

A19 Downhill Lane Junction Improvement
Scheme Number: TR010024
7.22 Applicant's Responses to ExA's Second
Written Questions (ExQ2)

Rule 8(1)(b)
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[]

APPLICANT'S RESPONSES TO EXA'S SECOND WRITTEN QUESTIONS (EXQ2)

Regulation Number:	Rule 8(1)(b)
Planning Inspectorate Scheme Reference	TR010024
Application Document Reference	TR010024/APP/7.22
Author:	A19 Project Team, Highways England Project Team & Jacobs

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Ref No.	Question		Applicant Response
1	General and Cross-topic Questions		
Q2.1.1	Applicant	<p>Paragraph 3.1.3 of the Consents and Agreements Position Statement [APP-013] provides details of permits, consents and agreements which may also need to be sought separately from the DCO. Paragraph 3.1.4 indicates that at the time of submission of the application they were not sufficiently developed to confirm the requirements and therefore not practicable to include them within the DCO.</p> <p>Can the Applicant provide an update on the position with regard to the need for permits, consents and agreements?</p>	<p>The Applicant has reviewed the list of consents in paragraph 3.1.3 (application document reference TR010024/APP/3.3) and can confirm that the position stated in 3.1.4 remains unchanged for the reasons stated.</p> <p>As regards Section 61 consents and noise monitoring, the Applicant would note the position agreed with the local authorities in the joint local authority Statement of Common Ground section 3.2 Chapter 12.7 (Application Document Reference: TR010024/APP/7.12) which states that <i>"No specific noise monitoring requirements have been identified. The parties will remain in consultation regarding potential monitoring during the construction phase of the Scheme."</i></p>
Q2.1.2	Applicant Local authorities	<p>At Deadline (D)4 the Applicant confirmed [REP4-001] that the joint local authority Statement of Common Ground (SoCG) as submitted at D3, and the private side agreement (relating to the adoption of roads) had been agreed and that the submission of the signed SoCG would be submitted in advance of D5. Paragraph 5.16 of [REP3-017] also refers.</p> <p>The Applicant and the local authorities are asked to confirm the position with regard to the SoCG. In addition, please explain why it is necessary for matters relating to the adoption of roads to be subject to a side agreement. It is stated that this is a private agreement and implied that it will not be submitted to the Examination. If this is the correct interpretation explain why it is not appropriate to submit the agreement to the Examination.</p>	<p>The Applicant submitted the signed Statement of Common Ground with the local authorities on Wednesday 27th November.</p> <p>The matters relating to the adoption of roads are included, at the request of the local authorities, in a side agreement for two reasons set below.</p> <p>First, Article 10(1) of the dDCO states that "any street (other than a trunk road) to be constructed under this Order must be completed to the reasonable satisfaction of the local highway authority in whose area the street lies...". The purpose of the side agreement is to set out in detail how that high level principle will operate in practice. It describes the practical mechanisms (e.g. inspection of works) through which roads will be assessed as being completed to the authorities' reasonable satisfaction. Given the detailed and technical nature of those procedures the parties agreed that it was best practice to set them out in a separate agreement, rather than in the Order itself.</p> <p>Second, the side agreement contains commercially sensitive information, particularly with respect to the provision of funds to the local authorities in connection with the handing over of completed roads and related assets.</p>

