



The Planning Inspectorate

Application by Highways England for the A19 / A184 Testo's Junction Improvement Project

The Examining Authority's Schedule of Issues and Questions for Issue Specific Hearing 5: the draft Development Consent Order (the dDCO Schedule)

The table in this Schedule contains the Examining Authority's (ExA's) issues and questions on the draft Development Consent Order (DCO) (Revision 4) as submitted at Deadline 3 (D3) [REP3-008]. They will form the basis of Issue Specific Hearing 5 (ISH5) into the dDCO on **Thursday 1 March 2018**. They are principally addressed to the Applicant but observations from other interested parties (IPs) are encouraged, particularly in relation to the matters itemised on page 2 of this Schedule. Observations may be made orally at ISH5, or in writing by Deadline 5 (D5), 8 March 2018.

Abbreviations Used

PA2008	<i>The Planning Act 2008 as amended</i>	LIR	<i>Local Impact Report</i>
AN	<i>Planning Inspectorate Advice Note</i>	LPA	<i>Local planning authority</i>
Art	<i>Article</i>	MP	<i>Model Provision (in the MP Order)</i>
ALA 1981	<i>Acquisition of Land Act 1981</i>	MP Order	<i>The Infrastructure Planning (Model Provisions)(England & Wales) Order 2009</i>
BoR	<i>Book of Reference [APP-015]</i>	NPA2017	<i>The Neighbourhood Planning Act 2017</i>
CA	<i>Compulsory Acquisition</i>	NPS	<i>National Policy Statement</i>
CPO	<i>Compulsory Purchase Order</i>	NSIP	<i>Nationally Significant Infrastructure Project</i>
dDCO	<i>Draft DCO [REP3-008](Rev 4)</i>	R	<i>Requirement</i>
D{number}	<i>Examination Deadline {number}</i>	SI	<i>Statutory Instrument</i>
EM	<i>Explanatory Memorandum [REP2-012](Rev 2)</i>	SoS	<i>Secretary of State</i>
ES	<i>Environmental Statement [APP-018 – 048]</i>	TP	<i>Temporary Possession</i>
ExA	<i>Examining authority</i>		

The Examination Library

References in these questions set out in square brackets (eg [REP3-008]) are to documents catalogued in the Examination Library. The Examination Library can be obtained from the following link:

<http://infrastructure.planninginspectorate.gov.uk/document/TR010020-000263>.

It will be updated as the examination progresses.

Citation of Questions

Questions in this table should be cited as follows:

Hearing reference: question number, eg **ISH5:1** – refers to question 1 in this table.

Direction of and Responses to Questions

All questions are directed to the Applicant and responses are sought from the Applicant.

The following questions relate to decision-making under and discharge of Requirements in a way that could bear on the relevant planning authority South Tyneside Council (STC) and its attention is directed to those questions.

- ISH5:16 (Requirement 5: Mitigation Measures in the REAC (the Register of Environmental Actions and Commitments)); and
- ISH5:18 – 20 (Process for Discharge of Requirements).

The following questions have implications for IPs more broadly. The attention of the named IP or group of IPs is drawn to the individual questions listed below.

- ISH5:3 (General: consultation approach to the dDCO) is relevant to any IP that has provided responses to the dDCO up to D3.
- ISH5:10 (Article 32: Definition of 'Statutory Utility', its Effect for Gas, Electricity and Water Undertakings and the Adequacy of Protective Provisions) is relevant to any IP who is a gas, electricity or water undertaking.
- ISH5:17 (Requirement 5: Mitigation Measures in the REAC) is relevant to any IP which considers itself to be a beneficiary of mitigations provided for in the REAC.

