

A19 Downhill Lane Junction Improvement

Scheme Number: TR010024

7.8 Written Submission of Applicant's case at Issue Specific Hearing 1 and the Open Floor Hearing on 13 August 2019, and Responses to ExA's questions on the dDCO

Rule 8(1)(k)

Planning Act 2008

Infrastructure Planning (Examination Procedure)

Rules 2010

Infrastructure Planning

Planning Act 2008

The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009

A19 DOWNHILL LANE JUNCTION IMPROVEMENT

The A19 Downhill Lane Junction Development Consent Order 202[]

WRITTEN SUBMISSION OF APPLICANT'S CASE AT ISSUE SPECIFIC HEARING 1 AND THE OPEN FLOOR HEARING ON 13 AUGUST 2019, AND RESPONSES TO ExA'S QUESTIONS ON THE dDCO

Regulation Number:	Rule 8(1)(k)
Planning Inspectorate Scheme Reference	TR010024
Application Document Reference	TR010024/APP/7.8
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Version	Date	Status of Version
Rev 0	August 2019	Submitted for Examination Deadline 1

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A19 DOWNHILL LANE JUNCTION SCHEME

WRITTEN SUMMARY OF APPLICANT'S ORAL SUBMISSIONS

ISSUE SPECIFIC HEARING INTO THE DRAFT DCO AND OPEN FLOOR HEARING ON 13 AUGUST 2019 AT THE CLARION HOTEL, BOLDON, TYNE AND WEAR

1 Introduction

- 1.1 This document summarises the case put by Highways England (**the Applicant**) in relation to the A19 Downhill Lane junction scheme (the **Scheme**) at the Issue Specific Hearing (**ISH**) into the draft Development Consent Order (**dDCO**) and the Open Floor Hearing (**OFH**) which both took place at the Clarion Hotel Boldon, Boldon Business Park, Boldon Colliery, Tyne and Wear on 13 August 2019, at 14:00 and 18:30 respectively.
- 1.2 In what follows, the Applicant's submissions on the points raised follow the Agenda for the ISH into the dDCO and the Agenda for the OFH set out in the Examining Authority's (**ExA**) rule 6 letter which was published on the Planning Inspectorate's website on 12 July 2019.
- 1.3 A table setting out the ExA's questions on the dDCO published at Annex E of the ExA's rule 6 letter, and the Applicant's responses to these questions, is at **Appendix 1** to this document. To avoid repetition, this document will where possible cross-refer to this table of questions and responses in summarising the Applicant's case.

Issue Specific Hearing into the dDCO

2 Agenda item 1 – Welcome, introductions, arrangements

- 2.1 Tom Henderson (**TH**), Partner at BDB Pitmans LLP (**BDBP**), introduced himself as lead advocate for the Applicant. He noted that he would be assisted by Mustafa Latif-Aramesh (**MLA**), Associate at BDBP, on questions related to compulsory acquisition provisions, protective provisions and progress on side agreements.
- 2.2 TH was also accompanied by the following members of the team for the Applicant, to be called upon if required:
 - 2.2.1 Tom Howard, Senior Project Manager, Highways England;
 - 2.2.2 Ben Wade, Senior DCO Lead, Costain (construction contractor for Highways England); and
 - 2.2.3 Michael Robinson, Delta Simons, EIA Lead

3 Agenda item 2 – Purpose of the hearing

- 3.1 TH explained the Applicant's approach to drafting the dDCO. The Applicant had had regard to Planning Inspectorate Advice Notes, and other relevant sources including guidance from the Office of Parliamentary Counsel.

- 3.2 TH added that the dDCO is one of a number of DCOs that the Applicant is progressing as part of its Road Investment Strategy. The Applicant is seeking to make best use of resources and in line with that to develop a common approach to drafting through precedents and standards.
- 3.3 A fundamental principle of the Applicant's drafting approach is to make sure that the dDCO is aligned with tried and tested Highways England DCOs. The dDCO reflects the combined work of a number of schemes which have gone before this one, during which various approaches have been tested and honed. The Applicant has aimed to learn from these and to be consistent with previous DCOs, and also to have regard to progress on other Highways England DCO applications currently under examination.
- 3.4 The Applicant has had regard to the desirability of following drafting precedents in its answers to the ExA's questions on the dDCO. The Applicant recognises the need to justify the inclusion of provisions. The Applicant is also conscious, however, where the inclusion of such provisions is justified, that if it departs from the particular drafting precedents this may cast doubt on the interpretation of previous Orders – for example, through the expansion of definitions.
- 3.5 TH explained certain integral elements of the dDCO reflect arrangements set up between Highways England and the Secretary of State for Transport (**SoS**) – in particular the process for discharging requirements. While other DCOs may seek consent from the local planning authority (**LPA**) for discharging requirements, in the case of Highways England DCOs a procedure has been set up where there will be consultation with relevant LPAs but discharge falls to the SoS. The Department for Transport (**DfT**) has set up a unit to deal with the discharge of requirements on Highways England schemes. *[Please see **Appendix 2** which contains correspondence between Highways England and the Department for Transport setting out these arrangements.]*
- 3.6 TH also highlighted that the Scheme is a sister scheme to the A19 Testo's Junction project. The Applicant is trying to establish a consistent set of Orders because both schemes are being implemented at the same time under a combined delivery programme. There is a public interest in having a consistent set of measures between the two schemes. A number of the measures proposed to be secured via the dDCO, including traffic regulation measures and consultation forums, have already been set up and are operating effectively through the Testo's scheme. The A19 Downhill Lane Junction scheme is seeking to continue and/or replicate these.

4 Agenda item 3 – Function and structure of dDCO

- 4.1 TH explained the change to the name of the dDCO from "A19 Downhill Lane Junction Improvement Order" to "A19 Downhill Lane Junction Order". This reflected the latest Highways England drafting practice as a result of the Testo's examination. The Testo's scheme was initially referred to as an "improvement", which reflected its name in the Road Investment Strategy. However, this is to be contrasted with the legal basis under which the Testo's scheme is an NSIP under section 22 of the Planning Act 2008 (the **2008 Act**), and the ExA for the Testo's scheme had identified that this could cause potential confusion.
- 4.2 On reflection, and having regard to schemes elsewhere in the country, the Applicant decided that the most straightforward drafting strategy going forward was to simply name each scheme in the Order without setting out the NSIP classification or the title given to a project in the Road Investment Strategy. This is now a precedented approach (see, for example the M20 Junction 10A Development Consent Order) and reflects the Applicant's current practice.

4.3 The endnotes in the dDCO have been updated to reflect the drafting of the Testo's Order. Endnotes is the drafting term for what would commonly be called footnotes.

4.4 TH noted that the Applicant had prepared a table with detailed answers to the ExA's questions (see **Appendix 1**), and he would be going through these answers in addressing agenda items 3 a) to h).

a) the proposed articles

4.5 TH talked through the Applicant's responses to the ExA's questions 7 to 12, which address the proposed articles. These responses, together with the ExA's questions, are set out in the table at **Appendix 1** to this document.

b) the proposed project description (Schedule 1) and its relationship with other major projects particularly the A19 Testo's Junction Alteration and the IAMP project

4.6 TH explained the approach adopted by the Applicant in relation to Schedule 1. The project's engineering and design team had been tasked with reducing the Scheme and its components to a list of numbered works. The sub-division of works reflects what the Applicant considers to be an appropriate categorisation. The numbered works align with works on works plans and elsewhere in application documents. This is consistent with DCO drafting practice. The lettered works are ancillary powers, and all of these are exercisable only in connection with numbered works. As a drafting approach, rather than repeating these ancillary powers under each numbered work, the Applicant has created a single list. Further information on the Applicant's approach to the lettered works is included in the response to question 38 in **Appendix 1** to this document.

4.7 TH noted that Article 36 of the dDCO deals with the disapplication of some of the provisions of the Testo's Order. He took the ExA through what was proposed in this article and how it would be achieved. The article deals with a matter which the Applicant was not aware of at the time of the Testo's examination, and which has come to light subsequently. The purpose of the amendments to the Testo's Order is to modify plans approved on that scheme so that the NMU provision in the Testo's scheme is removed. A full description of the proposed change is in plans and section which have been submitted (see **Application Document Reference: TR010024/APP/7.5 / APP-054**).

4.8 TH added that there was precedent for a DCO amending a previous DCO (see the Millbrook Gas Fired Generating Station Order 2019).. As a matter of law, this approach was permitted under s.120(5)(b) of the Planning Act 2008 which permits a DCO to amend legislation of local application. [Post-hearing note: the Applicant would refer to paragraph 6.8 of the Decision Letter dated 13 March 2019 in relation to the Millbrook Power project which states "*The Secretary of State agrees with the ExA and the Applicant that section 120(5) does provide an appropriate mechanism for a new Development Consent Order to amend an existing Development Consent Order...*") Further detail regarding the operation of article 36 is available in the response to question 36 in **Appendix 1** to this document.

4.9 TH talked through the proposed addition of requirement 3(3) and accompanying definitions to the dDCO. To provide necessary context, he began by explaining that requirement 3(1) is well precedented and reflects a process agreed between Highways England and the Department for Transport. It allows departure from the scheme's preliminary design where the SoS permits

it, in circumstances where the SoS concludes that the proposed changes do not give rise to materially new or materially different environmental effects.

- 4.10 Noting this flexibility, proposed requirement 3(3) made explicit provision for a design change to accommodate a possible combined NMU provision associated with the IAMP TWO project. Under requirement 3(3) the scheme's preliminary design could be departed from where the conditions in proposed requirement 3(3) are met.
- 4.11 TH explained that there is no specified longstop date at this point in time, and offered to provide further information regarding the Applicant's proposals to maintain interim NMU provision across the junction. It was agreed that a paper would be submitted by the Applicant by Deadline 2 to provide further information on these points.
- 4.12 TH outlined the engagement which had taken place to date regarding the proposed integrated NMU solution with IAMP Two. A meeting with the Local Access Forum, local authorities and IAMP LLP had taken place on 17 April 2019 (after the application was submitted). The Applicant circulated minutes on the basis that it would bring forward integrated NMU provision subject to any comments received within 28 days. Only one response was received, from UK Cycling, and this stated that they had no comments.

c) the proposed requirements (Schedule 2)

- 4.13 TH stated that the overarching point to note is that the proposed requirements substantially align with the regime being used to manage the Testo's Scheme and reflects the aforementioned arrangements between the Applicant and the Department for Transport. The ExA's questions relating to the proposed requirements are addressed in **Appendix 1**.

d) the need for and progress on protective provisions (Schedule 7)

- 4.14 MLA explained the current position in relation to statutory undertakers (SU) which have interests within the Scheme boundary. This is set out in the response to Q.47 in **Appendix 1** and has not been repeated here. MLA noted that the Applicant will continue to engage with SUs but does not anticipate any further update being required.
- 4.15 MLA responded to a query from the ExA as to whether protective provisions for the benefit of the Environment Agency (**EA**) were necessary. He noted that it would be normal for the EA to have protective provisions for their benefit if there were a provision in the Order disapplying the requirement for any of the consents which the EA is normally responsible for. This was not the case here, as it had been agreed with the EA that the Applicant would not be seeking the disapplication of these provisions.

e) the means of recording documents to be certified (Schedule 9)

- 4.16 TH noted that this this point was covered by the Applicant's response to the ExA's question 10 (see **Appendix 1** to this document).

f) the need for and progress on any planning obligations and/or side agreements

- 4.17 MLA stated that the Applicant was currently in discussion with local authorities on the need for any side agreements, but that no planning obligations were anticipated. An update will be provided when the Statement of Common Ground between the Applicant and local authorities is submitted.

g) the need for and progress on any other consents

- 4.18 TH noted that there was no specific update on this point. The majority of matters would be dependent on the development of detailed design for the Scheme.

h) progress on Statements of Common Ground relevant to the DCO

- 4.19 It was noted that this point had been covered at the Preliminary Meeting that morning but in summary:
- 4.19.1 A finalised statement of common ground between the Applicant and Natural England had been submitted on 6 August 2019; no further changes are required to the dDCO.
 - 4.19.2 A joint statement between the Applicant and National Grid had obviated the need for a statement of common ground; as National Grid had confirmed no specific protective provisions were required, accordingly no further changes are required to the dDCO.
 - 4.19.3 Statements of common ground with the local authorities would be submitted at Deadline 2, following a request from both South Tyneside and Sunderland City Councils that they wanted the deadline to align with the deadline for the Local Impact Report. The Applicant does not anticipate any further changes to dDCO from its discussions with the local authorities.
 - 4.19.4 An update on progress of the statement of common ground between the Applicant and the Environment Agency would be provided at Deadline 1. The Applicant does not anticipate any further changes to dDCO from its discussions with the Environment Agency.
 - 4.19.5 A statement of common ground between the Applicant and IAMP LLP would be submitted at Deadline 2 following a request by IAMP LLP. The Applicant does not anticipate any further changes to dDCO from its discussions with IAMP LLP.