			<p>By virtue of the above, the Applicant has not considered it necessary or appropriate to put the side agreement before the examination. In support of this position, the Applicant would add the following three points:</p> <ul style="list-style-type: none"> - In the Applicant's experience of DCO promotions, it is a well-established and legitimate principle that side agreements may properly remain "in private" where that reflects the interests of the parties, and (where appropriate) a summary of the outcome has been provided to the Examination (as above). - As far as the parties to the side agreement are concerned, the matters covered by the agreement are not "at large" within the Examination, nor are they contentious. No other third party has made representations on these matters. - This approach mirrors exactly the position taken on the A19 Testo's scheme, where the side agreement (in that case with South Tyneside only, given the location of that scheme) was not provided as part of that Examination. This caused no impediment to the recommendation and decision-making stages for that scheme.
3	Biodiversity, Ecology and Natural Environment (including Habitats Regulations Assessment)		
Q2.3.1	<p>The Applicant Local Authorities</p>	<p>Paragraph 7.15 of the Local Impact Report (LIR) [REP2-021] states that "the delivery of compensation measures, including biodiversity offsets, is likely to involve access to land, or land purchase, outside a scheme footprint and a commitment to long-term management through legal agreements. They therefore require early consideration in project design. The principles of offsetting should be agreed with the competent authority at an early stage, particularly where this is not clearly set out in a policy or biodiversity offsetting strategy." The Applicant responded [REP3-012], indicating that the scheme will deliver all biodiversity offsetting within the DCO boundary and so does not require access to land outside the scheme footprint. The Applicant is asked to demonstrate where within the scheme boundary biodiversity offsetting is proposed to take place.</p>	<p>The Examining Authority is directed to paragraphs 9.9.6 to 9.9.13, including Table 9.10, in Volume 1 of the ES (Application Document Reference: TR010024/APP/6.1) for an explanation on how the habitat created as part of the Scheme to mitigate for loss of habitat would achieve a net gain in biodiversity through a net gain in habitat types assessed as being of county importance or above. The Environmental Masterplan which is included in the final pages of the ES illustrates the location of the habitat creation, retention, re-creation / re-establishment and planting proposals within the DCO boundary for the Scheme that will deliver the net biodiversity gain presented in Table 9.10 of the ES.</p>

		The Local Authorities are asked to comment on the Applicant's response to paragraph 7.15 of the LIR.	
Q2.3.2	The Applicant Local Authorities	Paragraph 7.16 of the LIR [REP2-021] states that “it is important that [the] scheme is sustainable and that it produces a net gain for biodiversity and nature conservation. National policy promotes the inclusion of measures to enhance biodiversity within development proposals. Enhancement of biodiversity should be an objective of this project.” In response [REP3-012] the Applicant noted that Chapter 9 of the ES [APP-020] outlines the habitat gain and loss of the scheme and demonstrates a net biodiversity gain. The Applicant is asked to confirm how a net biodiversity gain for the scheme has been achieved. The Local Authorities are asked to explain the policy basis for seeking a net biodiversity gain.	Please see response to ExQ2.3.1 above.
4	Compulsory Acquisition and / or Temporary Possession		
Q2.4.1	Applicant Hellens Land Limited South Tyneside Council	At D4 the Applicant and Hellens Land Limited submitted a Joint Statement on the status of discussions between the parties [REP4-004]. The Applicant also set out its position separately [REP4-001] as did Hellens Land Limited [REP4-005]. The parties are asked to confirm the outcome of any further discussions on this matter by D5 and at subsequent deadlines if the matter remains unresolved.	There is no update to the position as stated at Deadline 4. The Applicant has carried out further drainage investigations as part of its preparations for the detailed design of the scheme, as stated in the joint position statement submitted at deadline 4 under option ‘C’ in relation to plot 1/7c.
5	Draft Development Consent Order		

