with regards to groundwater quality is from a slightly different perspective than South East Water’s.*
- 2.2 *Although the HRA is essentially a conceptual model rather than a more specific method assessment, we believe that the HRA covers the issues and risks to groundwater quality appropriately. Furthermore, it describes the proposed mitigation measures that will be undertaken during the construction phase.*

Highways England Response

- 2.2.1 Highways England is pleased to note the Environment Agency's satisfaction with the Hydrological Risk Assessment ("HRA") methodology and its conclusions.
- 2.3 *With regards to South East Water’s requests for further information we understand their position that in order to protect their water supply, HE response to a contamination spill would be more robust if there were more details in terms of conceptual understand so that if a spill occurred it could be rapidly assessed which borehole is at risk and what mitigation and action should occur. Therefore, we believe that South East Water’s request for the applicant to produce a groundwater contour map with the construction design and Bray boreholes located on it is a reasonable request. However, we are of the opinion that at Beenhams Heath the proposed piles will not penetrate the aquifer and therefore water quality is more at risk from surface water runoff to the chalk rather than from drilling and piling.*

Highways England Response

- 2.3.1 Highways England met with South East Water on 23 February 2016 and a Statement of Common Ground ("SoCG") will be submitted before the end of Examination. The SoCG includes Highway England’s agreement to provide contour mapping.
- 2.4 *South East Water request details of the specific depths of piles to be included within the current report and drawings. We acknowledge that this would make the conceptual model more complete compared to the more generic current assessment. But we do not believe that it will change the outcome as HE do state piling will be in made ground and perhaps up to a metre of aquifer. Therefore, there would be limited water table interaction. From the HRA it is clear that the piling is only of a very limited nature in the aquifer and that by installing permanent casing before boring minimises the risks of pollution which both South East Water and the Environment Agency accept.*

- 2.5 *However, we do agree with South East Water that in order to most rapidly and appropriately respond to an incident during construction the HRA should include maps detailing the piling location, depth, groundwater depth and flow direction, and location of bray boreholes. Currently, the report describes how HE would minimise the risks but not the response to those risks being realised.*

Highways England Response

- 2.5.1 Highways England can confirm that the HRA will be updated to show the location and directions of piling when this element of the detailed design is complete. Mitigation measures to reduce the risk of contamination of groundwater SPZs, including during piling, are provided in section 10.4 of the CEMP. These mitigation measures will be further developed during detailed design.
- 2.5.2 As noted above, following a meeting with South East Water on 23 February 2016, a SoCG has been agreed between the parties and will be submitted before the end of the Examination. The SoCG includes reference for pollution incident procedures in paragraph 10.4.1 of the CEMP.
- 2.6 *We still support the wording of requirement 12 (groundwater quality and contaminated land) as noted in the Deadline 5 draft DCO.*

Highways England Response

- 2.6.1 Noted.
- 3.0 Development Consent Order**
- 3.1 *The following remarks summarise our comments on the draft DCO made at the relevant hearing on Friday 12 February 2016.*
- 3.2 *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. Prior to and during the hearings, we continued to liaise with Highways England on the wording of protective provisions for the Environment Agency. On 15 February 2016 we provided amendments to the applicant on their latest draft these. Our preferred protective provision wording is noted in Appendix 2 – should the ExA have any queries why we require the wording as noted in appendix 2 please feel free to contact us.*

Highways England Response

- 3.2.1 The protective provisions with the Environment Agency are largely agreed, with just a few points remaining between the parties. Highways England will continue to engage with the Environment Agency on this matter in the hope that agreement can be reached prior to the end of the Examination. However, comments on the protective provisions at Appendix 2 to the Environment Agency's representation are provided below.
- 3.3 *In the hearing agendas you have also asked our position on the following requirements:*

- 3.3.1 **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.
- 3.3.2 **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.
- 3.3.3 **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.
- 3.3.4 **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.
- 3.3.5 **Requirements 23 and 26 (Flood Risk)** - We have concerns with the current wording as noted in the draft DCO submitted for deadline 5 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.

Highways England Response

- 3.3.5.1 Highways England has previously addressed these matters in its response to the Environment Agency's Deadline VI representations submitted at Deadline VII and its written summary of the oral representations made at the Issue Specific Hearing in to the DCO, which were also submitted at Deadline VII. Highways England considered that no further response is required.
- 3.4 **DCO Discharge of Requirements – Schedule 2, Part 2**
- 3.4.1 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.
- 3.4.2 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.