Q No.	Part of DCO	Drafting example (where relevant)	Issue or Question
1.	<p>General: Approach to precedent and establishment of best practice DCO drafting for the Road Investment Strategy (RIS)</p>		<p>Approach to Precedent</p> <p>In the 'Applicant's Responses to the Examining Authority's Questions on the Draft' DCO (Document 7.9) submitted at D1 [REP1-016] in section 2, the Applicant set out its response to ExA issues and questions about the approach to be taken to precedent in the drafting of DCOs. Advice in the Planning Inspectorate's Advice Note 15 (AN15) (in paragraph 2.5.1) is clear and accepted, as are the public policy reasons for following precedent set out in paragraph 2.5.2.</p> <p>However, it remains equally important to test a dDCO in Examination to ensure that any precedented provisions <i>'are relevant or remain appropriate for that particular application or proposed application'</i> (AN15 para 1.1) and therefore remain supported by NPS policy and responsive to the context of the application. Precedent is of persuasive value, but it is not directive. There should be no circumstances in which a provision is accepted without test, merely because an equivalent provision has been included in a made DCO for a broadly equivalent proposal.</p> <p>In turning its mind to the consideration of precedent, the ExA is conscious that strategic highways applications by Highways England do not benefit from a fully developed body of established practice and precedent. There are currently two made DCOs in which the applicant was Highways England, those for the A14 Cambridge to Huntingdon Improvement Scheme and the M20 Junction 10A. There are a further 4 made DCOs where the applicant was the Highways Agency, pursuing analogous development purposes to those of Highways England. Amongst the made DCOs for strategic highways, there are clear and material differences in circumstances and approach, for example between the approach taken to the 'green field' development of a new alignment (such as the A14), as distinct from on-alignment improvements such as in this application. There are also less clear differences of approach, such as those between the made DCO for the A19 / A1058 Coast Road Junction Improvement and this application.</p> <p>Whilst there is a degree to which established practice can be distilled</p>

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			<p>from the decisions in respect of strategic highways DCOs, there is not yet the same body of precedent as there is in other fields of NSIP development (such as offshore wind farm development, in respect of which there are 16 made DCOs to consider).</p> <p>The Applicant has made clear in its submissions (see [REP1-016] at paragraph 2.5.2(b)) that it is seeking as far as possible a standardised set of provisions for a substantial number of similar DCOs required to deliver the RIS. This is a laudable aim, and of particular relevance in relation to an application such as the one in this case, which is likely to form the first of a number relating to similar circumstances (the upgrading of a roundabout to a grade separated intersection and/or to a closely associated pair or group of projects, delivering on-alignment improvements within a strategic highway corridor). Whilst there is not yet a substantial body of precedent for a dDCO delivering development of this type, it is anticipated to be a common form of strategic highway development as the RIS progresses. In these circumstances, it is important that the approach taken to draft provisions is considered with care, on the basis that generalisable approaches taken in this dDCO may, subject to the decision of the SoST, continue to be applied in a considerable number of future proposals of similar type and scale.</p> <p>These observations are set out here to preface the discussion of certain individual questions about the dDCO in the remainder of this commentary, on matters that the Applicant has responded to at or following ISH1 on the basis that a preferred approach is justified by 'precedent'. In some instances, the logic and technical soundness of that argument is clear. In others it is not yet as clear as it might be, and in that regard the ExA has an ongoing obligation to consider and test the drafting employed.</p>
2.	General: drafting approach to the NSIP		<p>Approach to the NSIP</p> <p>In the 'Applicant's Responses to the Examining Authority's Questions on the Draft' DCO (Document 7.9) submitted at D1 [REP1-016] in response to ISH1:5, the Applicant clarifies that Explanatory</p>

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			<p>Memorandum (EM) paragraphs 2.8 to 2.11 [REP2-012] seek to demonstrate that the project is a highway alteration (s22(1)(b), PA2008).</p> <p>The dDCO is still titled '<i>The A19 / A184 Testo's Junction <u>Improvement</u> Development Consent Order 201[*]</i>'</p> <ul style="list-style-type: none"> For the avoidance of doubt on this point, should the dDCO be titled '<i>The A19 / A184 Testo's Junction <u>Alteration</u> Development Consent Order 201[*]</i>'?
3.	<p>General: consultation approach to the dDCO</p>		<p>Consultation and Statements of Common Ground</p> <p>In the 'Applicant's Responses to the Examining Authority's Questions on the Draft' DCO (Document 7.9) submitted at D1 [REP1-016] in response to ISH1:8 at answer 8.4, the Applicant refers to the process of consultation with stakeholders relevant to the development of the DCO.</p> <ul style="list-style-type: none"> The Applicant is asked to confirm whether it has had any further discussions with stakeholders (including IPs) in respect of any changes to the DCO since ISH3 (as shown in [REP3-009 &10]) and if so to summarise the status and outcomes of those discussions. Any IP present at the hearing will be asked to comment and provide views on the most recent changes. Any IP not present at the hearing may do so in writing by D5.

