



Meeting note

Project name	Lake Lothing Third Crossing
File reference	TR010023
Status	Final
Author	The Planning Inspectorate
Date	7 December 2017
Meeting with	Suffolk County Council
Venue	Planning Inspectorate Offices
Attendees	The Planning Inspectorate Richard Price – Case Manager Lynne Franklin – Lawyer James Bunten – Case Officer Suffolk County Council Michael Wilks (Suffolk County Council) Heidi Slater (Pinsent Masons) Olivia White (WSP)
Meeting objectives	Project update and draft document feedback meeting
Circulation	All attendees

Summary of key points discussed and advice given

The Planning Inspectorate (the Inspectorate) advised that a note of the meeting would be taken and published on its website in accordance with section 51 of the Planning Act 2008 (the PA2008). Any advice given under section 51 would not constitute legal advice upon which applicants (or others) could rely.

Project update

The Applicant provided a brief description of the scheme, which had been subject to EIA scoping in April. The Applicant explained that the Environmental Statement would be drafted under the 2009 EIA Regulations but noted it would acknowledge and respond to the 2017 Regulations to the extent that it was relevant to assist the Examining Authority.

The Applicant noted that it was working with CABE with regards to bridge design, with the aim that the bridge becomes a landmark within Lowestoft, and explained the advantages of the chosen design over the previous double-leaf design. The Applicant highlighted how the chosen design addressed some concerns raised at scoping.

The Applicant advised that likely submission was still Spring 2018.

Statutory consultation



The Applicant explained that its statutory consultation period ran from 4 September 2017 to 23 October 2017. It had been extended from six weeks to seven because additional parties with land interests had been identified and given further time to respond. The Inspectorate advised that the extension to the statutory consultation period should be clearly explained and evidenced in the Consultation Report.

The Applicant summarised the consultation responses, noting the key themes arising, and highlighting its ongoing dialogue with Statutory Undertakers and other statutory consultees. A Navigation Working Group had been set up to assist discussions with Associated British Ports and other port users.

The Applicant briefly discussed the parties with which it had exchanged draft Protective Provisions (PP). The Applicant's aim was to agree PPs early to avoid, where appropriate, the need to prepare respective Statements of Common Ground.

The Applicant summarised its progress in seeking to assemble the Order lands by agreement.

Feedback on draft Consultation Report and draft Development Consent Order (and Explanatory Memorandum)

The Inspectorate advised that the main body of the draft Consultation Report (CR) was well progressed, but due to the absence of several of the listed appendices, assertions made within the body of the draft CR could not be corroborated. The Applicant queried the Inspectorate's preference for how the CR should address s47 community consultation responses made by s42(d) persons. The Inspectorate advised that in order to avoid excessive duplication, cross-referencing/ signposting within the CR should be applied wherever possible. Any exhaustive evidence should be provided in the appendices.

The Inspectorate's comments on the Applicant's draft DCO and Explanatory Memorandum are provided in table form at Appendix A to this meeting note.

The Inspectorate confirmed receipt of the rest of the Applicant's suite of draft documents. Feedback would be provided by the Inspectorate as follows:

- For the draft Land Plans and draft Book of Reference (BoR) – by 15 December 2017.
- For the introductory chapters of the Environmental Statement and Habitats Regulations screening report – by 22 December 2017.

The Applicant stated that a draft Statement of Reasons would be provided to be reviewed in conjunction with the draft Land Plans and BoR.

The Inspectorate stated that reviewing further versions of the draft documents would not be achievable before formal submission of the application. Individual queries could be responded to as required by the Applicant.



AOB

The Applicant's attention was drawn to latest example document published to the National Infrastructure Planning website: [National Grid's 'Guide to the application'](#). All applicants are being advised to prepare an equivalent document as part of their applications for development consent.

The Applicant noted that the scoping opinion had implied that in preparing its Environmental Statement the Applicant should have regard to the National Policy Statement for Ports, and queried what the Inspectorate saw as its relevance to the scheme. The Inspectorate advised that its Environmental Services Team would provide a response to the enquiry at a subsequent meeting.