<p>Q2.5.1</p>	<p>Applicant</p>	<p>Paragraph 5.7 of [REP3-017] indicated that Art 7 is not concerned with transferring powers (eg compulsory acquisition powers) but instead addressed a legal peculiarity of PA2008. The Applicant went on to state that <i>'absent specific provisions to address the benefit of the Order, the powers would run with the land and not with the undertaker'</i>.</p> <p>The EM [REP2-006] states that the purpose of paragraph (2) is to clarify the exceptions where the Order will self-evidently benefit others, e.g. in relation to the construction of a new private means of access. Absent this provision, there would be a contradiction since strictly speaking only Highways England could benefit from these works.</p> <p>Notwithstanding that the same wording has been used in other DCOs the Applicant is asked to clarify why paragraph (2) is needed and the effect of having it. In answering, the Applicant is asked to identify where paragraph (2) would apply in the context of the Order i.e. who are the persons who would benefit from the grant of powers under this sub-section.</p>	<p>As the ExA has highlighted, the necessity of Article 7(2) derives from a peculiarity in the Planning Act 2008 (the Act). The Applicant directs the ExA to section 156(1) of the Act which states that "the order has effect for the benefit of the land and all persons for the time being interested in the land", unless any contrary provision is made in the Order (s156(2)). The peculiarity, therefore, is that absent any contrary provisions in the Order, the powers will run with the land and not the Applicant.</p> <p>As such, Article 7(1) makes such a contrary provision by stating that the Order has effect solely for the benefit of the Applicant. It then becomes necessary to clarify that this will not be the case when a particular work authorised by the Order is clearly for the benefit of another landowner or statutory undertakers. Absent this provision, there would be a legal contradiction since strictly speaking only Highways England could benefit from these works under Article 7(1).</p> <p>With this in mind, Article 7(2) applies where the Applicant is conducting works for another landowner's express benefit. As the ExA notes, this approach is well-precedented in other DCOs.</p> <p>In the case of this scheme, such works principally concern the private means of access as detailed at Schedule 1 to the dDCO, Work Nos. 1, 11, 12, 22 and Part 2 of Schedule 4 to the dDCO.</p> <p>The Applicant would also refer to its response to Question 16 of the Written Submission of Applicant's case at Issue Specific Hearing 1 (TR010024/APP/7.8 / REP1-010) which sets out a comprehensive justification for the standard drafting included in this provision. As was noted in that response, the following would also fall under article 7(2):</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).
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Q2.5.2	Applicant	<p>In Revision 1 of the dDCO [AS-002] paragraphs (2) and (3) of Art 23 in respect of the submitted version [APP011] were deleted. The relevant EM [AS-004] does not explain why the change was made and the matter was not addressed in Q29 of the ExA's Questions on the dDCO (which related to Art 23) or the Applicant's response to those questions [REP1-010].</p> <p>The Applicant is asked to clarify the reasoning for this proposed change which would allow wider powers to create new rights in all of the Order land.</p>	<p>The Applicant would refer to its cover letter dated 5 March 2019 (AS-006) submitted prior to the start of the examination which explained this change.</p> <p>In summary, the section 51 advice issued to the Applicant requested that, in respect of the versions contained in the initial application, the Applicant consider the consistency of Schedule 5 (creation of new rights) and the Book of Reference. The Applicant removed Schedule 5 (which at the time set out land in which only rights were to be acquired) as there was no land in which only rights were to be acquired, and hence this Schedule was included in error. Article 23(2)-(3) in Revision 0 of the dDCO was removed on the basis that these provisions are only relevant in circumstances where it is proposed to acquire rights over land (i.e., what is commonly called "blue land").</p> <p>As the Applicant noted in its cover letter, "the land shown in blue on the Land Plans is dealt with under Article 36 (i.e., the amendment of the A19/A184 Testo's Junction Alteration Development Consent Order 2018) and this is explained in the Revised Plans, Drawings and Sections for the A19/A184 Testo's Junction Alteration Scheme document (Application Document Reference: TR010024/APP/7.5)."</p> <p>The Applicant's response to Question 29 in the Written Submission of Applicant's case at Issue Specific Hearing 1 (TR010024/APP/7.8 / REP1-010) sets out the justification for the imposition of rights under Article 23(1) in light of the removal of those paragraphs.</p>
Q2.5.3	Applicant	<p>At paragraph 3.28 of the Applicant's Written Submission of Case at the Compulsory Acquisition Hearing [REP3-016] it was confirmed that Art 29 would allow temporary possession over all of the plots in the scheme boundary including those that were subject to full acquisition of the freehold. This would allow temporary possession in the first instance with acquisition coming at a later stage. Paragraph 3.30 refers specifically to Art 29(9) and the power to impose rights in respect of land proposed to be used temporarily. The Applicant also referred to the fact that it had carried out diligent inquiry to understand the nature of the land and right ownership across the scheme</p>	<p>The Applicant considers that the provision provides important and justifiable flexibility to the Applicant should the creation of a permanent right prove to be necessary at a future stage (e.g. an underground cable or pipeline, which requires diversion and the creation of a new right). In such circumstances, the Applicant does not consider there would be an onerous human rights impact on the basis that the right would be making provision for a right that had already existed on the land.</p> <p>The Applicant's view is that the guidance note relates to circumstances where it is known a right is to be imposed, rather than a situation such as this. The Applicant re-iterates its early submission</p>