Q No.	Part of DCO	Drafting example (where relevant)	Issue or Question
4.	Art 2(7)	<p><i>The provisions of the Neighbourhood Planning Act 2017(a), insofar as they relate to temporary possession of land under articles 29 and 30 of this Order, do not apply in relation to the construction of any work or the carrying out of any operation required for the purpose of, or in connection with, the construction of the authorised development and, within the maintenance period defined in article 30(11), any maintenance of any part of the authorised development</i></p>	<p>Article 2(7): Neighbourhood Planning Act 2017 Temporary Possession (TP) Provisions</p> <p>The dDCO was changed at D3 to insert a provision dis-applying the temporary possession (TP) provisions of the Neighbourhood Planning Act 2017 (NPA2017).</p> <p>The NPA2017 codifies a revised approach to TP. Elements of the TP provisions in NPA2017 provide clearer procedures and or broader rights than have been accorded in TP provisions typically included in DCOs to date. The TP provisions in NPA2017 have not been commenced and the ExA is currently unaware of a likely commencement date.</p> <p>The ExA understands the Applicant's position in justifying this change to the dDCO as being that the TP provisions there should reflect the basis on which the owners and occupiers of land prospectively subject to TP have been consulted. However, on the basis that the NPA2017 changes accord clearer and broader rights to such persons, there may be an argument that the application of such provisions to their land would not cause any material adverse effect to them. On that basis:</p> <ul style="list-style-type: none"> • Would it be necessary to consult such persons before according a clearer and broader suite of rights to them, to respond to the intentions of Parliament? • If the NPA2017 TP provisions commence before the dDCO is made, is there an argument that the dDCO should be subject to them? • If the SoS were to decide that the TP provisions of the NPA2017 should become applicable, without prejudice to the Applicant's view that they should be dis-applied, what drafting effects would that have on the dDCO?

Q No.	Part of DCO	Drafting example (where relevant)	Issue or Question
5.	Art 3(2)	... ' <i>within or adjacent to the Order limits</i> '...	<p>Article 3(2): Application to Adjacent Land (Outside the Order Limits)</p> <p>The ExA notes the Applicant's response to its question ISH1:22 at 22.5 [REP1-016]. An explanation has been provided that "adjacent" means any land which touches the land inside the [O]rder limits but does not fall within the Order limits itself.' But this has not been formed into a general definition in Art 2(1) or a specific definition for the purposes of Art 3 in that article.</p> <p>The ExA also remains unclear however about the precise extent to which this definition of adjacency applies. If it is intended to apply to parcels or plots of land, then its application is limited, precise and justified. If it is intended to apply to ownerships of land, in circumstances where adjacent land (for example) includes land in the ownership of the Church Commissioners, which is a substantial estate of national extent, at what other point than the plot is the end of adjacency to be found? Similar although slightly less extensive consideration would apply if the definition applied to occupancies, which could still account for a whole agricultural holding.</p> <ul style="list-style-type: none"> • Should the term "adjacent" be formally defined? • Should it be defined as relating to plots as distinct from ownerships or occupation of land?