5 Agenda item 4 – Discharge of requirements and conditions, appeals and disputes

- 5.1 TH stated that it was his understanding that the discharge of requirements by the SoS as set out in Part 2 of Schedule 2 to the dDCO originally derived from the fact that, prior to the Planning Act 2008 regime, road schemes were consented under the Highways Act 1980, where consent was granted by the SoS. The Applicant's position is that the decision to discharge requirements relating to the strategic road network falls to be taken by the SoS having consulted with relevant LPAs before doing so.
- 5.2 This is the approach that has been taken on highways schemes across the country. The Applicant would note this reflects arrangements between the Applicant and the Department for Transport (see **Appendix 2**), and would note the following schemes have followed this approach:
- 5.2.1 A14 Cambridge to Huntingdon Improvement Scheme
 - 5.2.2 A160-A180 Port of Immingham Improvement

- 5.2.3 A19/1184 Testo's Junction Alteration
 - 5.2.4 A556 Knutsford to Bowdon Scheme
 - 5.2.5 M20 Junction 10A
 - 5.2.6 M4 Junctions 3 to 12 Smart Motorway
- 5.3 TH noted significantly, on the Testo's scheme requirements are being discharged at DfT level, and as previously noted it is important that the DLJ and Testo's schemes are aligned in terms of processes. One scheme promoted by the Applicant (the A19 Coast Road scheme) has not followed the approach, but instead deviated from the heavily precedented approach.
- 5.4 The Applicant understands the local authorities are content with the SoS discharging requirements in this case.

6 Agenda item 5 – Specific issues and questions raised by the ExA

- 6.1 TH set out the Applicant's responses to those questions from the ExA which had not already been covered under previous agenda items. These responses can be found in the table at **Appendix 1** to this document. Where additional oral submissions of a general nature were made by the Applicant these are summarised below.
- 6.2 TH set out the Applicant's change of approach from "materially new or materially different" to "materially new or materially adverse worse" environmental effects. He explained that the ES regime requires the applicant to consider significant effects whether adverse or beneficial. The SoS made the amendment to the Testo's Order and the Applicant is aligning the dDCO with that decision. The Applicant would refer to **Appendix 3** which contains the Testo's Correction Order and Correction Notice, where this approach was confirmed by the SoS.

Agenda item 6 – Review of issues and actions arising

- 6.3 TH confirmed that written responses to the ExA's written questions would be submitted for Deadline 1 (27 August). Where any matters were still outstanding this would be identified in the commentary on the dDCO.
- 6.4 TH noted that a note on the proposed integrated NMU solution would be submitted for Deadline 2 (10 September).

Agenda item 7 – Next steps

- 6.5 No comments were made on this point.

Agenda item 8 – AOB

- 6.6 No comments were made on this point.

Agenda item 9 – Hearing Closure

- 6.7 The ExA closed the hearing at 16.39.

Open Floor Hearing

7 Agenda item 1 – Welcome, introductions and arrangements for the OFH

- 7.1 No questions of an introductory or preliminary nature were raised by the Applicant or by other attendees at the OFH.

8 Agenda item 2 – Representations by Mr Edward Wylie [RR-001]

- 8.1 Mr Wylie raised a number of questions relating to engagement with the community in West Bolden.
- 8.2 TH noted that the Applicant would be submitting responses to Relevant Representations for Deadline 1 (27 August 2019). He suggested that the Applicant respond to the questions raised at the OFH as part of a comprehensive response to Mr Wylie's relevant representation. Mr Wylie agreed with this suggestion.

9 Agenda item 3 – Closure of hearing

- 9.1 The ExA closed the OFH at 18:50.

Appendix 1 to Applicant's Written Summary of ISH 1: Responses to Table 1 contained in Rule 6 letter dated 12 July 2019

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
1.	General: Order Format and Tracking of Changes		The Applicant is asked to supply subsequent versions of the draft Development Consent Order (dDCO) in both .pdf and Word formats and in two versions, the first forming the latest consolidated draft and the second showing changes from the previous version in tracked changes, with comments outlining the reason for the change. The consolidated draft version in Word is to be supported by a report validating that version of the dDCO as being in the SI template and with updated revision numbers.	Noted – the Applicant is content to supply subsequent versions of the dDCO in the format requested but would request that a validation report is only provided in relation to the Applicant's final, preferred version of the dDCO. This has been agreed in other Highways England schemes currently in the examination phase (e.g. the M42 Junction 6 scheme).
2.	General: Plan or Document Changes and Revision Numbers		The Applicant is asked to ensure that all application or subsequent plans and documents referred to in the dDCO in whatever provision are identified by Drawing or Document and Revision Numbers in subsequent versions of the dDCO. Where revisions are prepared to plans and documents, these should be reflected in the latest version of the dDCO. The Applicant should undertake a final audit of plans and documents referred to in the dDCO prior to submitting its final preferred dDCO to the	Noted – the Applicant will refer to plans and documents by document and revision numbers as requested.

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
			Examination. Where it is necessary to refer to document numbers the Applicant should use the Examination Library system.	
3.	General: List of Plans or Documents to be Certified.		The Applicant is asked to confirm that Schedule 9 (Documents to be Certified) will be updated in each subsequent version of the dDCO provided during the Examination. This should accompany an update to the Applicant's Document Tracker recording the latest version of each plan and documents.	The Applicant confirms that Schedule 9 will be updated as requested.
4.	General: drafting approach to principal, associated and further development		Section 3 of the EM [APP-012] describes the Applicant's approach to drafting in respect of associated development. Paragraphs 3.4 and 3.5 indicate that the Applicant has chosen not to distinguish between the principal development of the NSIP and associated development within the meaning of s115 of PA2008. This is justified by the Applicant on the basis that " <i>there is no requirement for a development consent order to distinguish between these two categories</i> ". The EM also makes reference to the DCLG Guidance on associated development. ³ Schedule 1 of the dDCO describes the authorised development	(i) As is explained in paragraphs 3.4 and 3.5 of the Explanatory Memorandum [APP-012]; the approach taken in Schedule 1 of not separately defining elements of the Scheme as forming part of the NSIP or as associated development is deliberate and is in line with precedent for highways development consent orders, including the Testo's scheme. There is no requirement at law to separate the works comprising the NSIP from those constituting associated development, nor does DCLG 'Guidance on associated

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
			<p>set out in Works Nos. 1-25 with the description of 'further development' following.</p> <p>(i) If no distinction is made between the principal and associated development how can it be demonstrated that the DCLG Guidance has been adhered to?</p> <p>(ii) Furthermore, what is the rationale for the identification of further development?</p>	<p>development applications for major infrastructure projects' require it.</p> <p>Instead, paragraph 10 of that guidance recommends that applicants, "as far as practicable", should explain in their explanatory memorandum which parts of the development are associated development and why. Paragraphs 3.1 – 3.7 of the Explanatory Memorandum adopt this Guidance.</p> <p>All of the works within Schedule 1 form part of the nationally significant infrastructure project or are associated development within the meaning of section 115(2) Planning Act 2008 or are both. In England once development consent is granted there is no distinction made at law between associated development and development constituting the NSIP and so the distinction is academic.</p> <p>The Secretary of State will need to be satisfied that the various items of development for which development consent is sought fall into at least one of these categories (and the Applicant</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>is clear in its submission that they all do) but s/he does not need to establish which category. Were the applicant to categorise the elements of the development into principal vs ancillary works, that would not obviate the need for the Secretary of State to take his or her own view in respect of each specific work.</p> <p>(ii) As is explained in paragraph 3.7 of the Explanatory Memorandum [APP-012] the works of 'further development' listed (a) to (o) in Schedule 1 contain powers in order to ensure that the authorised development and the associated development are able to be constructed without undue impediment.</p> <p>The Applicant notes that it is standard drafting to have a list of ancillary development powers which may be exercised within the Order limits for the purposes of or in connection with the construction of any of the numbered works. It avoids the need to draft these powers repeatedly under each of the numbered works, and is clearly tied to the delivery of a</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>numbered work, which are themselves bound by the constraints by the suite of DCO documents.</p> <p>The use of such measures was explicitly approved in the A19/A1058 Coast Road (Junction Improvement) Order 2016 and extensive provisions were used in both the A14 Cambridge to Huntingdon Improvement Order 2016 and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 and – most recently and most relevant to this scheme – the A19/A184 Testo's Junction Alteration Order 2018. It is appropriate that both “sister schemes” are authorised on a consistent basis.</p> <p>(iii) The Applicant agreed with the ExA's comment at ISH1 that an annex setting out the Works and whether they were NSIP elements or associated development was not necessary.</p>
5.	General: drafting		A number of footnotes referenced in the dDCO are not identical to the respective footnotes in the Testo's DCO. The Applicant is asked to	This has been dealt with in the iteration of the dDCO submitted on 24 July 2019.

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
	approach to footnotes		<p>review the two documents for consistency and where a different footnote is appropriate, to explain why that is the case. Examples of differences other than those specifically identified below include, but are not limited to, Art 2(1), Art 16(6) footnotes (a) and (b), Art 19(1)(c), Art 26(7) footnote (a), Art 39(1) footnote (c) and Schedule 1 of the dDCO.</p> <p>Paragraph 7 of PINS Advice Note 15 provides guidance on the use of footnotes.</p>	
6.	Preamble	<i>"[The application was examined by a single appointed person...]"</i>	<p>The Applicant is asked to draft the Preamble to the next version of the dDCO to confirm that the application has been examined by a single appointed person appointed by the Secretary of State by removing the square brackets. The square brackets extending around the following two paragraphs should also be removed.</p>	<p>This has been dealt with in the iteration of the dDCO submitted on 24 July 2019.</p>
7.	Art 2(1)		<p>Article 2: Interpretation</p> <p>Footnotes (a), (d) and (e) include details about amendments to the respective Acts. With respect to (a) the Applicant is asked to confirm whether the list of amendments is complete. In respect of all three, the Applicant is asked to</p>	<p>This has been dealt with in the iteration of the dDCO submitted on 24 July 2019.</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
			explain why it is necessary to include such qualifications within the Order.	
8.	Art 2(1)	<p><i>“commence” means beginning to carry out any material operation (as defined in section 56(4) of the 1990 Act) forming part of the authorised development other than operations consisting of archaeological investigations, non-intrusive investigations for the purpose of assessing ground conditions, pre-construction ecology surveys, pre-construction ecological mitigation and works under mitigation licences, remedial work in respect of any contamination or other adverse ground conditions, erection of any temporary means of enclosure, and the temporary display of site notices or advertisements and “commencement” is to be construed accordingly;”</i></p>	<p>The effect of this definition is to permit a wide range of works before discharge of the pre-commencement requirements. The EM [APP-012] states at para 1.2.1 that the works excluded from the definition of commencement are either “<i>de minimus</i>” or “<i>have minimal potential</i>” for adverse effects. It is unclear how this is secured within the definition.</p> <p>Notwithstanding the Applicant’s comments about the definition, how are these exclusions from the statutory definition of commencement justified?</p> <p>Moreover, it is noted that such exclusions were not part of the Testo’s DCO.</p> <p>Clarification is also sought about the extent of works involved in the “<i>pre-construction</i>” surveys permitted by the definition and whether these should be defined themselves in the DCO.</p> <p>Is such flexibility necessary? If so, please provide reasons and consider whether it is</p>	<p>The effect of this definition of commence is to permit the carrying out of various preparatory operations immediately upon the Order coming into force, rather than awaiting the discharge of requirements.</p> <p>The Applicant considers that the approach is appropriate in the particular circumstances of the Scheme:</p> <ul style="list-style-type: none"> - Some of the works excluded may have to be carried out in order to comply with pre-commencement requirements, for example, to inform assessments and proposals that need to be submitted for approval. - It would also help Highways England to minimise the construction timetable, which has an associated public interest in terms of reducing the length of disruption. - It would align with Testo’s – in the Testo’s Order the same effect was achieved through the inclusion of a separate provision, Art 3(3), setting out that nothing in the Order prevents the carrying out of various operations immediately upon the