The Applicant explained that some consultation responses had sought for traffic regulation measures to be included in the Order at Rotterdam Road and roads adjoining Durban Road. The Applicant explained that its traffic modelling had not suggested that such measures would be necessary or justified, and was not minded to include such measures in the draft DCO to be submitted with the application, but rather to monitor the actual impacts with the scheme in place and then implement an appropriate form of mitigation, if required. The Inspectorate advised that if an appointed Examining Authority agreed with analogous representations made to the examination, and was persuaded that additional mitigation was necessary, there could be mechanisms by which additional traffic calming measures could be achieved outside of the red line boundary (eg through a private agreement with the local highway authority).

Next steps

The following actions were agreed:

- Applicant to provide draft SoR as soon as possible.
- Short feedback teleconference to be arranged in the new year if further discussion of written comments is required.

Lake Lothing Third Crossing

Draft documents review

The following table comprises the comments made by the Planning Inspectorate about the form and content of the draft Development Consent Order and draft Explanatory Memorandum offered by the Applicant (Suffolk County Council) in November 2017.

The review of draft documents forms part of the Planning Inspectorate's Pre-application service for applicants¹. The commentary included in this document comprises advice issued by the Planning Inspectorate under section 51 of the Planning Act 2008 (PA2008). It does not constitute legal advice upon which the Applicant (or others) should rely.

¹ <https://infrastructure.planninginspectorate.gov.uk/application-process/pre-application-service-for-applicants/>

Draft Development Consent Order (and draft Explanatory Memorandum)

Provision	Comments
General drafting points	
-	<p>The Applicant should ensure that the draft DCO follows guidance and practice for Statutory Instrument (SI) drafting (for example avoiding "<i>shall/ should</i>") and is in the SI template when submitted – see Advice Note 13.</p> <p>The Applicant should also follow best practice drafting guidance in Advice Note 15.</p> <p>At the moment the structure and headers of the draft DCO do not fully follow normal practice. For example, it is not normal to place <i>Benefit of Order</i> and <i>Transfer of benefit</i> in 'miscellaneous and general' or to combine <i>Principal Powers</i> and <i>Streets</i> in a single part – see York Potash Harbour Facilities Order structure for illustration.</p>
-	<p>The Explanatory Memorandum (EM) should state whether each Article is based on a model provision or precedent Article. Where there has been a change from the precedent Article or model provision this should ideally be shown in a track changed draft DCO. It would also be helpful if the EM clarified whether the change is minor and has been made where, in the Applicant's view, the model provision is unclear or does not follow standard/ modern SI drafting practice. Where a model provision or precedent Article is substantially changed the EM should clearly explain how that alters the effect. Particularly where an Article is novel, the power on which each article is based should be identified.</p>
-	<p>Notwithstanding that drafting precedent has been set by previous DCOs or other orders, whether or not a particular provision in this DCO is appropriate, necessary and justified will be for the Examining Authority (ExA) to consider and examine taking account of the facts of this particular DCO application and having regard to any views expressed by the relevant authorities and Interested Parties.</p>
-	<p>Before the draft DCO is finalised all internal references and legal footnotes should be checked.</p>



Articles

Article 2 - *interpretation*

"commencement" - it will be necessary for the Applicant to justify the flexibility created by this 'carve out' clarifying any impacts of the 'exemption works' so that the ExA can consider whether they need to be controlled by Requirement. Note also that in the more recent [York Potash Harbour Facilities Order](#) the Secretary of State changed the drafting approach and didn't extend the 'exemption' to site clearance or diversion etc of services:

"45. In article 2(1) (interpretation) the Secretary of State is replacing the definition of "commence" with substantive provisions in article 3 (development consent, etc., granted by the Order) to make clear that certain of the works referred to in that definition may be carried out once the Order comes into force and are not subject to prior approval under the requirements or the DML. However, he does not consider that it is appropriate that this exemption should extend to site clearance or the diversion and laying of services as these operations may have impacts that should be subject to mitigation measures that would be secured through the requirements."