Q No.	Part of DCO	Drafting example (where relevant)	Issue or Question
6.	Art 6	<p><i>... 'except that these maximum limits of vertical deviation do not apply where it is demonstrated by the undertaker to the Secretary of State's satisfaction and the Secretary of State, following consultation with the relevant planning authority, certifies accordingly that a deviation in excess of these limits would not give rise to <u>any materially new or materially worse adverse environmental effects from those reported in the environmental statement.</u>'</i></p>	<p>Article 6: Materially New or Materially Worse Adverse Environmental Effects</p> <p>The precedent for drafting of this nature in the A14 made Order being acknowledged, it is nevertheless rare and in NSIP practice terms broadly undesirable for a DCO to provide for the approval of 'materially new or materially worse environmental effects in comparison with those reported in the environmental statement'. Such changes would also be material changes to the development approved under the DCO. Parliament has provided a process under which material changes to a made Order may be considered (PA2008 s153 and Sch 6) and, if warranted, an Amendment Order can be made. In broad terms DCOs are expected to control development to ensure that materially new or materially worse effects than those identified in the ES do not arise.</p> <p>The ExA retains concerns about drafting that appears to support a means of bypassing otherwise applicable law and policy in respect of the material change amendment of DCOs (AN15 para 19.2) the role of Environmental Impact Assessment (EIA) (AN15 para 20) and the amendment of DCOs (AN15 para 19.2).</p> <ul style="list-style-type: none"> • Can the Applicant explain how the drafting in Art 6 is compatible with and responds to advice in AN15 para 19.2? • Can the Applicant explain how the drafting in Art 6 is compatible with and responds to advice in AN15 para 20?
7.	Art 7(2)	<p><i>... 'the works for which <u>the consent</u> is granted by this Order' ...</i></p>	<p>Article 7(2): Minor Drafting</p> <p>The word 'the' in 'the works for which <u>the consent</u> is granted by this Order' appears superfluous?</p>

Q No.	Part of DCO	Drafting example (where relevant)	Issue or Question
8.	Art 23(2) & Sch 5 Column 2	<p>[Article 23(2)] <i>(2) In the case of the Order land specified in column (1) of Schedule 5 (land in which only new rights etc. may be acquired) the undertaker's powers of compulsory acquisition are limited to the acquisition of such wayleaves, easements, new rights in the land or the imposition of restrictive covenants, as may be required for the purpose specified in relation to that land in column (2) of that Schedule.</i></p> <p>[Sch 5 Column 2, in each row] <i>'To construct, operate, access and maintain...'</i></p>	<p>Article 23(2): Minor Drafting / Explanation</p> <p>Can the Applicant provide a practical example to explain how the imposition of restrictive covenants would enable it to 'construct, operate, access and maintain' the specific Works in the referenced Plots?</p>
9.	Art 24(5)		<p>Article 24(5): PA2008 s152 and the Land Compensation Act 1961 (The 1961 Act)</p> <p>The ExA notes the Applicant's response to its question ISH1:39 at 39.1-2 [REP1-016]. PA2008 s152 (4) provides:</p> <p><i>'A dispute as to whether compensation under subsection (3) is payable or as to the amount of the compensation, must be referred to the [Upper Tribunal]...'</i></p> <ul style="list-style-type: none"> On that basis, the reference to the 1961 Act still appears to be superfluous?
10.	Art 32 & Sch 9		<p>Article 32: Definition of 'Statutory Utility', its Effect for Gas, Electricity and Water Undertakings and the Adequacy of Protective Provisions</p> <p>The ExA notes the Applicant's response to its question ISH1:49 at 49.2 [REP1-016].</p> <p>The ExA is content with the explanation provided there by the Applicant and has no remaining direct concerns. However this is to place gas, electricity and water undertakings that remain as IPs on notice that they are excluded from the definition of a statutory utility for Art 32 as drafted. In the Applicant's submission, the protective</p>

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			<p>provisions in Sch 9 are precedented and sufficient to provide such entities with all necessary protection.</p> <ul style="list-style-type: none"> Any final concerns from IPs about the drafting on this point must be raised at the hearing or in writing by D5.
11.	Art 42		<p>Article 42: Arbitration</p> <p>The ExA notes the Applicant’s response to its question ISH1:54 at 54.3 [REP1-016]. The ExA is still giving consideration to this response. It notes that whilst arbitration by persons appointed by a Professional Institution is provided for in made strategic highways DCOs and so is precedented, no reason underlying that precedent has been provided.</p> <p>The ExA’s question ISH1:54 set out a reason for the suggested change to this provision which the Applicant is requested to review. Further to this reason, the ExA notes that at the inception of the PA2008 system, dDCOs for development in a wide range of NSIP subject matters contained draft provisions of the nature of those in this dDCO. However, as the NSIP system as a whole has developed, the precedent for arbitration by ‘a person appointed by the SoS’ has become more broadly established.</p> <ul style="list-style-type: none"> What specific justification is there for the arbitration provision proposed and how does this specifically meet the needs of strategic highway development in a manner that can be distinguished from NSIP development more broadly? The ExA notes that, due to the absence of general appeal provisions in this dDCO, there is scope for additional work of the nature of appeals on the discharge of or determinations under Requirements to be sent to arbitration. Can the Applicant provide evidence of circumstances in which a person appointable by the Professional Institution has carried out appellate work (as distinct from more traditional forms of arbitration)?