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
			<p>more appropriate that the works are controlled by a requirement relating to preliminary works.</p>	<p>Order coming into force. The change reflects the Applicant's current drafting practice (see also response to question 14).</p> <p>The proposed definition in the dDCO has also been accepted by the Secretary of State on a number of other schemes (see for example the M20 Junction 10a Development Consent Order 2017, and the Silvertown Tunnel Order 2018).</p> <p>Advice Note 15 explicitly states that a definition of commence which permits certain advance works may be justified in the particular circumstances of a proposed NSIP.</p> <p>The Applicant's understanding is that the Secretary of State has tended to determine this on the basis of whether the advance works were likely to have significant environmental effects</p> <p>The Applicant has given careful consideration to the works which are excluded from the proposed definition of "commence", and it is not considered that any of these activities will have significant environmental effects:</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<ul style="list-style-type: none"> - Pre-construction surveys for which it is anticipated will be required for geology and ecology are listed in the ES Appendix 1.3 'REAC PART 2 – ENVIRONMENTAL ACTION PLAN (Tables A1.3-2, A1.3-3 and A1.3-4). - A number of anticipated ecology surveys are non-intrusive visual surveys which must be completed at certain times of year, typically early Spring and late Summer. Some surveys are required to inform the detailed design process such as soil testing. - The environmental statement has assessed the carrying out of these works in accordance with those measures. There are therefore the necessary controls to ensure that the effects of the works are appropriate minimised. - The anticipated pre-construction surveys for geology and ecology are part of the process of <i>reducing</i> environmental effects and would not themselves have significant environmental effects. - Similarly, any remedial action undertaken in relation to contaminated land would be

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>for the purpose of reducing environmental effects.</p> <p>The Applicant does not consider that a separate definition of “pre-construction” surveys is necessary; the proposed definition of “commence” already contains a sufficiently clear list of potential operations which may be undertaken pre-construction.</p> <p>This should also be put in the context of HE’s other powers to undertake surveys:</p> <ul style="list-style-type: none"> - Article 19 of the DCO is a general power to survey land, and does not require DCO applicants to specify what proposed surveys are in order to exercise the power. - Likewise section 172 Housing and Planning Act 2016 and section 289 Highways Act 1980 – standalone powers which are exercisable without EIA – do not prescribe in detail what may fall are already available to the applicant. - It would not be appropriate to create a more onerous regime in the DCO than is already available under these regimes. <p>Finally, the Applicant does not consider that a requirement relating to preliminary works would be appropriate. This would also defeat</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				the purpose of this provision, namely to enable timely commencement of the scheme whilst requirements are being discharged.
9.	Art 2(1)	<i>“maintain...includes to inspect, repair, adjust, alter, remove or reconstruct...”</i>	The Applicant is asked to confirm whether the impacts of the various activities listed have all been assessed in the ES?	<p>The definition of "maintain" contained in article 2(1) matches that which has been approved by the Secretary of State in the making of previous highway development consent orders, including (most pertinently) the Testo's scheme.</p> <p>It is therefore considered to be appropriate and acceptable to adopt the same definition for this Scheme.</p> <p>Works within the DCO definition of 'maintain' have been considered and assessed as appropriate in the ES in accordance with section 2.16 of the Environmental Statement (DCO application reference TR010024_APP_6.1), and copied below:</p> <p><i>“2.16 Maintenance proposals</i></p> <p><i>2.16.1 Operational maintenance of the A19 would experience relatively few changes as compared to the current situation.</i></p> <p><i>Maintenance of the trunk road network is the responsibility of Highways England, whilst</i></p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p><i>maintenance of the local road network is the responsibility of the local authorities. These arrangements would apply to the Scheme, meaning that the A19 mainline, structures, link roads and slip roads would be maintained by Highways England. The circulatory carriageway would be the responsibility of South Tyneside Council. The local authorities would have responsibility for Downhill Lane (East) and (West), Washington Road and the A1290.</i></p> <p><i>2.16.2 Existing maintenance activities include inspection and repair of barriers and signage, drain inspection and clearance, road repairs and road verge / vegetation maintenance (amongst other activities). For Highways England and parties acting on their behalf, future maintenance activities would include these same tasks, plus the addition of inspection and maintenance of the new bridge and drainage attenuation features. Highways England and parties acting on their behalf would be responsible for maintaining vegetation clearance on NMU routes within their tenure and local authorities would be responsible for maintenance outside of Highways England's tenure.</i></p>

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				<p>2.16.3 Decommissioning has not been considered during the EIA process. This is due to the fact that road schemes have very long operational life times and most likely to be subject to a consent application, with supporting environmental assessment, as part of any future changes.”</p> <p>The various elements of the definition ("inspect, repair, adjust, alter, remove or reconstruct") would bear their common sense meanings and would allow the Applicant to undertake all types of works reasonably associated with maintenance.</p> <p>Wide maintenance powers are necessary to ensure that Highways England can swiftly and efficiently address parts of the networks that require maintenance. It should be added that the infrastructure has a long design life, so we would expect maintenance to be relatively limited.</p> <p>The Applicant also notes that powers of maintenance under Part IV of the Highways Act 1980 ('Maintenance of Highways') are wide, and exist as permitted development (i.e. requiring no EIA). See s329 – “<i>maintenance</i>” includes repair, and “<i>maintain</i>” and</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p><i>“maintainable” are to be construed accordingly.</i></p> <p>The Applicant considers that its definition aligns with those wide maintenance powers in the Highways Act 1980, albeit providing more detail and clarity as to what activities this maintenance might comprise.</p> <p>In the Applicant’s submission, it would not be appropriate to narrow the scope of maintenance powers, simply be reason of a section of the network being authorised under DCO.</p>
10.	Art 2(1)	<p><i>“the Testo’s plans” means the revised Testo’s plans, drawings and sections submitted with the application for this Order and certified by the Secretary of State for the purposes of this Order and for the purposes of the A19/A184 Testo’s Junction Alteration Development Consent Order 2018;</i></p>	<p>The Applicant is asked to clarify whether this is intended to be the documents referenced TR010024/APP/7.5 [APP-054]. If this is correct the Applicant should include the document reference in Schedule 9 – Documents to be Certified.</p>	<p>Schedule 9 relates to certified documents for the purposes of the Downhill Lane Junction scheme, and refers to documents certified pursuant to Article 41(1) only. The Testo’s Junction scheme plans are proposed to be certified under Article 41(4) of the dDCO.</p> <p>Schedule 8 to the dDCO makes an amendment to Article 40 of the Testo’s Junction Order to make it clear that the revised Testo’s plans certified under Article 41(4) of the dDCO are certified documents for the purposes of the Testo’s Junction Order.</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				The Applicant considers it more appropriate for the updated Testo's Junction plans to be certified documents for the purpose of that scheme, rather than the Downhill Lane Junction scheme.
11.	Art 2(2)		The Testo's DCO makes reference to Neighbourhood Planning Act 2017. Should it be similarly referenced here	Article 36(2) of the dDCO replicates the effect of Article 2(2) of the Testo's Order. The Applicant considered that as there was more than one provision being modified / amended, these should be dealt with in the same Article.
12.	Art 2(1)		Is it necessary/appropriate to define "requirement"?	The applicant does not consider it necessary/appropriate to define "requirement"; the word conveys its ordinary and natural meaning. This aligns with the approach taken on the Testo's scheme and in many other consented DCOs.
13.	Art 3(2)	<i>"(2) Any enactment applying to land within or adjacent to the Order limits has effect subject to the provisions of this Order;"</i>	<p>Article 3: Development consent etc. granted by the Order</p> <p>Notwithstanding the Applicant's statement in the EM [APP-012] that there is precedent for Article 3(2) the Applicant is asked to clarify:</p> <ul style="list-style-type: none"> why this extensive provision is necessary and justified for the 	<p>Section 120 of the 2008 Act provides that:</p> <p><i>"...(5) An order granting development consent may –</i></p> <p><i>(a) Apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order;</i></p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
			<ul style="list-style-type: none"> • scheme; • what enactments might apply to land within the Order limits • that may affect the authorised development; • why it should apply to land outside the Order limits; and • how this article will ensure “consistency with legislation more generally”. 	<p><i>(b) make such amendments, repeals or revocations of statutory provisions of local application as appear to the [Secretary of State] to be necessary or expedient in consequence of a provision of the order or in connection with the order;</i></p> <p><i>(c) include any provision that appears to the [Secretary of State] to be necessary or expedient for giving full effect to any other provision of the order...”</i></p> <p>Article 3(2) in the dDCO has been included and is necessary in order to ensure that there are no acts of a local or other nature that would hinder the construction and operation of an NSIP.</p> <p>The Applicant carried out a proportionate search of local legislation within a reasonably close proximity to land within the Order Limits, but no search can be completely exhaustive and there remains the possibility that a local act or provision may have been overlooked.</p> <p>Accordingly, there is a chance that there may be some statutory provisions which would fall within (a) or (b) above.</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>As such the Applicant has therefore taken a cautious approach in including this Article which, as noted in the Explanatory Memorandum (APP-12/ Volume 3.2), has been accepted on other consented schemes such as the A14 Cambridge to Huntingdon Improvement Order 2016 and the Testo's Junction DCO 2018.</p> <p>Including this Article ensures that the construction and operation of the Scheme are not jeopardised by any incompatible statutory provisions which might exist i.e. a provision which would be an absolute restriction that could not be dealt with unless by statutory amendment. The Article would prevent delay in this situation by ensuring that the Scheme could be constructed without impediment.</p> <p>The Applicant does not consider that this provision should only apply to land within the Order limits. The Applicant takes the view that it is necessary to include land adjacent to the Order limits as there may be statutory provisions that are expressed to relate to land which falls just outside the Order limits, but may also have an effect on land within the Order limits.</p>

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14.	Art 3(3)		<p>Art 3(3) of the Testo's Order sets out that nothing in the Order prevents the carrying out of various operations immediately upon the Order coming into force.</p> <p>Why has it been decided not to include such a provision in this dDCO?</p>	<p>The dDCO contains a broader definition of "commence" than the Testo's Order (see response to question 8 above). The effect of this definition of commence is to permit the carrying out of various operations immediately upon the Order coming into force.</p> <p>It was therefore not necessary to include a provision equivalent to article 3(3) of the Testo's Order in the dDCO. The change reflects the Applicant's current drafting practice.</p> <p>Testo's Junction DCO articles 3(1) and 3(2), in terms of their effect, mirror what is in dDCO. Article 3(3) of the Testo's Order permits certain activities to be carried out immediately upon the Order coming into force, i.e. before requirements are discharged.</p> <p>The dDCO, however, has adopted in common with other Highways England DCOs a definition of commencement which has the same effect. The dDCO therefore achieves the same ends as the Testo's Junction DCO by a different drafting measure. The Applicant's understanding is that the commencement definition is Highways England's preference in terms of its model Order.</p>