"maintain" - notwithstanding precedent in other DCOs the Applicant must still justify the scope of this definition within the context of this particular draft DCO and development.

"local planning authority" - is it correct in the interpretation of *Procedure for discharge of conditions* to describe Waveney District Council as the local planning authority in the exercise of its functions set out in sections 60 and 61 of the Control of Pollution Act 1974? Waveney isn't acting in the exercise of its planning functions when acting under sections 60 and 61.

Note: It will assist the examination if the Applicant provides a short document with the application explaining the separation of functions/ powers within Suffolk County Council ie as undertaker, highway authority, county planning authority etc.

"Order land" - it is normal practice to define the Order land as *"land shown on the land plans which is within the boundary of the land required for or affected by the proposed development, and is land in respect of which rights are to be acquired and extinguished as described in the book of reference"*. Does the annotation on the Land Plans show *"land required for or affected by"* the Proposed Development?

"Order limits" - Order limits should be defined further to clarify that the limits show the limits *"within which the authorised development and works may be carried out"*.

"Secretary of State" – should not be defined. The Order should assume a general Secretary of State to allow for



The Planning Inspectorate

	<p>any future changes to government machinery.</p> <p>General – ensure any definitions replicated from s135 of the PA2008 are identical. Where they are not, explain and justify in the EM.</p>
<p>Article 3 – <i>disapplication of legislation etc.</i></p>	<p>In the EM, it isn't sufficient to say that the local legislation "<i>could threaten</i>" the single consent. This Article will need more justification including justification for the width of the disapplication (ie disapplying 'any' byelaws, disapplying all of the provisions in the Neighbourhood Planning Act 2017 relating to temporary possession of land).</p> <p>It is recommended that the Applicant provides extracts from the relevant legislation which is being disappplied, information about the purpose of the byelaw/ regulation/ consent, an explanation as to the effect of disapplication and cross-reference to the relevant part of the protective provision which would prevent any adverse impact as a result of removing byelaw control or the necessity for consent.</p> <p>Regarding A3(1)(c), the Water Resources Act 1991 was partially repealed by Environmental Permitting (England and Wales) (Amendment) (No. 2) Regulations. The draft DCO should reflect this.</p>
<p>Article 4 – <i>development consent etc., granted by the Order</i></p>	<p>This Article is very general and unspecific. The EM should explain the effect of and necessity for Article 4(2). How much land is 'adjacent' to the DCO boundary and thus affected by the provision? How far from the boundary does the provision cease to bite?</p>
<p>Article 6 – <i>subsidiary works and operations</i></p>	<p>It isn't clear that direct precedent for this Article is provided in the York Potash Harbour Facilities Order or the Able Marine Energy Park DCO and it's noted that the Article is based on a model harbour DCO provision. That model provision identifies (although without limitation) a number of specific works.</p> <p>This Article is very wide and will need careful examination and further justification in the EM (or signposts to other documents) should be provided.</p> <p>It will be important to know the extent of the works which this Article purports to consent and to ensure that they have been subject to Environmental Impact Assessment (EIA). In relation to the control centre, the ExA will want to consider whether the construction and operation of the control centre should be subject to Requirements. And why is it considered that this development is a "<i>subsidiary work</i>" when it is included as authorised development in Schedule 1?</p> <p>What is the relationship between the dredging etc (authorised by Article 6(7)) and the activities subject to the</p>