Q No.	Part of DCO	Drafting example (where relevant)	Issue or Question
			<ul style="list-style-type: none"> Can the Applicant provide evidence that the Professional Institution has been made aware that appellate work might be within the remit of the arbitration role and is nevertheless content to accept that role on those terms?
12.	Schedule 2 Part 1, R1 & R4		<p>Handover Environmental Management Plan (HEMP) In the Agenda to ISH1 Table 1 to Annex E at Q59 (ISH1:59) [PD-005], the ExA observed in relation to the definition of the HEMP as follows:</p> <ul style="list-style-type: none"> <i>Should the HEMP (or an equivalent document) be defined in a manner that obliges it to provide a greater measure of content conformity with the CEMP and / or to continue to deliver those commitments in the REAC that require oversight or active management in the operational phase?</i> <i>Generally, the dDCO contains no procedure for consultation on or approval of the HEMP (or an equivalent document). Should a procedure be defined?</i> <p>Whilst changes have been made to the definition of the HEMP in R1 and the Applicant's response to the ExA's question in ISH1:59 [REP1-016] at 59.6 is noted, elements of these observations have not been responded to fully. Why would such an approval process relating to a strategic highway Order need to be different from the approach typically taken under other DCOs?</p> <p>Is there an argument that R1 and or R4 should provide as follows:</p> <ul style="list-style-type: none"> the HEMP must substantially accord with the approved CEMP and address all aspects of the CEMP that are relevant to the operation and maintenance of the approved development (see R4); and be submitted to and approved in writing by the SoS following consultation with the relevant planning authority, to the extent that it relates to matters relevant to its function.

Q No.	Part of DCO	Drafting example (where relevant)	Issue or Question
13.	Schedule 2 Part 1, R3(1)	... 'provided that the Secretary of State is satisfied that any amendments to the engineering drawings and sections showing departures from the preliminary scheme design would not give rise to <u>any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement.</u> '	<p>Materially New or Materially Worse Adverse Environmental Effects</p> <p>The ExA refers to consideration of Art 6 above (ISH5:6) and for the same reasons asks the Applicant:</p> <ul style="list-style-type: none"> • Can the Applicant explain how the drafting in R3(1) is compatible with and responds to advice in AN15 para 19.2? • Can the Applicant explain how the drafting in R3(1) is compatible with and responds to advice in AN15 para 20? • Further, is there any reason why the drafting formulation here (“in comparison with those reported...”) is different to the formulation used in Art 6 (ISH5:6) (“from those reported”)?
14.	Schedule 2 Part 1, R1	“HEMP” means the handover environmental management plan, to be developed and completed by the end of the <u>construction, commissioning and handover stage...</u>	<p>Minor Drafting</p> <p>The words ‘construction, commissioning and’ appear to be superfluous to the intention of this provision.</p>
15.	Schedule 2 Part 1, R4(2)	.	<p>Construction Environmental Management Plan (CEMP): Working Hours Provisions</p> <p>The CEMP working hours provisions were changed at D3 to insert overnight traffic management measures as an exception from the normal working hours limitations. The basis for this change is clear and justified. However:</p> <ul style="list-style-type: none"> • given that a number of exceptions are specifically listed, but other potentially relevant and foreseeable exceptions are not, are there any other foreseeable circumstances in which an exception to the working hours provisions might need to be provided (such as in an emergency, to control a pollution source)?
16.	Schedule 2 Part 1, R1 & R12	“the Manual of Contract Documents for Highway Works” means the document of that name published electronically by the strategic highway authorities for	<p>Manual of Contract Documents for Highway Works</p> <p>The dDCO was changed at D3 to define the Manual of Contract Documents for Highway Works (the manual), which is then referred to in R12 (Fencing).</p>