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15.	Art 6	<p><i>In carrying out the authorised development the undertaker may—</i></p> <p><i>(a) deviate laterally from the lines or situations of the authorised development shown on the works plans to the extent of the limits of deviation shown on those plans; and</i></p> <p><i>(b) deviate vertically from the levels of the authorised development shown on the engineering drawings and sections to a maximum of 0.50 metres upwards or 0.50 metres downwards,</i></p> <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</i></p>	<p>Article 6 Limits of Deviation</p> <p>The Applicant is asked to explain the need for a vertical deviation of 0.5m upwards and downwards. Justification for this level of flexibility is required for this scheme notwithstanding that the approach has been adopted in other DCOs including the Testo's DCO. The applicant refers to precedent in the Testo's DCO but the need for this level of flexibility must be justified for this scheme in consideration of the circumstances of this case.</p> <p>The Applicant is asked to explain why it is necessary and appropriate to permit amendment to the maximum limits of vertical deviation by the SoS at a later date without applying to amend the Order under the provisions in schedule 6 of PA2008.</p> <p>Furthermore, what process is in place for the SoS to determine whether exceeding the vertical limits would not give rise to any materially new or materially worse adverse environmental effects?</p> <p>The Applicant is also asked to comment on the final part of Art 6 which is in effect a tailpiece</p>	<p>It is standard practice to include Limits of Deviation within schemes to allow for unknown or unforeseeable constraints which may arise during construction requiring a proportionate and reasonable adjustment to the alignment of the work in question. The Limits of Deviation are necessary and provide a required proportionate degree of flexibility in the delivery of an NSIP.</p> <p>Flexibility is needed because we are seeking consent for a preliminary design not a detailed design. Whilst the applicant has confidence in the vertical alignment of the preliminary design as shown on the Engineering Plans and Sections, flexibility is required during the detail design process to allow the applicant to achieve the most effective and efficient design.</p> <p>A specific example would be the flexibility required when carrying out the detailed design of the NMU arrangement.</p> <p>The proposed limits of deviation are within the scope of the assessments carried out for the ES (see para 2.18.2, reproduced below). This took into account engineering flexibility in</p>

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		<p><i>excess of these limits would not give rise to any materially new or materially worse adverse environmental effects from those reported in the environmental statement.”</i></p>	<p>provision. PINS Advice Note 15 para 17.3 – 17.6 is relevant in this regard.</p>	<p>assessing a reasonable worst case scenario, and found no significant effects:</p> <p><i>Where there are specific areas of uncertainty, or potential alternative designs still under consideration, these are identified within the Scheme description and the limitations statements in Section 5.4 and the specialist assessment chapters of this ES.</i></p> <p><i>The detailed design will continue up until construction, but any changes will not be significant. A limit of deviation has been defined in the DCO (DCO application reference TR010024_APP_3.1) and incorporated into the design to allow for adjustments during the detailed design stage without causing significant changes to the effects presented in this ES.</i></p> <p><i>In considering this vertical limit of deviation, it should be noted that there are restrictions on where it can practically be applicable (principally in the vicinity of the new bridge over the A19 carriageway) as in other areas the Scheme has to tie in to existing highway levels.</i></p> <p><i>All members of the EIA team were briefed on the limits of deviation and the design</i></p>

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				<p><i>uncertainties before beginning their assessment work, and these factors were taken into account throughout the assessment to ensure that it was based on a 'reasonable worst-case' scenario. This is so that the permanent and temporary land-take boundaries would not be exceeded and to provide confidence that the EIA covers all eventualities.</i></p> <p>Article 6 does not, and does not seek to, circumvent the procedures for material and non-material changes to development consent orders. Having regard to AN 15, it countenances against tail pieces which would <i>"allow the discharging authority to approve details which are outside the parameters authorised within any granted DCO"</i>. This is not the case here because the flexibility is inside the authorised parameters set by the ES.</p> <p>The Applicant would further note that the Secretary of State would decide this matter, so it does not fall foul of this part of AN 15 <i>"Furthermore, it is not acceptable to circumvent the prescribed process in Schedule 6 by seeking to provide another route to approving such changes or variations,</i></p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p><i>by a person other than the Secretary of State who made the DCO.”</i></p> <p>Article 6 is heavily precedent and there have been no issues with analogous provisions included being granted development consent on other Highways England schemes.</p> <p>The Applicant would include with any application for certification under article 6 an assessment of the proposed change that would assess whether or not the Applicant's proposal would give rise to any materially new or materially worse environmental effects in comparison with those reported in the environmental statement.</p> <p>The Department for Transport's National Transport Casework Team is responsible for reviewing the documentation provided by the Applicant in relation to the requirement and approving discharge of the requirement on behalf of the SoS.</p>
16.	Art 7(2)	<i>“Paragraph (1) does not apply to the works for which the consent is granted by this Order for the</i>	<p>Article 7: Benefit of Order</p> <p>The EM [APP-012] states that the purpose of paragraph (2) is to <i>“clarify the exceptions</i></p>	As mentioned in paragraph 4.3.4 of the Statement of Reasons (TR10024/APP/4.1 / APP-015), a preliminary assessment undertaken by the Applicant indicates

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
		<p><i>express benefit of owners and occupiers of land, statutory undertakers and other persons affected by the authorised development.”</i></p>	<p>where the order will “self-evidently” benefit others”.</p> <p>Nevertheless, the Applicant is asked to identify the works to which Art 7(1) will not apply.</p> <p>Might the result of this be to grant CA or TP powers to unspecified persons who may not be of sufficient financial standing to pay the compensation costs? Consequently, should CA and TP powers be excluded from article 7(2)?</p>	<p>diversionary works may be required for Northern Powergrid and BT Group assets.</p> <p>Therefore the current understanding is that works proposed as part of the Scheme which would fall under article 7(2) may be:</p> <ul style="list-style-type: none"> • diversions of apparatus for the benefit of BT associated with Work No. 21 (Plots 1/4c and Plot 1/8); and • diversions of or providing a physical layer of protection for apparatus for the benefit of Northern Powergrid associated with Work No. 20 and 21 (Plot 1/4a). <p>The Applicant will continue engaging with BT and Northern Powergrid to minimise the need for any diversions.</p> <p>In addition, article 7(2) extends to private means of access which are proposed to benefit the landowners, rather than Highways England (see Schedule 1 to the dDCO, Work Nos. 1, 11, 12, 22 In Schedule 1 and Part 2 of Schedule 4 to the dDCO (TR10024/APP/3.1(3)) .</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>Article 7(2) would not impliedly transfer the benefit of CA or TP powers, given that any transfer of powers would have to happen under article 8 of the draft DCO. It is therefore not necessary to exclude CA and TP powers from article 7(2). To expand:</p> <ul style="list-style-type: none"> - Under s.156 Planning Act 2008 an order granting development consent in respect of any land has effect for the benefit of the land and all persons for the time being interested in the land, unless contrary provision is made in the order. - Art. 7 of the dDCO makes such contrary provision, overriding section 156 (as permitted by section 156(2)) to restrict the benefit of the order to Highways England rather than anyone with an interest in the land. - The purpose of article 7(2) is to clarify that the limitation of benefit solely to the Highways England in article 7(1) does not apply in relation to works which will self-evidently benefit others. Absent this provision, there would be a contradiction as strictly speaking only Highways England could benefit from these works.

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>- It extends the benefit of the works to others, but not the functions and powers themselves (which is clearly dealt with by art 8)</p> <p>The drafting of article 7 is based on established precedent in other made DCOs, and the same wording was accepted and approved by the Secretary of State in the A14 Cambridge to Huntingdon Improvement Order 2016 (see article 8(2)), the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 (see article 7(2)) and – most pertinently – in A19/A184 Testo's Junction Improvement Order 2018 (see article 7(2)).</p>
17.	Art 9(3)	<p><i>“The following provisions of the 1991 Act do not apply in relation to any works executed under the powers of this Order - ...</i></p> <p><i>section 73(e) (power to require undertaker to resurface street);</i></p> <p><i>Schedule 31(i) restriction on works following substantial street works);...”</i></p>	<p>Article 9: Application of the 1991 Act</p> <p>In the case of footnote (e), text is repeated, whilst the reference in footnote (i) does not match that of the Testo's Order. The Applicant is asked to clarify/explain.</p>	<p>This has been dealt with in the iteration of the dDCO submitted on 24 July 2019.</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
18.	Art 9(7)	<p><i>"Nothing in article 10 (construction and maintenance of new, altered or diverted streets)- ...</i></p> <p><i>(c) the undertaker is not by reason of any duty under that article to maintain a street, to be taken to be the street authority in relation to that street for the purposes of Part 3 of that Act: or...</i></p> <p><i>(d)</i></p>	The Applicant is asked to look at the drafting of Art 9(7)(b) following from the wording of the introductory clause.	This will be amended in the next iteration of the dDCO.
19.	Art 11(1)	<i>"On the date on which a street described in Schedule 3 is completed and open for traffic -"</i>	<p>Article 11: Classification of roads, etc.</p> <p>The Applicant is asked to explain why the qualification relates to <i>'a street described in Schedule 3'</i> instead of <i>'the authorised development'</i>?</p>	<p>The Applicant has not adopted the approach of referring to the completion of <i>"the authorised development"</i> in Article 11(1) on the basis that, should there be a modification of the preliminary scheme design in accordance with Requirement 3(1) or Requirement 3(3), it avoids any ambiguity concerning whether a public right of way arises notwithstanding the particular street has not been constructed. Hence this is essentially a drafting improvement that the Applicant has identified.</p> <p>By way of example, Schedule 3 currently contains a reference to the Scheme NMU provision crossing the A19. In order to make it clear that a public right of way will not arise in respect of the Scheme NMU provision</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>crossing the A19 in the event the authorised development is completed without this particular street (e.g. because Requirement 3(3) is triggered), the Applicant has adopted the wording which makes reference to the relevant street described in Schedule 3, rather than the authorised development.</p> <p>The Applicant notes this approach is precedented and follows the M20 Junction 10a Order (see article 13 of that Order).</p>
20.	Art 11(1)	<p><i>“(b) a road described in columns (1) and (2) of Part 2 (classified roads) of Schedule 3...</i></p> <p><i>(c) a non-motorised user route described in Part 3 (other public rights of way) of Schedule 3...-”</i></p>	<p>Part 2 of Schedule 3 is headed ‘<i>other classified roads</i>’ whilst Part 3 is headed ‘<i>non-motorised user routes</i>’. The Applicant is therefore asked whether the wording of Art 11(1)(b) and (c) (or alternatively the respective Schedule Part) require amendment?</p>	<p>Agreed - this will be amended in the next iteration of the dDCO.</p>
21.	Art 11(2)	<p><i>“From such day as the undertaker may determine no person is to drive any motor vehicle at a speed exceeding the limit of 40 miles per hour on the roads described in columns (1) and (2) of Part 4 of Schedule 3 (classification of roads, etc.).”</i></p>	<p>The Applicant is asked to explain the reason for the imposition of a speed limit of 40mph on the roads identified in Part 4 of Schedule 3.</p>	<p>The Applicant would note that 40mph is the existing speed limit of the A1290, Washington Road (East) and Downhill Lane (East).</p> <p>The Scheme involves the construction of a new circulatory carriage (including a new overbridge to the south), as well new slip roads, improvements to the existing A1290 and construction of realign sections of road</p>