The Planning Inspectorate

	<p>Deemed Marine Licence? Is Article 6 consistent with the definitions in and effect of the Harbour Authority protective provisions?</p> <p>How does the Requirement for Secretary of State consent (under (9)(b)) relate to the marine licence conditions?</p>
Article 7 – maintenance of the authorised development	<p>Although this would be a matter for examination the Applicant should consider whether the limitation to the extent of maintenance authorised in 7(2) should apply to maintenance authorised through Article 6.</p>
Article 8 – street works	<p>It's noted that here and elsewhere there is reference to the need for maximum construction flexibility because of the "early design stage". The Applicant will need to provide full justification for any flexibility built into the draft DCO and be able to demonstrate that (where there is uncertainty because the design is not sufficiently advanced) the EIA has been based on a realistic worst case scenario. The Applicant should have regard to Advice Note 9.</p>
Article 13 – temporary stopping up and restriction of use of streets	<p>Notwithstanding the precedents, whether or not Article 13 of the draft Lake Lothing DCO is appropriate or is too wide will be a matter for the ExA depending on the facts of this particular DCO application (including the impacts of authorising temporary working sites in such circumstances) and taking account of any views expressed by Interested Parties.</p>
Article 16 – use of private roads for construction	<p>It's noted that no DCO precedent is provided and this Article will need more explanation/ justification in the EM. By reference to s120 PA2008 and Schedule 5 as necessary, on what legal power is this Article based? It's noted that this power obviates the need to acquire an easement. What then is the legal nature of the "temporary passage" which is created if it isn't an easement? Has the Applicant identified and consulted persons with a right in every private road within the Order limits and are those persons identified in Part 1 and/ or Part 3 of the Book of Reference? If not, why not?</p>
Article 17 - clearways	<p>Is the drafting of this Article based on any precedents? Further explanation of the power on which this Article is based should be provided by reference to the matters listed in Part 1 of Schedule 5.</p>
Article 18 – public rights of way	<p>Is this Article necessary? Is the creation of a new right of way provided for in Article 12?</p>



The Planning Inspectorate

<p>Article 24 – <i>temporary suspension of navigation within Lake Lothing in connection with authorised development</i></p>	<p>What is the statutory basis for this Article?</p>
<p>Article 29 – <i>compulsory acquisition of rights</i></p>	<p>Full justification should be provided for the power to impose restrictive covenants.</p> <p>The Applicant should note paragraph 26 of Advice Note 15: "<i>Before deciding whether or not the power is justified the Secretary of State will need to consider issues such as proportionality; the risk that the use of land above or below a structure could be sterilised if it has to be acquired outright in the absence of a power to impose restrictive covenants</i>".</p> <p>Note also the Secretary of State's decision (paragraph 62 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) DCO) "<i>to remove the power to impose restrictive covenants and related provisions as he does not consider that it is appropriate to give such a general power over any of the Order land as defined in article 2(1) in the absence of a specific and clear justification for conferring such a wide-ranging power in the circumstances of the proposed development and without an indication of how the power would be used</i>".</p>
<p>Article 32 – <i>power to override easements and other rights</i></p>	<p>The Applicant should note paragraph 62 the Secretary of State's decision on the M4 Motorway (Junctions 3 to 12) (Smart Motorway) DCO "<i>to delete article 23 (power to override easements and other rights) as these provisions have now been superseded by sections 203 to 205 of the Housing and Planning Act 2016</i>". The Applicant should consider the implications of the Housing and Planning Act 2016 on the need for this DCO power.</p>
<p>Article 34 – <i>application of the Compulsory Purchase (Vesting Declarations) Act 1981</i></p>	<p>It would appear that this Article has been changed from the model provision. To the extent that it is relevant to understand the meaning of this Article, the Applicant should explain whether changes were made by the Housing and Planning Act 2016 to the Compulsory Purchase (Vesting Declarations) Act 1981 and the effect of reflecting those changes in this Article.</p>