boundary. Reference was also made to answers to Questions 29 and 32 in [REP1-010] in support of the Applicant's position.

Notwithstanding the numerous made DCOs where a similar approach to drafting was taken in relation to temporary possession powers the Applicant is asked to explain how, in acquiring as yet unspecified rights, a judgement can be made as to whether they meet the compulsory acquisition tests in PA2008 or address Human Rights issues.

The Applicant is also asked to consider how the proposed approach conforms to the DCLG PA2008 Guidance for compulsory acquisition and in particular paragraph 10 of Annex D which states that *"where it is proposed to create and acquire new rights compulsorily they should be clearly identified"*.

Schedule 6 identifies 'Land of Which Temporary Possession May Be Taken'. Other application documents such as the Statement of Reasons, Land Plans and Book of Reference also describe the land in Schedule 6 as being for temporary possession. It is noted that in answer to Q32 in [REP1-010] the Applicant confirmed that it had consulted all persons as necessary on the basis of its intended use of the land. Nevertheless, the Applicant is asked to demonstrate that persons with an interest in that land have been appropriately consulted and given adequate opportunity to effectively participate in the Examination on the basis that their land may be subject to the compulsory acquisition of new rights.

Without further clarification on these matters the ExA's dDCO / DCO Commentary recommends an amendment to Art 29(9) to exclude the power to compulsorily acquire undefined new rights in land listed and described as being for temporary possession in Schedule 6.

that is has consulted persons on the basis of the *intended* use of the land.

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 and in the public interest in accordance with its duties as a public body. 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.

The Applicant would note that this provision is not novel and a removal of the power would be a departure from the following precedents:

Order	Equivalent provision
The A19/A1058 Coast Road (Junction Improvement) Development Consent Order 2016	Article 28(8)
The A19/A184 Testo's Junction Alteration Development Consent Order 2018	Article 29(9)
The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016	Article 28(8)
The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016	Article 30(8)
The A556 (Knutsford to Bowdon Improvement) Development Consent Order 2014	Article 26(8)
The A160/A180 (Port of Immingham Improvement) Development Consent Order 2015	Article 28(8)