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				<p>(see Schedule 1 of the dDCO). Article 11(2) makes clear that in respect of these new or altered parts of the road network, the speed limit will also be 40 mph.</p> <p>It is not considered appropriate, or safe, to increase the speed limit on these roads as the highway geometry is not designed to tolerate a higher speed limit. The existing junction is also 40mph and so to maintain the status quo, the horizontal and vertical geometry of circulatory carriageway has been similarly designed to be part of the local road network. Continuity of speed limit through the junction is considered the safest and most desirable option.</p> <p>These speed limits have been discussed with the local highway authority, South Tyneside Council.</p>
22.	Art 11(3)	<i>"The application of paragraph (1) may be varied or revoked by any instrument made under any enactment which provides for the variation or revocation of such matters."</i>	The Applicant is asked to provide further justification for Art 11(3) which provides that the matters covered in the previous subsections can be varied or revoked in the future using existing enactments for such matters, without the need to apply under PA2008 for an amendment to the Order.	<p>Article 11(3) operates to place all of the highways altered under the DCO in the same position so far as reclassification is concerned as if they had been constructed using powers under the Highways Act 1980.</p> <p>This means that traffic on the whole of the STC/SCC and the Applicant's respective networks can be regulated in the same way (i.e., by way of Traffic Regulations Orders</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>made under the Road Traffic Regulation Act 1984), irrespective of how individual highways were constructed.</p> <p>In the Applicant's view this is more appropriate than requiring STC/SCC or the Applicant to apply to vary the DCO under section 153 of the Planning Act 2008, particularly where no changes are proposed to the works themselves, only changes to traffic regulation.</p> <p>The intention of the Planning Act 2008 is not to provide an entirely separate statutory regime for the ongoing traffic regulation of the strategic or local highway network.</p> <p>This provision is heavily precedent, see for example article 11(2) of the Testo's Order and article 13(9) of the M20 Junction 10a Order.</p>

23.	Art 12(2)	<p><i>“Without limitation on the scope of paragraph (1), the undertaker may use any street temporarily stopped up or restricted under the powers conferred by this article and which is within the Order limits as a temporary working site.”</i></p>	<p>Article 12: Temporary stopping up and restriction of use of streets.</p> <p>Should the term ‘<i>working site</i>’ be defined in Article 2? How is ‘<i>working site</i>’ to be interpreted in terms of the following articles of the dDCO and Testo’s Order: Art. 29 (temporary use of land for carrying out the authorised development); Art. 30 (temporary use of land for construction compounds); and Art 31 (temporary use of land for maintaining the authorised development)?</p>	<p>The Applicant’s view is that “working site” should be given its ordinary and plain meaning, which would include using the sites for the purposes of working areas associated with the numbered works set out in Schedule 1.</p> <p>Use of the term “working sites” is heavily precedented. To try and define it could risk excluding something unforeseen to the detriment of expedient scheme delivery.</p> <p>Article 29(1)(c) and (d) would enable the Applicant to construct temporary works and construct works on “that land” (a reference to the land in Schedule 6 or other land within the Order limits where no notice of entry or declaration under the 1981 Act has been made as per Article 29(1)(a)(i)-(ii)).</p> <p>Article 31(1)(b) also makes provision for the ability to carry out temporary works. The temporary use of land in the Order limits for the purposes of establishing “working sites” is therefore captured by those articles in the same manner other works are.</p> <p>Article 30 regulates the use of the particular plots in respect of the main construction compound and the Testo’s construction compound only. The provision does not contain the specific power to carry out specific works.</p>
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Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>Lettered work (o) includes “working sites” and the Applicant would refer the ExA to its response to Question No. 38 below for a justification of the lettered works.</p>
24.	Art 12(6)	<p><i>“If a street authority which receives an application for consent under paragraph (4) fails to notify the undertaker of its decision before the end of the period of 28 days beginning with the date on which the application was made, it is deemed to have granted consent.”</i></p>	<p>Is this 28-day deemed approval period which also appears in Articles 16 (11), 17(9), 19(6) appropriate?</p> <p>These articles all contain provisions deeming consent to be granted if the consenting body does not respond within 28 days. Has the Applicant checked that the consenting bodies in each case are content with this? Do IPs wish to comment?</p>	<p>The Applicant’s view is that the deemed approval periods in Article 16, 17 and 19 are appropriate.</p> <p>The Road Investment Strategy (RIS) sets out a programme of road works across the country. The Applicant’s resources need to be used in such a way as to ensure best value for money and therefore it is essential that the proposed works will be carried out expeditiously; any delay to the Scheme would have a detrimental effect on the Applicant’s ability to do this.</p> <p>The Applicant considers that the provisions are necessary, and the inclusion of a longstop deemed consent provision appropriate, on the basis that the Scheme is a Nationally Significant Infrastructure Project and needs to be delivered without any undue delay.</p> <p>The obligation on the determining authority is to make a decision within the specified date and the drafting is intended to prevent a</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>determining authority from causing such a delay.</p> <p>The Applicant can confirm that the application documents, including the dDCO have been provided in a number of rounds of consultation and engagement with bodies with an interest in the Scheme with such engagement continuing. The Applicant understands that STC and SCC are content with these provisions.</p> <p>The Applicant is implementing the Testo's DCO in close proximity to the Scheme and there has been no need to utilise the provisions to date which should give the ExA comfort that they are only intended as a necessary last resort in order to ensure compliance with the Road Investment Strategy programmes.</p> <p>The deemed consent provisions adopted by the Applicant in the dDCO have been adopted from precedents contained and endorsed by the SoS in many other DCO schemes (both highway and non-highway) and the Applicant is satisfied that the inclusion of such provisions is justified and proportionate for the reasons given above.</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>If the determining authority is not able to reach a decision in that time it is open to that body to notify the Applicant that consent is not given, thereby allowing the Applicant to instigate the arbitration provisions set out in article 43.</p> <p>The Applicant refers the ExA to its general comments set out earlier concerning the need for consistency across the Scheme and the Testo's scheme.</p>
25.	Art 14	<p><i>“The undertaker may, for the purposes of the authorised development, form and layout means of access, or improve existing means of access, at such locations within the Order limits as the undertaker reasonably requires for the purposes of the authorised development.”</i></p>	<p>Article 14: Access to works</p> <p>[i] The Applicant is asked to provide further justification for this general power which permits the creation of accesses.</p> <p>[ii] Paragraph 5.52 of the EM [APP-012] refers to the need for Highways England to create new <u>temporary</u> accesses, but the power in Art 14 is not limited to temporary access and could include permanent accesses.</p> <p>Whilst noting the title of Art 14, should the article be specifically limited to temporary access?</p>	<p>[i] The Scheme is a Nationally Significant Infrastructure Project and the Applicant must have the ability to form accesses, or improve existing accesses, to standards and to timescales sufficient for its purposes in connection with the Scheme.</p> <p>The purpose of the Article is to allow the Applicant flexibility to undertake such works for the purposes of carrying out the Scheme.</p> <p>Whilst every effort has been made to identify all accesses and all works required to those accesses is possible that unknown or informal accesses exist or the need to improve an access or lay out a further access will only come to light as the Scheme is carried out.</p> <p>In addition, the power is required in relation to the Scheme particularly because overlapping</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>development with IAMP may require the laying out of new access or the improvement of a new access created as part of that development.</p> <p>[[ii] The Applicant does not consider it necessary to limit the article to temporary accesses. The general power is intended to put the Scheme on an equivalent footing with schemes authorised under the Highways Act 1980 which would benefit from the wide power contained in section 129 of that Act.</p> <p>In addition, the power can also be used in relation to existing means of access and so it would not be appropriate to limit the power in this manner.</p> <p>The Explanatory Memorandum (TR10024/APP/3.2(3)) is referring only to access required in respect of works and will be updated in the next iteration submitted for clarity.</p>
26.	Art 15(2)(c)(iii)	<i>"prevented from proceeding by circumstances outside the persons control."</i>	<p>Article 15: Clearways</p> <p>Should the reference be to 'person's control'?</p>	Agreed - this will be amended in the next iteration of the dDCO.
27.	Art 17(2)		<p>Article 17: Discharge of water</p> <p>Should there be a footnote relating to section 106 as per the Testo's Order?</p>	This has been dealt with in the iteration of the dDCO submitted on 24 July 2019.

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
		<i>"...dispute under section 106 (right to communicate with public sewers) of the Water Industry Act 1991."</i>		
28.	Art 17(8)		Should Art 17(8) reflect the fact that the Homes and Communities Agency is now known as Homes England?	This has been dealt with in the iteration of the dDCO submitted on 24 July 2019.
29.	Article 23(1)	<i>"(1) Subject to paragraph (2), the undertaker may acquire such rights over the Order land, or impose restrictive covenants affecting the Order land, as may be required for any purpose for which that land may be acquired under article 20 (compulsory acquisition of land) by creating them as well as acquiring rights already in existence. "</i>	<p>Article 23: Compulsory acquisition of rights and restrictive covenants</p> <p>Art 23 grants wide powers for the creation of new rights and restrictive covenants over all of the Order land. It is not limited to the creation of specific rights and restrictions and there does not appear to be any description of new rights/restrictive covenants sought in the BoR [APP-017]. Furthermore, the land plans show the land to either be for land to be acquired to use permanently or land to be acquired temporarily and no not include any land in which new rights/restrictive covenants are to be created.</p> <p>The Applicant is asked to include a schedule detailing each of the new rights or restrictions it seeks or to ensure that the description of each new right and restriction is clearly set out in the BoR. The Applicant is also asked to identify the plots on the Land Plans where new</p>	<p>The Applicant is considering further its position as regards restrictive covenants and response in writing; the Applicant acknowledges it will either have to remove the power or provide further details of restrictive covenants to be imposed.</p> <p>In relation to the acquisition of rights, a schedule containing the plots where rights are proposed cannot be produced at this stage as it is not currently aware of any rights that will be required. The power is required notwithstanding this, for the two reasons explained below.</p> <p>Firstly, the power is justified because whilst the relevant land is currently proposed to be acquired, at the point of scheme implementation there may be scope to reduce the land interference, with associated public benefits.</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
			<p>rights and restrictive covenants are to be created.</p> <p>In responding, the Applicant should have regard to paragraph 24 and good practice point 9 in PINS Advice Note 15.</p>	<ul style="list-style-type: none"> - In respect of rights, the Applicant notes paragraph 5.3.4 of the Statement of Reasons which states as follows: <ul style="list-style-type: none"> <i>....the limits of the Land have been drawn as tightly as possible so as to avoid unnecessary land take. In the event that less land proves to be required in a particular area following the detailed design stage, the Applicant would only seek to acquire that part of the Land that is required and, in all events, will seek to minimise effects on landowners.</i> - The Applicant considers that the general power is justified as the flexibility to achieve its aim through the exercise of a lesser power to acquire rights, rather than acquiring the whole of the land outright, would allow the Applicant to take a proportionate approach should the opportunity arise. - Without the inclusion of this article, the Applicant would have no alternative but to acquire the land outright if an alternative agreement could not be reached by private agreement.