Q No.	Part of DCO	Drafting example (where relevant)	Issue or Question
		<i>England, Scotland, Wales and Northern Ireland, or any equivalent replacement published for that document;</i>	<ul style="list-style-type: none"> The current definition of the manual does not provide for circumstances in which a strategic highway authority for Scotland, Wales or Northern Ireland might cease to agree or publish the manual. It would appear more robust for the definition simply to define the manual as published 'by or on behalf of the strategic highway authority for England', which would have the effect of ensuring that that an unforeseen subsequent change to the status of the manual would not affect the definition. The manual currently appears to be available online only via the electronic resource www.standardsforhighways.co.uk. Is this the only approved source of this publication and if so, is it necessary to be clearer about its source in the definition? <p>The manual is a substantial work of 7 volumes (Vol 0 – Vol 6).</p> <ul style="list-style-type: none"> Is its relevance limited to fencing alone (R12)? Is it necessary to provide a more precise citation in R12 to the particular part(s) of the manual that are intended to be referred to?
17.	Schedule 2 Part 1 R5(2)	<i>'(2)The landscaping scheme must reflect the mitigation measures set out in the REAC and must be based on the illustrative environmental masterplan annexed to the environmental statement...'</i>	<p>Mitigation Measures in the REAC</p> <p>The ExA notes the Applicant's response to its question ISH1:63 at 63.1 [REP1-016].</p> <p>The ExA is content with the explanation provided there by the Applicant and has no remaining direct concerns. It does not propose an amendment to R5 to specifically incorporate and list individual measures. However this is to place IPs on notice that they must review the detailed list of REAC measures in Appendix 1.2 of the ES.</p> <ul style="list-style-type: none"> Any final concerns from IPs about adequacy of and security for mitigation must be raised at the hearing or in writing by D5.
18.	Schedule 2 Part 2	[From R13...] <i>(2)Subject to sub-paragraph (3), <u>in the event that the</u></i>	<p>Procedure for Discharge of Requirements: Guillotine on the SoS and Applications that Exceed the Rochdale Envelope</p> <p>In the Agenda to ISH1 Table 1 to Annex E at Q8 (ISH1:8) [PD-005] I</p>

Q No.	Part of DCO	Drafting example (where relevant)	Issue or Question
	R13 to R16	<p><i>Secretary of State does not determine an application within the period set out in sub-paragraph (1), the Secretary of State is <u>taken to have granted all parts of the application</u> (without any condition or qualification at the end of that period).</i></p> <p><i>(3)Where—</i></p> <p><i>(a) an application has been made to the Secretary of State for any consent, agreement or approval required by a requirement included in this Order;</i></p> <p><i>(b) the Secretary of State does not determine such application within the period set out in sub-paragraph (1); and</i></p> <p><i>(c) the application is accompanied by a report that considers it likely that the subject matter of the application would give rise to any <u>materially new or materially worse environmental effects with those reported in the environmental statement,</u></i></p> <p><i><u>the application is taken to have been refused</u> by the Secretary of State at the end of that period.</i></p>	<p>raised a general question about ‘guillotine’ provisions. This question builds on responses provided to that question in the Applicant’s answer 8 [REP1-016].</p> <p>R 13 provides a ‘guillotine’ process for applications to the SoS made under requirements. The basis for the drafting of this provision is clear, as is the ‘precedent’ for it in the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 (the A14 made Order) Schedule 2 Part 2, R20 and subsequently in the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 (the M4 SM made Order). There, as here, a distinction is drawn between applications that are deemed unconditionally approved in the case of non-determination after 8 weeks, and applications accompanied by a report highlighting a likely breach of the Rochdale Envelope, that are deemed unconditionally refused in the same circumstances.</p> <p>AN15 para 21 identifies ‘good practice’ that ‘Applicants are also encouraged to confirm in the explanatory memorandum that the discharging authority has been consulted about and is willing to assume a discharging role.’ Notwithstanding the precedent for this drafting or the Applicant’s previous answer on this point [REP1-016] at answer 8.5-6, the EM [REP2-012 &13] does not confirm that the SoS is content with this drafting and nor has evidence of the June 2016 agreement on drafting with DfT been provided.</p> <p>The Applicant has referred the ExA to the M4 SM ‘Register of Requirements’ (register) as demonstrating how the discharge process will function ([REP1-016] at answer 8.6). That register is a clear document of record in relation to discharges under the equivalent of Schedule 2 Part 1 of this dDCO, where the same type of register and process is provided for in R15. However, the M4 SM register contains no record of decision outcomes around guillotine provisions under the equivalent of Schedule 2 Part 2 of this dDCO. Further, the M4 SM is understood to be commencing works in a few months’ time and so is</p>