			<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 75%; padding: 5px;">The M20 Junction 10a Development Consent Order 2017</td> <td style="width: 25%; padding: 5px;">Article 31(8)</td> </tr> </table> <p>If, having weighed up the matter further, the ExA is still minded to recommend the removal of Article 29(9)(a), the Applicant's view is that subparagraph (b) would also need to be removed as it allows for the acquisition of subsoil in relation to temporary land. In circumstances where the ExA is not minded to permit the imposition of rights over temporary land, it follows that a greater interest (i.e., the acquisition of subsoil) should also be removed.</p> <p>For completeness, the appropriate amendment in line with this view would be:</p> <p>"... (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—</p> <p>(a) acquiring new rights over any part of that land under article 23 (compulsory acquisition of rights); or</p> <p>(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)."</p>	The M20 Junction 10a Development Consent Order 2017	Article 31(8)
The M20 Junction 10a Development Consent Order 2017	Article 31(8)				
Q2.5.4	Applicant	<p>Paragraphs 5.8 to 5.10 of the Applicant's Written Submission in respect of ISH3 [REP3-017] explain the reasoning for the temporary possession of Plot 1/14/b in the event that Plots 2/1, 2/2a and 2/2b (the Testo's construction compound) were to be used for construction activities for the Downhill Lane Junction scheme. The Applicant has made amendments to Art 30 [REP3-005] to allow the temporary possession of Plot 1/14b whilst ensuring that there were no physical works take place on Plot 1/14b.</p> <p>Notwithstanding that Plot 1/14b would be landlocked by the scheme and not capable of being used whilst Plot 1/14a was being occupied temporarily for construction, the Applicant is asked to clarify how it could lawfully possess the land temporarily if it did not require the land for the purposes</p>	<p>The Applicant has amended the dDCO (Application Document Reference: TR010024/APP/3.1(6)) in light of the ExA's comments so that it cannot take temporary possession of Plot 1/14b under the DCO if it is in possession of the Testo's construction compound.</p> <p>The Applicant's proposed drafting is as follows:</p> <p>(2) Where the undertaker 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 the authorised development, the undertaker may not enter on and take temporary possession of the specified land <u>under article 29 or 31 of this Order</u> or carry out construction activities on that land <u>for the purposes of the authorised development</u>.</p>		

		<p>specified in Schedule 6 namely <i>“the main site compound to include, but not limited to, site offices, welfare facilities, parking provisions, storage of plant and materials, and the treatment of site generated waste”</i>.</p>	<p>The Applicant has maintained the wording “for the purposes of the authorised development” in the provision, and inserted “under article 29 and 31 of the Order” (both underlined above).</p> <p>This is because, as a means of simplifying compensation matters, the Applicant may voluntarily take possession of the land by agreement with the landowner (i.e. outwith the exercise of the Order powers). This is because the land (Plot 1/14b) is landlocked, and compensation in respect of both plots may be payable. The drafting suggested by the ExA would prevent such measures, as it does not limit the restriction to the exercise of the powers under the Order.</p> <p>In circumstances where Plot 1/14b is effectively rented by the Applicant as a compensatory measure voluntarily (i.e., not under the temporary possession powers in the DCO), it is important to emphasise that the proviso not to carry out construction activities would still bite.</p> <p>This provides the ExA and Secretary of State comfort that no works outside of the scope of the environmental assessments are to be carried out on Plot 1/14b (see paragraph 5.8.7 to 5.8.8 of the Environmental Statement which makes clear 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) whilst also making clear that temporary possession will not be taken using the temporary possession powers under the DCO.</p>
Q2.5.5	Applicant	<p>The ExA has proposed an amendment to Art 36(1) to ensure that the proposed changes to the Testo's scheme are only implemented provided that work on the original Testo's NMU scheme has not commenced. This is intended to ensure that the A19 Downhill Lane Junction Scheme's proposals for NMU users would not be prevented from implementation and would remove the uncertainty which could arise in the unlikely event that Works 4 and 6 of the Testo's scheme had commenced.</p> <p>The Applicant is asked to comment on the proposed amendment to Art 36(1) and specifically whether it would affect the flexibility which the Applicant seeks to have in implementing the Testo's scheme alongside the Downhill Lane Junction</p>	<p>By way of a preliminary comment, the Applicant would note that:</p> <ul style="list-style-type: none"> - the principal reason for the inclusion of article 36 is the removal of a NMU facility authorised by the Testo's project, which potentially promotes an unsafe NMU movement as a result of the A19 Downhill Lane project (the DLJ Scheme) proposals; - if the DLJ Scheme is authorised and constructed, this NMU facility (if not removed from the Testo's Order) would effectively lead to a dead end;

proposals and IAMP proposals. Would this have any implications for the assessment undertaken for the Environmental Statement?