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<ul style="list-style-type: none"> - Accordingly, as regards the permanent land acquisition, the proposed power would permit a reduction in the interference with land (already justified in the Statement of Reasons). - Advice Note 15 is intended to capture broad restrictive covenants powers where no outright of acquisition of land is taking place. The Applicant does not, therefore, consider that paragraph 24 should impede the general power in Article 23(1) in respect of <i>rights</i>. <p>Secondly, the power is required in circumstances where the power to acquire rights may arise before the acquisition of the relevant land.</p> <ul style="list-style-type: none"> - For example, if the Applicant has taken temporary possession under Article 29, there may be a need to acquire a right prior to the acquisition of the land, e.g. for a statutory undertaker. - This is considered proportionate, and accords with the approach and drafting of the A19 Testo's Order, and more recently made orders, namely the Silvertown Tunnel Order and Port of Tilbury

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>Expansion Order – the Applicant would note that the power to impose rights applies to the permanent land take on those schemes.</p> <p>In respect of rights over land proposed to be temporarily possessed, please see Question 32 below.</p>
30.	Art 25 (2) and (3)	<i>“...substitute “section 118() (legal challenges...”</i>	<p>Article 25: Modification of Part 1 of the 1965 Act</p> <p>The Applicant is asked to check the references to footnotes in respect of Art 25(2) and (3) and to explain the empty bracket after section 118.</p>	<p>This has been dealt with in the iteration of the dDCO submitted on 24 July 2019: the footnotes have been amended in accordance with the made A19/A184 Testo’s Junction Alteration Development Consent Order 2018, and the empty bracket after section 118 in Article 25(2) has been removed.</p>
31.	Art 26(7)	<i>“...for subsection (1)(b)() for “section 15...”</i>	<p>Article 26: Application of the 1981 Act</p> <p>The Applicant is asked to explain the empty bracket after the reference to subsection (1)(b).</p>	<p>This has been dealt with in the iteration of the dDCO submitted on 24 July 2019.</p>
32.	Art 29(9)	<i>“(9) The undertaker may not compulsorily acquire under this Order the land referred to in paragraph (1)(a)(i) except that the undertaker is not to be precluded from—</i>	<p>Article 29: Temporary use of land for carrying out the authorised development</p> <p>[i] Art 29(9) limits the undertaker’s CA powers in the land listed in schedule 6 to the acquisition of any part of the subsoil under Art 27 and the acquisition of new rights under Art</p>	<p>[i] The Applicant’s intention is to temporarily possess the plots in question for the purposes set out in Schedule 7 to the dDCO (TR010024/APP/3.1(3)).</p> <p>Although to the best of the Applicant’s knowledge it will not be necessary to create</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
		<p><i>(a) acquiring new rights over any part of that land under article 23 (compulsory acquisition of rights and restrictive covenants); or</i></p> <p><i>(b) acquiring any part of the subsoil (or rights in the subsoil of or airspace over) that land under article 27 (acquisition of subsoil or airspace only)."</i></p>	<p>23. Under Art 23 the creation of new rights is permitted over all of the Order land. The effect of this is that all of the land in schedule 6 will be subject to CA but the SoR [APP-015] implies that some land will only be subject to temporary possession (see Table 2 of Annex A). If some land will only be used temporarily the Applicant must ensure that this is secured in the DCO by excluding the land in schedule 6 from the scope of CA or the Applicant should provide justification for CA of the land in schedule 6 with reference to the relevant legal tests even though it is described as being for "temporary possession".</p> <p>[ii] The Applicant is also asked to provide evidence that all persons with interests in the land listed in schedule 6 were consulted correctly in respect of the powers sought over that land.</p>	<p>permanent rights over these plots, Article 33(8) would nonetheless provide important flexibility to the Applicant to do so should the creation of a permanent right prove to be necessary at a future stage (e.g. an unknown pipeline, which requires diversion and the creation of a new right).</p> <p>As the creation of a permanent right would increase the Applicant's liability to pay compensation, the Applicant would only seek to use this power if it was considered to be absolutely necessary. If it did not seek compulsory powers, it could be in a ransom situation in terms of seeking a private agreement with the landowner for a new right, which would not be in the public interest.</p> <p>The Applicant emphasises that it is not seeking a new or unusual power in Article 29(9), which reflects both the A19 Testo's Order and other precedented DCOs.</p> <p>[ii] The Applicant confirms it has consulted all persons as necessary on the basis of its intended use of land, and this is evidenced in the Consultation Report (APP/TR010024/5.1 / APP-018) and the Applicant refers to its response directly above.</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response

33.	Art 30	<p>“(1) The undertaker may only enter on and take temporary possession of the land identified as plot reference 2/1, 2/2a and 2/2b shown on the land plans for the purposes of the authorised development if the development authorised by the A19/A184 Testo’s Junction Alteration Development Consent Order 2018 (the “Testo’s Order”) has commenced and the main construction compound referred to as Work No. 31 in Schedule 1 to the Testo’s Order has not been vacated at the commencement of development authorised by this Order.</p> <p>(2) The undertaker may not carry out construction activities on the land identified as plot reference 1/14b shown on the land plans at the same time as it is in possession of the land identified as plot reference 2/1, 2/2a and 2/2b on the land plans for the purposes of this Order.”</p>	<p>Article 30: Temporary use of land for construction compound</p> <p>[i] Art 30(2) prevents the undertaker from <u>carrying out construction activities</u> on plot 1/14b at the same time as it is in possession of plots 2/1, 2/2a and 2/2b. It does not explicitly prevent the exercise of temporary possession powers or CA powers over that land. “Construction activities” are undefined in the order. The purpose for which temporary possession may be taken of the plot is described as being “the main site compound to include but not limited to site office, welfare facilities, parking provisions, storage of plant and materials and the treatment of site generated waste”.</p> <p>It is uncertain whether these are all “construction activities”, and therefore the Applicant is asked to clarify the position.</p> <p>[ii] As presently drafted, it would be possible for all plots 2/1, 2/2a, 2/2b and 1/14b to be used temporarily, potentially at the same time, and definitely at different times.</p> <p>The Applicant is asked to clarify their intentions in respect of plot 1/14b and ensure that the drafting secures the parameters used for relevant assessments in the ES.</p>	<p>[i] The Applicant would comment that the listed activities would be construction activities and does not consider an amendment is required.</p> <p>[ii] As explained in paragraphs 5.8.7 to 5.8.8 of the Environmental Statement: “in order to present the worst-case effects of a standalone Scheme, the ES specialist Chapters 6 to 14 assumed that the Scheme would be a standalone development using the full temporary land-take for the Scheme excluding the Testo’s main site compound... Any additional effects that may subsequently arise from the Scheme sharing use of the Testo’s scheme’s main site compound, including extending its use beyond completion of the Testo’s scheme, are qualitatively discussed at the end of each specialist ES chapter.” The assessments have not assumed whether the land will be temporarily possessed, but rather the ES has assessed the carrying out of works associated with the standalone construction compound. The Applicant does not, therefore, believe the Article requires amendment.</p>
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Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
			<p>If the Applicant's intention is that plot 1/14b will not be used if plots 2/1, 2/2a and 2/2b are used then the drafting of this article should be amended to secure this.</p>	
34.	Art 33 (8)	<p><i>“(8) In this article – “apparatus”... “relocation works”...; and “statutory utility”...”</i></p>	<p>Article 33: Apparatus and rights of statutory undertakers in stopped up streets</p> <p>The Applicant is asked to explain why, in this article, it is necessary to define “<i>apparatus</i>” when it is defined in Art 2 and why “<i>relocation works</i>” and “<i>statutory utility</i>” are not defined in Art 2 instead of Art 33?</p>	<p>The Applicant will remove the definition of “apparatus” from Article 33 in the next iteration of the DCO. The Applicant has included the definition of statutory utility and relocation works in Article 33 because the terms are only used in this article. The Applicant draws the ExA’s attention to the Office of Parliamentary Counsel’s Drafting Guidance which states:</p> <p style="text-align: center;"><i>There are no hard and fast rules when it comes to deciding where to put a definition: what will work best for the reader is necessarily a matter of judgement.</i></p> <p>The Applicant’s judgment is that as the definitions are used solely in and only relevant to this Article, it would assist the lay reader to have the definitions here rather than Article 2. This follows the approach of the Testo’s Order, and other made non-highway and highway DCOs.</p>