The Planning Inspectorate

Article 35 – <i>application of Part 1 of the Compulsory Purchase Act 1965</i>	The Applicant should provide further explanation and justification for the need to clarify that entering and taking possession for the temporary use of land is not caught by the counter notice procedures in Schedule 2A.
Article 36 – <i>temporary use of land for carrying out the authorised development</i>	It isn't clear why the Article authorises the construction of (permanent) works in Schedule 1. Is there any precedent, in particular, for 36(1)(d) and 36(4)(b)? Further explanation and justification is required.
Article 38 – <i>statutory undertakers, and</i> Article 39 – <i>apparatus and rights of statutory undertakers in stopped up streets</i>	<p>The Applicant should note that where a representation is made under s127 of the PA2008 and has not been withdrawn, the Secretary of State will be unable to authorise Article 30 unless satisfied of specified matters set out in s127.</p> <p>The Secretary of State will also be unable to authorise removal or repositioning of apparatus unless satisfied that the extinguishment or removal is necessary for the purpose of carrying out the development to which the order relates in accordance with s138 of the PA2008. The Applicant should provide relevant justification either in the EM or Statement of Reasons.</p>
Article 41 – <i>disregard of certain interests and improvements</i>	Are there precedents for this Article? What is the justification for the Article? The Applicant should consider the replacement of sections 6 to 9 in the Land Compensation Act 1961 by new sections 6A to 6E brought about by the Neighbourhood Planning Act 2017. Does this affect the drafting of Article 41?
Article 42 – <i>set-off for enhancement in value of retained land</i>	<p>The Applicant should consider the replacement of sections 6 to 9 in the Land Compensation Act 1961 by new sections 6A to 6E brought about by the Neighbourhood Planning Act 2017. Does this affect the drafting of Article 42?</p> <p>Note: it isn't appropriate to maintain that the precedent in the Thames Tideway DCO demonstrates that the Secretary of State agrees with this principle. It is a different Secretary of State.</p>



The Planning Inspectorate

Article 43 – <i>no double recovery</i>	Is there precedent for this Article?
Article 44 – <i>operation of the new bridge</i>	Could this be a Requirement (see section 120(1) of the PA2008 - an order granting development consent may impose Requirements in connection with the development for which consent is granted), rather than an operative provision?
Article 45 – <i>closing the highway on the new bridge</i>	On what power is this Article based and is there a precedent?
Article 46 – <i>protection against dredging</i>	This does not appear to be an operative provision. Could it instead be a condition of the protective provisions (PP) for the Harbour Authority?
Article 47 – <i>offences and power to make byelaws</i>	<p>The EM should identify the power on which this Article is based – making particular reference to s120 of the PA2008:</p> <p><i>“(8) With the exception of provision made under subsection (3) for or relating to any of the matters listed in paragraph 32B of Schedule 5, an order granting development consent may not include—</i></p> <p><i>(a) provision creating offences,</i></p> <p><i>(b) provision conferring power to create offences, or</i></p> <p><i>(c) provision changing an existing power to create offences.”</i></p> <p>Is there a precedent? What is the justification for the Article?</p>
Article 48 – <i>fixed penalty notices</i>	As above.
Article 49 – <i>benefit of Order</i>	This isn't a 'miscellaneous and general power' – see general drafting comments above.



The Planning Inspectorate

Article 50 – <i>transfer of benefit of Order, etc.</i>	Paragraph (4) (the consent of the Secretary of State is not required) will need further explanation and justification.
Article 51 – <i>operational land for purposes of the 190 Act</i>	This may be an Article which is frequently used but it still requires justification in the circumstances of this particular draft DCO.
Article 52 – <i>application of landlord and tenant law</i>	This may be an Article which is frequently used but it still requires justification in the circumstances of this particular draft DCO.
Article 53 – <i>traffic regulation measures</i>	On what power is this Article based and is there a precedent? Does this Article combine more than one model provision/ precedent? What are the vehicles to which paragraph (2) refers (Road Traffic Exemptions etc)?
Article 55 – <i>defence to proceedings in respect of statutory nuisance</i>	<p>The Applicant should explain why this Article is necessary in the circumstances of this Nationally Significant Infrastructure Project.</p> <p>Section 65 (noise exceeding registered level) of the Control of Pollution Act 1974 was repealed by the Deregulation Act 2015. The Applicant should ensure that this and all statutory references are updated.</p>
Schedule 1 – Authorised development	
General	<p>The section 35 direction for the scheme has the effect that " <i>associated matters</i>" are to be treated as development for which development is required. This means that those " <i>associated matters</i>" may be granted development consent under section 115(1)(a). Arguably some of those " <i>associated matters</i>" may not in fact constitute development – it's noted that the " <i>elements of development</i>" listed in 2.8.1 to 2.8.3 of the EM include stopping up which isn't development. Stopping up is however a matter which would be " <i>ancillary to, the development for which consent is granted</i>" which could properly be authorised by the DCO in accordance with section 120(3) – and, see below, the authorised development in Schedule 1 includes matters which aren't development.</p>