- 3.4.3 *The current paragraph 2(3) of Part 2, Schedule 2 would then become paragraph 2(4) of Part 2, Schedule 2.*
- 3.4.4 *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.*
- 3.5 *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 postpermission consultation by the applicant and/or their consultants will 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.*

Highways England Response

- 3.5.1 Highways England has previously addressed these matters in its response to the Environment Agency's Deadline VI representations submitted at Deadline VII and its written summary of the oral representations made at the Issue Specific Hearing in to the DCO, which were also submitted at Deadline VII. Highways England considered that no further response is required.

Environment Agency - Appendix 1 Flood Risk Requirement – Agreed wording

(Blue Text - final plan reference to be updated by HE to reflect amended FRA drawing numbers)

Flood risk

1.— (1) No scheduled works within Flood Zone 3 as shown on annex H to the flood risk assessment are to commence until a detailed scheme of compensation works for the effects of the authorised development upon flood risk in Flood Zone 3 (“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 ensure that compensation works:

- (a) be substantially in accordance with the outline flood compensation scheme shown on drawing [TR010019-v-FRA-01] sheets 1 to 13; or
- (b) where alternate mitigation works or measures not detailed in the flood risk assessment are proposed, demonstrate that the works or measures are at least as effective as those set out in paragraph (a);
- (c) provide sufficient compensation to ensure that the authorised development will not increase flood risk for all events up to and including the 1% annual exceedance probability plus a 20 percent allowance for climate change.

(3) The flood compensation scheme must provide for phasing of the provision of flood risk compensation in accordance with any phasing of the construction of the authorised works.

(4) The authorised development and the flood compensation scheme must be implemented in accordance with the approved scheme.

(5) No part of the Order land situated in Flood Zone 3 plus a 20 percent allowance for climate change is to be used for storage, except as shown on annex H to the flood risk assessment

Highways England Response

1. Highways England can confirm that the wording of this Requirement is agreed between the parties. It can also confirm that the drawing reference at paragraph 2(a) is correct and the square brackets can be removed.

Appendix 2 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)

Highways England Response

1. Highways England's response to the Environment Agency's proposed amendments to the protective provisions is provided below. In order to aid the Examining Authority, Highways England has provided a clean version of the protective provisions that it maintains should be included in Part 6 of Schedule 9 to the DCO for the benefit of the Environment Agency at Appendix B to Highways England's response to the Examining Authority's draft DCO, which is submitted at Deadline VIII.

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*

Highways England Response

2. Highways England agrees that reference to "flood protection work" (singular) is appropriate. However, Highways England is of the view that it should be set out in full throughout the protective provisions rather than being abbreviated.
3. Further, in order to make the definition clearer, Highways England submits that it should read: "means **work to** any watercourse".

“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.*

Highways England Response

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...

4. The words highlighted in bold and underlined should be to 'of' not 'or'.

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.*

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*

Highways England Response

5. Highways England does not agree that this provision should be included in the protective provisions on the basis that it is otiose and represents poor drafting practice. Highways England has explained to the Environment Agency that this provision is not necessary as the obligations would already be binding on any subsequent purchaser of the land, as follows:
- 5.1 The Order runs with the land - S.156(1) of the Planning Act 2008("PA 2008") provides that "If an order granting development consent is made in respect of any land, the order has effect for the benefit of the land and all persons for the time being interested in the land." Consequently, if the land is transferred, the Order runs with the sale of the land.
- 5.2 If the benefit of the Order was transferred, the obligations in the protective provisions would be binding on the transferee - Article 8(3) of the draft DCO provides that "The exercise by a person of any benefits or rights conferred in accordance with any transfer or grant under paragraph (1) (of Article 8) is subject to the same restrictions, liabilities and obligations as would apply under this Order if those benefits or rights were exercised by the undertaker."
6. Further, in relation to the text underlined in bold above, whilst Highways England can seek to bind its successors in title by way of a covenant on the

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.

transfer of land, it cannot bind future, subsequent successors in title who are a further step removed. The underlined wording is therefore unacceptable.

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.*

Highways England Response

7. In order to be consistent with paragraph 4, the reference should be to the "retention, inspection and maintenance plan."

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

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.

Highways England Response

8. Highways England agrees with the Environment Agency's deletion of the wording at paragraph 9(2) above.

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 a 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.