35.	Art 35		<p>Article 35: Felling or lopping of trees and removal of Hedgerows</p> <p>[i] As set out in paragraph 22.1 and good practice point 6 in PINS Advice Note 15, where it is known that specific hedgerows need to be removed they should be listed in a schedule. This article should then be amended to refer to the schedule.</p> <p>[ii] The Applicant is also asked to consider an addition to the article being a subsection requiring any other hedgerows only be removed once the prior consent of the local planning authority has been obtained.</p>	<p>[i] Article 35 puts works carried out to hedgerows under the DCO in the same position as they would be if they had been authorised by way of planning permission, or were being carried out by the Applicant in its capacity as highway authority.</p> <p>In those circumstances, regulation 6(1)(e) and (h) of the Hedgerows Regulations respectively, would authorise the removal of hedgerows. Given these existing powers, the Applicant does not believe that the recommendations in Advice Note 15 are appropriate in the case of Highways England, as they do not seem to take account of this situation.</p> <p>This approach was endorsed on the A19 Testo's scheme where no specific hedgerows were set out.</p> <p>[ii] As noted above, the restrictions on the removal of hedgerows under the Hedgerow Regulations 1997 would be unaffected by this article and so the recommendations in paragraph 22 and Good Practice Point 6 of Advice Note 15 are not considered applicable for Highways England in this context. The Applicant does not think it appropriate for it to be under a more onerous requirement than it would be whilst exercising its highway authority functions.</p>
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			<p>[iii] In addition, the Applicant is asked to clarify whether any mitigation would be provided in respect of the felling or lopping of trees or the removal of hedgerows and if so, how this would be secured through the DCO.</p>	<p>[iii] The Applicant notes mitigation associated with the exercise of powers under Article 35 is secured through Requirement 5 in Schedule 2 of the dDCO which states:</p> <p><i>“The authorised development must be landscaped in accordance with a landscaping scheme....”</i></p> <p><i>“The landscaping Scheme must reflect the mitigation measures set out in the REAC”</i></p> <p>The REAC provides for the following mitigation (see REAC Actions LVIA5 and LVIA 6-10):</p> <ul style="list-style-type: none"> - <i>Provide tree belt planting on embankment slopes between the Downhill Lane junction northbound off and southbound on slip road, as well as the realigned Washington Road, to screen and / or filter views towards the layout and lighting of the Washington Road and new road and NMU bridge and integrate the embankments into the landscape. Maintain planting by controlling weed growth, replacing dead trees and ensuring adequate space for healthy tree growth.</i> - <i>Provide tree, shrub and scrub planting along the Downhill Lane junction northbound off and southbound on slip roads and provide woodland planting within the new junction</i>
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				<p><i>circulatory area of the junction to replace lost vegetation and integrate the Scheme into the surrounding landscape character</i></p> <p><i>[...]</i></p> <p><i>Landscape mitigation in line with the South Tyneside Landscape Character Study – Part 2 guidelines:</i></p> <p><i>“Provision of new woodland and hedgerow planting to reinforce and reinstate landscape pattern / structure and create linear links between sites of habitat value. Avoid extensive woodland planting that would obscure key views to the south (Penshaw Monument) or east (St Nicholas Church)”.</i></p> <p><i>Establishment of tree, shrub and scrub planting and habitat creation around the new attenuation ponds would integrate the Scheme with the surrounding vegetation and shrub and scrub planting to gap up boundaries.</i></p> <p>In addition, REAC Action ECOL2 outlines proposals for a net gain in biodiversity through creation/planting of 8.76 ha of habitats, including 1.88 ha of Native Woodland (incorporating native broadleaved plantation and mixed plantation). 1.85 km of hedgerow/linear tree and shrubs would also be planted under REAC Action ECOL2, to</p>
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Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>replace the 0.83km to be lost during construction.</p> <p>The Applicant further notes that Requirement 5 also states the Applicant must consult with the relevant local planning authority regarding the landscaping scheme.</p>
36.	Art 36	<p><i>“(1) The A19/A184 Testo’s Junction Alteration Development Consent Order 2018 is modified in accordance with Schedule 89, where— (a) column 1 sets out where the amendment is to be made; (b) column 2 sets out how the amendment is to be made; and (c) column 3 sets out the text to be substituted, inserted or omitted.</i></p> <p><i>(2) The provision of the Neighbourhood Planning Act 2017... article 30 (temporary use of land for construction compounds)...</i>”</p>	<p>Article 36: Disapplication of legislative provisions</p> <p>[i] Clarification is sought from the Applicant as to whether the proposed amendments to the Testo’s DCO can be made on the basis of the Testo’s works commencing before the SoS makes a decision on this DCO.</p> <p>[ii] In the EM (para 5.126) the Applicant states that the removal of the non-motorised user route in the Testo’s scheme could be carried</p>	<p>[i] The amendments to the Testo’s DCO can be made notwithstanding the commencement of the works under that Order – there is no legal restriction in this regard.</p> <p>By way of analogy, modifications to the preliminary scheme design of the Testo’s Order are also permitted under Requirement 3(1) of that Order. There is no requirement such modifications are requested prior to the commencement of works.</p> <p>This part of the Testo’s works has not commenced and are not anticipated to be commenced until after the Scheme has been granted development consent.</p> <p>[ii] Requirement 3(1) of the Testo’s Order requires the Applicant to deliver that project in accordance with the preliminary scheme</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
			<p>out under requirement 3 in schedule 2 to the Testo's DCO. The Applicant is asked to expand upon the means by which the DCO would provide for removal of the non-motorised route in the Testo's scheme.</p>	<p>design "<i>unless otherwise agreed in writing by the Secretary of State following consultation with the relevant planning authority on matters related to its functions</i>" and provided the amendments would not give rise to any materially new or materially different environmental effects.</p> <p>Appendix 1.2 of the Environmental Statement (TR010024/APP/6.3 / APP-021) provides support for the conclusion that the effects are not materially new or materially different from the Testo's ES provided the Scheme (and, in particular, the alternative NMU arrangements) are authorised.</p> <p>If the Scheme is authorised, the Applicant would be able to utilise Requirement 3(1) of the Testo's Order to show that there are no materially new or materially different environmental effects and request that the Secretary of State consent to the modification for of the Testo's preliminary scheme design.</p> <p>However, as explained in paragraph 5.124 of the Explanatory Memorandum (TR10024/APP/3.2(3)), the Applicant has taken to opportunity to promote the change in the Scheme application, both for clarity and to</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
			<p>[iii] Reference to construction compounds does not correspond with the title of Art 30 which refers to the singular.</p>	<p>avoid the need for two separate applications to the Secretary of State</p> <p>[iii] This has been dealt with in the iteration of the dDCO submitted on 24 July 2019.</p>
37.	Art 38	<p><i>“Development consent granted by this Order is to be treated as specific planning permission for the purposes of section 264(3) (cases in which land is to be treated as operational land for the purposes of that Act) of the 1990 Act.”</i></p>	<p>Article 38: Operational land for the purposes of the Town and Country Planning Act 1990</p> <p>Notwithstanding precedent in other DCOs, the Applicant is asked to explain why this power is necessary in the circumstances of this particular NSIP. The Applicant is also asked to identify the permitted development rights that will be made available.</p>	<p>For background, section 264 of the Town and Country Planning Act 1990 states that notwithstanding any provision of section 263, land will not be “operational land” unless it has a “specific planning permission” and it used for the purposes of a statutory undertaker’s undertaking; or section 264(4) (which is not relevant here) applies.</p> <p>This provision is required to ensure the DCO falls within the definition of “specific planning permission.”</p> <p>The Applicant considers this article to be necessary to ensure that land that has the benefit of development consent under the DCO is treated in the same way as if it had had the benefit of planning permission, for the purposes of deciding whether it is “operational land”.</p> <p>The provision is necessary to ensure that any statutory undertakers whose equipment is relocated under the DCO have the same</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>ability to rely on permitted development rights in relation to that equipment as they would if they had relocated it themselves.</p> <p>As explained in paragraph 4.3.4. of the Statement of Reasons (APP/TR010025/4.1 / APP-015), a preliminary assessment has concluded that diversionary works are required for assets owned by Northern Powergrid and BT Group. Article 38 ensures the undertakers in respect of these works will continue to have the permitted development rights in respect of those diverted assets.</p>
38.	Schedule 1	<p><i>“A nationally significant infrastructure project as defined in sections 14 and 22 of the 2008, and associated development as defined in section 115 of the 2008, comprising-.”</i></p>	<p>Schedule 1: Authorised development</p> <p>[i] ‘Act’ appears to be missing from the final line.</p> <p>[ii] The Schedule at items (a) to (o) contains a very extensive list of further development that may be carried out in addition to the numbered Works. Justification is sought from the Applicant as to the need for the works and to confirm whether they have been subject to EIA.</p>	<p>[i] This has been dealt with in the iteration of the dDCO submitted on 24 July 2019.</p> <p>[ii] The Applicant notes it will be tied into locations as shown in the Engineering Drawings and Sections (TR10024/APP/2.6 / APP-010) unless consent is obtained from the Secretary of State, following consultations with the local planning authority. This consent cannot be given where any change would give rise to any materially new or materially different effects as per Requirement 3(1).</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>On that basis, the Applicant confirms all the lettered works have been considered within the Environmental Statement, whether as specific assessment elements (e.g. site clearance) or detailed elements within broader issues (e.g. road markings on new road layouts).</p> <p>The justification for these works is as follows:</p> <ul style="list-style-type: none"> - All of the lettered works are necessary to ensure flexibility in the construction of the Scheme. They can only be used “in connection with” the numbered works, hence they are not standalone powers. - The Applicant emphasises that the approach taken in terms of the lettered works is consistent with a long line of DCOs (and Transport and Works Act Orders) which have had to strike an appropriate balance between scheme detail and scheme flexibility, and it is appropriate for a scheme of this size and scale, and its location. - The Applicant notes that it is standard drafting to have a list of development which may be undertaken within the Order Limits for the purposes of or in connection

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
			<p>[iii] Are all works (a) – (o) limited to works which do not give rise to any materially new or material different environmental effects to those assessed within the ES, rather than simply work (o)?</p>	<p>with the construction of any of the numbered works. It allows for drafting efficiency, rather than repeating the letter works under each numbered work.</p> <ul style="list-style-type: none"> - The Applicant has adhered to standard practice and is not of the view that this list should be amended or altered. - The Applicant notes that the level of detail and scope of lettered works provided is in line with made DCOs (see, for example, a recent example contained in the A19/A184 Testo's Junction Alteration DCO 2018). <p>[iii] As set out above, the lettered works have been considered and assessed as appropriate and as the lettered works are proposed to be carried out in connection with a numbered work, they are already captured by the constraints tying the Scheme into the environmental assessments.</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
39.	Schedule 2		In presentational terms the layout of headings differs from the approach used in the Testo's Order. The Applicant is asked to ensure that the dDCO is in the SI template form.	The Applicant refers to the updated Validation Report which shows that the dDCO complies with the SI template, with the exception of matters that cannot be concluded unless the DCO is granted (e.g., the date of commencement, the signature entry).

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
40.	Schedule 2, R1	<i>“HEMP” means the handover environmental management plan, to be developed and completed by the end of the construction, commissioning and handover stage of the authorised development which is to contain ...”</i>	R1: Interpretation The definition of HEMP in this dDCO is far more extensive than the definition in the Testo’s Order with the difference appearing to be that the Testo’s Order included much of the additional text in R4(4) and (5). The Applicant is asked to explain this difference in approach.	The Applicant will amend the next iteration of the DCO to reflect the made A19 Testo’s Order.

41.	Schedule 2, R3	<p><i>“(1) The authorised development must be designed in detail and carried out in accordance with the preliminary scheme design shown on the engineering drawings and sections unless otherwise agreed in writing by the Secretary of State following consultation with the relevant planning authority on matters related to its functions, 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 any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement.”</i></p>	<p>R3: Detailed design</p> <p>[i] The Applicant is asked to explain the use of the term highlighted which differs from the approach adopted in the Testo’s Order which referred to “different” environmental effects. The term “materially new or material different environmental effects” is also included in work (o) in Schedule 1.</p> <p>[ii] R2(1) also contains a tailpiece (see PINS Advice Note 15 para 17.3 – 17.6).</p> <p>The Applicant is asked to explain why it is necessary and appropriate for the Order to permit amendment to the detailed design drawings, upon which the DCO has been examined, by the SoS at a later date without applying to amend the Order under the provisions contained in schedule 6 of PA2008 and without consultation or examination.</p>	<p>[i] This has been dealt with in the iteration of the dDCO submitted on 24 July 2019: the dDCO has been amended in accordance with the made A19/A184 Testo’s Junction Alteration Development Consent Order 2018.</p> <p>[ii] The Scheme presented in the Engineering Section Drawings (TR010024/APP/2.6 / APP-010) represents a reference design that must be developed into a detailed design following the grant of development consent.</p> <p>Requirement 3(1) allows for a proportionate and acceptable level of flexibility in the final design of the Scheme, something that is considered necessary and appropriate in delivering complex major infrastructure projects such as this, where an appropriate degree of flexibility is in the public interest. Importantly, that flexibility is limited to the scope of the assessment.</p> <p>Note that the relevant local planning authority is consulted on the assessment of that position, before any change is considered by the Secretary of State.</p> <p>Schedule 6 is intended to capture material or non-material changes which were not part of an application submitted. By contrast,</p>
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Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				requirement 3(1) links any such changes to the environmental effects reported in the Environmental Statement and so what is permitted by Requirement 3 can be distinguished from AN15.
42.	Schedule 2, R4(4)	<i>"The authorised development must be operated and maintained in accordance with the HEMP."</i>	<p>R4: Construction environmental management plan</p> <p>Unlike the Testo's Order the dDCO does not require the HEMP to be developed and completed in accordance with the process set out in the approved CEMP. Should this be included in the dDCO?</p>	The Applicant will amend the next iteration of the DCO to reflect the made A19 Testo's Order.
43.	Schedule 2, R4, 7, 8 & 10	<i>"No Part of the authorised development is to commence until for that part ..."</i>	<p>It is unclear what a "part" of the development is. This would appear to enable the undertaker to discharge the requirements on a piecemeal and undefined basis. Further explanation and justification are sought from the Applicant.</p> <p>In addition, the views of the discharging LPA's on this matter would be helpful.</p>	<p>The Applicant does not consider an amendment is required. "Part" is to be given its ordinary and natural meaning, namely a section or certain extent of the authorised development.</p> <p>The wording ensures the Applicant is able to deliver the authorised development expeditiously (e.g., if surveys or requirements are to be discharged in relation to specific parts (e.g. phased delivery), these can be completed in respect of those parts without causing further delays to the programme of a nationally significant infrastructure project).</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>The Applicant considers the wording appropriate on the basis that the Secretary of State is involved in the approval of the matters in Requirements 4, 8 and 10.</p> <p>The Applicant would highlight that the term “part” has been reinserted in the Testo’s Order in relation to the carrying out of surveys by the Secretary of State in the Testo’s Correction Order (see Appendix 3 of this note). In relation to Requirement 7, the Applicant justified the use of “part” on the basis that, inter alia, as a technical matter phased surveys are permissible.</p>
44.	Schedule 2, R8 (2)	<i>“The surface and foul water drainage...would not give rise to any materially new or <u>materially worse adverse environmental effects....”</u></i>	<p>R6: Surface and foul water drainage</p> <p>As with R3, the Applicant is asked to explain the use of the term highlighted rather than the use of ‘different’ environmental effects.</p>	<p>This has been dealt with in the iteration of the dDCO submitted on 24 July 2019: the dDCO has been amended in accordance with the made A19/A184 Testo’s Junction Alteration Development Consent Order 2018.</p>
45.	Schedule 2, Part 2		<p>Part 2: Procedure for discharge of requirements</p> <p>The Applicant is asked to explain why the template for discharge of requirements in Appendix 1 of Advice Note 15 has not been used and to justify the use of the version proposed.</p>	<p>The Applicant has a standard form of provisions for the discharge of requirements for all of its DCOs for RIS projects across the highway network which has been agreed with the Secretary of State.</p> <p>The Applicant’s use of this approach was approved recently by the Secretary of State in</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>the A19/A184 Testo's Junction DCO. The decision was made after Advice Note 15 was issued.</p> <p>The Applicant refers the ExA to its general comments set out above concerning the need for consistency across the Scheme and the Testo's scheme.</p>
46.	Schedule 2, R13 (3)	<i>"Where ...(c) the application is accompanied... would give rise to any materially new or materially worse environmental effects...."</i>	<p>R13: Applications made under requirements</p> <p>In contrast with earlier examples where the term "<i>materially worse adverse environmental effects</i>" is used, R13(3) does not include 'adverse'. What is the reason for this change from the previous approach?</p>	<p>This has been dealt with in the iteration of the dDCO submitted on 24 July 2019: the dDCO has been amended in accordance with the made A19/A184 Testo's Junction Alteration Development Consent Order 2018.</p>
47.	Schedule 7		<p>Schedule 7: Protective Provisions</p> <p>The Applicant is asked to provide regular updates throughout the Examination to confirm whether or not protective provisions have been agreed with the relevant statutory undertakers.</p>	<p>The Applicant notes the following statutory undertakers have assets in the Scheme boundary, as per paragraph 4.3.3 of the Statement of Reasons (TR10024/APP/4.1 / APP-015):</p> <p>BT Group Plc Northern Gas Networks Northern Powergrid Northumbria Water</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
				<p>The Applicant has provided all of these statutory undertakers with the dDCO and they have raised no concerns with the standard protective provisions contained in Schedule 7 of the dDCO.</p> <p>The Applicant notes that section 127 of the Planning Act 2008 is only engaged where <i>“a representation has been made about an application for an order granting development consent before the completion of the examination of the application, and the representation has not been withdrawn”</i>.</p> <p>None of the above statutory undertakers have submitted a relevant representation so the Applicant does not consider there are any outstanding issues with statutory undertakers but will carry on its ongoing engagement during the detailed design phase of the Scheme.</p> <p>In respect of National Grid, as explained at the Preliminary Meeting, National Grid’s assets are not affected by the Scheme. Section 127 of the Planning Act 2008 does not apply to National Grid’s assets on the basis the Applicant is not proposing to authorise the compulsory acquisition of any of their land (as per section 127(2)).</p>