	<p>Development associated with the Lake Lothing development (for which development consent is required as a result of the s35 direction) may also be granted development consent (section 115(1)(b)).</p> <p>It's not necessary to include the explanatory drafting "<i>which in accordance [...] is development for which development consent is required</i>". Schedule 1 doesn't need to describe development as being "<i>ancillary or related</i>". It's noted also that some of the "<i>development</i>" may not be considered as development - for example use etc and disposal of materials, relocation of vessels, interference with navigable or non-navigable watercourses. Could some of these matters be authorised by the Deemed Marine Licence?</p> <p>The text at (aa) and (bb) appears to be incomplete.</p> <p>Consider the following definition and extract from Schedule 1 from the York Potash Harbour Facilities Order:</p> <p><i>"authorised development" means the nationally significant infrastructure project and associated development described in Schedule 1 (authorised development) and any other development authorised by this Order, which is development within the meaning of section 32 (meaning of development) of the 2008 Act and any works carried out under the requirements"</i></p> <p>Extract:</p> <p><i>"In connection with Works Nos. 1 to 12 such development within the Order limits but excluding the lagoon as may be necessary or expedient for the purposes of or in connection with the construction or use of the nationally significant infrastructure project and associated development described in Works Nos. 1 to 12, provided that such works do not give rise to any materially new or materially worse environmental effects in comparison with those assessed in the environmental statement or any updated environmental information supplied".</i></p>
Schedule 2 - Requirements	
General	It would assist the examination for a document to be provided with the application explaining how each Requirement, in the Applicant's opinion, satisfies the tests in Planning Practice Guidance: Use of planning conditions .
Requirement 10 – contaminated land and	Redraft to make precise/ imperative/ certain ie which body, and when?

<i>groundwater</i>	
Requirement 11 <i>– amendment to approved details</i>	This Requirement provides no limitation on the scope of amendments that can be authorised and is unlikely to be justified. See for example the provisions in the York Potash Harbour Facilities Order which provided that no amendments to those details, plans or other matters would provide for development outside the parameters of the authorised development or for a form of development which would give rise to materially new or materially worse environmental effects in comparison with those assessed in the Environmental Statement.
Part 2 – procedure for discharge of requirements	It's noted that the Secretary of State is defined as the Secretary of State for Transport. In the context of this Schedule, isn't the Secretary of State for Communities and Local Government the appropriate Secretary of State?
Requirement 12 - interpretation	It is considered unusual to separate interpretation in this way. Suggest move to Requirement 2.
Requirement 15 - appeals	The Planning Inspectorate is close to finalising a 'standard provision' for bespoke appeals mechanisms, and this will be shared with the Applicant in due course. The Applicant should explain and justify any departure from the 'standard provision' in its EM.
Schedule 13 – Protective provisions	
Part 3	See M20 Junction 10a DCO for the Environment Agency's most contemporary preferences. Where any PPs cannot be agreed before the application is submitted, the Applicant's preferred PPs should be provided as a minimum.
Schedule 14 – Documents to be certified	
-	Consider embedding within Article 58 unless an unusually large number of plans etc to be certified eg M4 Motorway (Junctions 3 to 12) (Smart Motorway) DCO approach vs Thames Water Utilities Limited (Thames Tideway Tunnel) Order approach.