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			<p>still at a relatively early stage, where the process for operating a guillotined decision may not have been fully worked through. The A14 development is in construction. For this reason, practice in the A14 and the M4 SM developments should be brought within scope in responding to this question.</p> <ul style="list-style-type: none"> • Can the Applicant explain whether and if so how the guillotine provisions in the A14 and M4 SM made Orders have operated in practice with the SoS' decision team? • Have any practical issues arisen between the undertaker(s) and the SoS about: <ul style="list-style-type: none"> ○ the application of the guillotine; ○ whether it has always been sufficiently certain that an individual application was deemed granted or refused; and ○ how records of determinations and discharges are kept in relation to matters where the guillotine has been applied? ○ Was a record of deemed determinations kept in the 'register of requirements' provided for under the A14 made Order and is that how it would be proposed to be done under this dDCO R15? ○ If a record of deemed determinations has not been kept in either of the M4 or A14 made Orders, would the Applicant object to amending provision in this dDCO providing that such decisions should be recorded in the register? How might such a provision be drafted in and would R13 be the correct • Further to the Applicant's previous answer on this point [REP1-016] at answer 8.6 referring to the 'established process', is the Applicant able to provide any additional evidence of the June 2016 agreement with DfT and the SoS' satisfaction with this approach to drafting (eg in the form of a copy of the agreement, or a departmental letter of comfort)?

Q No.	Part of DCO	Drafting example (where relevant)	Issue or Question
19.	Schedule 2 Part 2 R13(3)(c)	<i>(3)(c)... 'the application is accompanied by a report that considers it likely that the subject matter of the application would give rise to any <u>materially new or materially worse environmental effects with those reported in the environmental statement...</u>'</i>	<p>Materially New or Materially Worse Adverse Environmental Effects</p> <p>The ExA refers to consideration of Art 6 (ISH5:6) and R3(1) (ISH5:13) above and for the same reasons asks the Applicant:</p> <ul style="list-style-type: none"> • Can the Applicant explain how the drafting in R13 is compatible with and responds to advice in AN15 para 19.2? • Can the Applicant explain how the drafting in R13 is compatible with and responds to advice in AN15 para 20? • Further, is there any reason why the drafting formulation here (“with those reported...”) is different to the formulation used in Art 6 (ISH5:6) (“from those reported”) or R3(1) (ISH5:13) (“in comparison with those reported...”) ? Other differences aside, on reflection the drafting here appears to be in error.
20.	Schedule 2 Part 2 R13 to R16		<p>Procedure for Discharge of Requirements: Appeals versus Arbitration</p> <p>The Applicant’s previous answer on this point [REP1-016] at answer 8.9 makes clear that it does not intend to create any formal process of appeal in relation to the discharge of requirements, because all of these are decisions by the SoS. Notwithstanding the argued basis for the approach taken in this dDCO in the precedent A14 and M4 SM made Orders, Art44 of the A14 made Order and Sch 11 of the M4 SM made Order do both contain differently drafted appeal provisions. Further, in this dDCO there are still written determinations of the relevant planning authority under R9 (Archaeological remains) in respect of which the SoS has no role, but there is no appeal process. The ExA is not aware of any precedent in a made Order for all disputes around the discharge of requirements being matters that fall under the general arbitration provisions (in this dDCO found at Art 42).</p> <ul style="list-style-type: none"> • Can the Applicant please provide precedent for a made Order with no appeal provisions in relation to the discharge of or written determinations under requirements and where any resultant

Q No.	Part of DCO	Drafting example (where relevant)	Issue or Question
			<p>dispute will be dealt with by general arbitration?</p> <ul style="list-style-type: none">• Is it the case that the limited form of appeal in Art44 of the A14 made Order amounts to the same provision as no appeal in this dDCO?• If no clear precedent for the total absence of appeal provisions can be found and this proves to be a novel provision, is there an argument for invoking an appeal process and in which case, what form might it appropriately take and what provisions should it apply to?