Q. No.	Part of DCO	Drafting example (where relevant)	ExA Question	Applicants Response
48.	Explanatory Note		Is the reference to West Bolden the most appropriate location and should the note also refer to Sunderland?	The Applicant will amend the next iteration of the dDCO to make reference to Washington, Sunderland, in addition to West Boldon and Sunderland.

**APPENDIX 2 TO WRITTEN SUMMARY OF APPLICANT'S ORAL SUBMISSIONS AT ISH1:
CORRESPONDENCE BETWEEN HIGHWAYS ENGLAND AND THE DEPARTMENT FOR TRANSPORT**



Department
for Transport

Department for Transport
Zone 3/27
Great Minster House
33 Horseferry Road
London
SW1P 4DR

Tel: 020 7944 6344

Web Site: www.gov.uk/dft

9th June 2016

Dear Tim Reardan, Highways England General Counsel

Development Consent Order (DCO) Requirements Sign-Off Process

I am writing to confirm the agreed arrangements for how the Planning Act 2008 DCO Requirements sign-off will be handled between the Department for Transport and Highways England.

Under the Planning Act 2008 the Planning Inspectorate covers certain matters of detailed design within a project's DCO by setting out individual "requirements". There is a statutory need for discharge of these requirements by the promoter (Highways England) to be approved, or "signed off" by a competent authority. Subject to the rigorous, evidenced governance in the attached, DfT (Road Investment Strategy Client Division, Strategic Roads, Economics & Statistics) will provide the requirements sign-off function for Strategic Road Network DCO projects. I am writing on the issue of how Ministers assure themselves of compliance now as this has been recently raised by the Planning Inspectorate.

The process is designed to provide clear evidence and assurance, with third party corroboration, of discharge of requirements. Evidence of discharge will be set out in a succinct document, listing all relevant 3rd party consultation correspondence and documentation, together with copies or links to those documents.

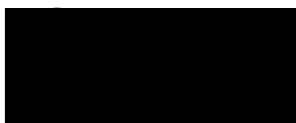
Requirements are on matters RIS Client Division sponsors are fully familiar with in their current roles. As such, based on our discussions, the level of work for RIS

Client is expected to be low, in the order of 5 working days/project, and without the need for additional specialist skills. However, independent specialist technical consultants will be funded by Highways England in exceptional circumstances.

Two projects (A14 Cambridge to Huntingdon and M4 J 3-12) with requirements in need of sign-off are planned to proceed to made DCO in 2016, with none currently scheduled for 2017. As discussed, once the agreed process is underway, we will jointly review its working to ensure our approach is efficient and effective, and, taking forward programme into account, revise accordingly.

Paul Williams will act as the DfT key contact, providing oversight and co-ordination, the Highways England key contact is Mima Garland. The key contacts will be jointly responsible for ensuring that propriety guidance is adhered to, to avoid any allegations of bias in the decision making process.

Yours faithfully



DfT: Paul O'Sullivan (Director Strategic Roads)

CC:

Highways England:

Jim O'Sullivan
Peter Adams
David Brewer
Anna Daroy
Mike Wilson
Mark Bottomley
Martin Fellowes
Martin Clarke
Sally Keith
Mima Garland

DfT:

Jon Griffiths
Mike Boon
Andrew Brunning
Paul Williams

Attachments:

Propriety guidance
Process flowchart

APPENDIX 3 TO WRITTEN SUMMARY OF APPLICANT'S ORAL SUBMISSIONS AT ISH1 AND OFH1:

A19/A184 TESTO'S JUNCTION ALTERATION CORRECTION ORDER AND CORRECTION NOTICE

2019 No. 0000

INFRASTRUCTURE PLANNING

**The A19/A184 Testo's Junction Alteration (Correction) Order
2019**

Made - - - - - *14th May 2019*

Coming into force - - - - - *15th May 2019*

The A19/A184 Testo's Junction Alteration Development Consent Order 2018 ("the Order")(a), which granted development consent within the meaning of the Planning Act 2008 ("the Act")(b), contains correctable errors within the meaning of the Act(c).

In accordance with paragraph 1(5)(a) of Schedule 4 to the Act, before the end of the relevant period, as defined in paragraph 1(6)(a) of Schedule 4 to the Act, the Secretary of State received a written request from the applicant(d) for the correction of errors and omissions in the Order.

In accordance with paragraph 1(7) of Schedule 4 to the Act, the Secretary of State has informed South Tyneside Council, as the local planning authority for the area in which the land to which the Order relates is situated, that the request has been received.

The Secretary of State, in exercise of the powers conferred by section 119 of, and paragraph 1(4) and (8) of Schedule 4 to, the Act, makes the following Order:

Citation and commencement

1. This Order may be cited as the A19/A184 Testo's Junction Alteration (Correction) Order 2019 and comes into force on 15th May 2019.

Corrections

2. The A/19/A184 Testo's Junction Alteration Development Consent Order 2018 is corrected as set out in the table in the Schedule to this Order, where—

- (a) column 1 sets out where the correction is to be made;
- (b) column 2 sets out how the correction is to be made; and

(a) S.I. 2018/994.
(b) 2008 c. 29. Paragraph 1 of Schedule 4 was amended by section 128(2) of and paragraphs 1 and 70 of Schedule 13 to the Localism Act 2011 (c. 20). There are other amendments to paragraph 1 that are not relevant to this Order.
(c) As provided for in Schedule 4 to the Act.
(d) As defined in paragraph 4 of Schedule 4 to the Act.

(c) column 3 sets out the text to be substituted, inserted or omitted.

Signed by authority of the Secretary of State for Transport



Natasha Kopala

Head of Transport and Works Act Orders Unit
Department for Transport

14th May 2019

SCHEDULE

Article 2

<i>(1)</i>	<i>(2)</i>	<i>(3)</i>
<i>Where the correction is to be made</i>	<i>How the correction is to be made</i>	<i>Text to be substituted, inserted or omitted (if any)</i>
Article 19(1)(c)	Omit “sections 35 and 46 of the Criminal Justice Act 1982 (c. 48)”	
Article 29(1)	For “article 22(1)” substitute	“article 22”
Schedule 2 (Requirements)		
Paragraph 1 (interpretation)	For “article 40 and 44 of the Conservation of Habitats and Species Regulations 2010” substitute	“article 42 and 46 of the Conservation of Habitats and Species Regulations 2017”
Requirement 7(1) (protected species)	For “by any part of the authorised development” substitute	“by that part of the authorised development”
Schedule 6 (Modification of compensation and compulsory purchase enactments for creation of new rights and imposition of restrictive covenants)		
Paragraph 2(2)	For “subsection 3(a)” substitute	“subsection (3)(a)”

EXPLANATORY NOTE

(This note is not part of the Order)

This Order corrects correctable errors in the A19/A184 Testo’s Junction Alteration Development Consent Order 2018 (S.I. 2018 No. 994), a development consent order made under the Planning Act 2008 (c. 29), following a request under paragraph 1(5)(a) of Schedule 4 to that Act.

CORRECTION NOTICE

THE A19/A184 TESTO'S JUNCTION ALTERATION ORDER (S.I. 2018 No. 994)

SCHEDULE 4 TO THE PLANNING ACT 2008 CORRECTION OF ERRORS IN DEVELOPMENT CONSENT DECISIONS

14 May 2019

The Secretary of State received two requests dated 10 and 18 October 2018 from Bircham Dyson Bell acting on behalf of Highways England ("the Applicant") for the correction of errors and omissions in the A19/A184 Testo's Junction Alteration Order 2018 ("the Order"), under paragraph 1(5)(a) of Schedule 4 to the Planning Act 2008.

The Secretary of State has made the following corrections to the Order.

Article 19

In 19(1)(c) omit "sections 35 and 46 of the Criminal Justice Act 1982 (c. 48)".

Secretary of State's rationale: To correct an error as the provisions are not relevant.

Article 29

In 29(1) for "article 22(1)" substitute "article 22".

Secretary of State's rationale: To correct a typographical error.

Schedule 2

In paragraph 1 for "article 40 and 44 of the Conservation of Habitats and Species Regulations 2010" substitute "article 42 and 46 of the Conservation of Habitats and Species Regulations 2017".

Secretary of State's rationale: To amend an out of date legislative reference.

Schedule 2 Requirement 7(1)

For "by any part of the authorised development" substitute "by that part of the authorised development".

Secretary of State's rationale: To reflect the intention of the provision and ensure consistency with other requirements.

Schedule 6

In paragraph 2(2) for “subsection 3(a)” substitute “subsection (3)(a).

Secretary of State’s rationale: To correct a typographical error.

Corrections not accepted

Schedule 2 Requirement 5(2)

Insert “illustrative” before “the environmental masterplan”.

Secretary of State rationale: the word “illustrative” does not feature in the title of the front sheet and title page of document TRO10020/APP/2.7(1). The Secretary of State does not therefore consider that this change is necessary.

Article 6 and the requirements 3(1), 8(2) and 13(3)(c)

The applicant requested the substitution of “materially new or materially worse adverse environmental effects” for “materially new or materially different environmental effects”.

The Secretary of State’s rationale: The Secretary of State accepts the wording recommended by the Examining Authority and so is not minded to accede to the suggested correction. It is the Secretary of State’s view that the recommended wording would allow the necessary scope for changes that are better for the environment providing such changes do not result in significant effects that have not already been previously identified and assessed in the Environmental Statement. In the circumstances of this particular case, the Secretary of State does not agree that by maintaining the recommended wording, it would have the effect outlined by the applicant.

LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS

Under section 118(4) of the Planning Act 2008, a decision under paragraph 1 of Schedule 4 to correct an error in an Order granting development consent can be challenged only by means of a claim for judicial review. A claim for judicial review must be made to the High Court during the period of 6 weeks beginning with the day after the day on which the Order making the correction is published. The A19/A184 Testos Junction Alteration (Correction) Order 2019 (as made) is being published on the Planning Inspectorate website at the following address:

<https://infrastructure.planninginspectorate.gov.uk/projects/north-east/a19-a184-testos-junction-improvement/>

These notes are provided for guidance only. A person who thinks they may have grounds for challenging the decision to make the Correction Order referred to in this notice is advised to seek legal advice before taking any action. If you require advice on the process for making any challenge you should contact the Administrative Court Office at the Royal Courts of Justice, Strand, London WC2A 2LL (020 7947 6655).