- for the two reasons above, and given the complexity of the issue, it is appropriate to deal with these matters as part of the DLJ Scheme application (rather than later), given the certainty it provides as part of the DLJ Scheme decision; and
- more generally, the complexity of integrating multiple “live” DCOs concurrently in this location gives rise to a particular need and justification for flexibility in the drafting of DCO provisions to address issues such as this.

In light of the ExA's question and related drafting proposal on Article 36(1), and in light of recent developments on the Testo's scheme, the Applicant is now proposing:

- amendments to Schedule 8 to the dDCO to address the effects on Work No. 6 of the Testo's Order; and
- amendments to Article 36(1) and Schedule 8 to address the effects on Work No. 4 in the Testo's Order.

These amendments are explained in detail below. They have also necessitated submission of the updated Land Plans (**Application Document Reference: TR010024/APP/2.3(1)**), Streets, Rights of Way and Access Plans (**Application Document Reference: TR010024/APP/2.5(1)**), Engineering Drawings and Sections (**Application Document Reference: TR010024/APP/2.6(2)**), and updated Revised Testo's plans, drawings and sections (**Application Document Reference: TR010024/APP/7.5(1)**). These are included in the Deadline 5 submissions.

It should be emphasised that there is nothing in article 36 nor Schedule 8 that creates any doubt over the permanent availability of the north-south NMU route along bridleway B46, whether or not the DLJ is authorised and built.

Work No.6

By way of explanation, the Testo's scheme construction programme has reached the point where Work No. 6 has now commenced and been substantially implemented, in part due to its integration with the delivery of other works authorised by the Testo's scheme. As a result

			<p>of this, Work No.6 will not be reversed and so the Applicant has removed Work No. 6 from Schedule 8 of the DLJ scheme dDCO. As a further consequence, it is now <i>not</i> necessary to reverse the stopping up of Bridleway B46 between points 1/7 and 1/8 (as shown on Sheet 1 of the revised Testo's Streets, Rights of Way and Access Plans). This was dependent on Work No. 6 <i>not</i> being implemented. Accordingly, Schedule 8 of the DLJ dDCO has now been re-drafted so that it does <i>not</i> amend Schedule 4 of the Testo's Order.</p> <p>To summarise, given the commencement of Work No. 6, the part of the B46 which is proposed to be extinguished under the made Testo's Order will, accordingly, always need to be stopped up. The effect of these latest amendments in the DLJ Scheme dDCO is that (i) Work No. 6 remains, as is, in the made Testo's Order; (ii) the extinguishment of public right of way over the B46 proceeds as per the made Testo's Order.</p> <p><u>Work No. 4</u></p> <p>The Applicant has further amended Article 36 of the dDCO so that the amendment of the Testo's Order, in accordance with Schedule 8, is contingent on the <i>commencement</i> of the DLJ Scheme. A consequential amendment along the same lines has been made to Article 41(4) to ensure that recertification of the Testo's plans would only occur on commencement of the DLJ Scheme.</p> <p>The rationale is that, on commencement of the DLJ Scheme, it will be sufficiently certain that the NMU provision under the DLJ Scheme will be delivered, and therefore that Work No. 4 in Schedule 1 of the Testo's Order will no longer be appropriate to deliver.</p> <p>Furthermore, it has come to the Applicant's attention that a further part of bridleway B46 would need to be stopped up associated with the implementation of Work No. 6. Accordingly, Schedule 8 of the DLJ Scheme dDCO now makes provision for an additional part of bridleway B46 to be stopped up (that part between points 1/8 to 1/9 in the revised Testo's Streets, Rights of Way and Access Plans, in addition to the existing stopping up of points 1/7 to 1/8). This change, as it entails the proposed stopping up of a public right of way, would be difficult to secure as a post-consent matter, and underlines the point that the proposed changes should be dealt with now as part of the DLJ Scheme application.</p>
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			<p>In order to provide the ExA with comfort on the deliverability of this proposal, the Applicant has sought to explain four scenarios so that it can be shown that the proposed drafting is robust:</p> <ol style="list-style-type: none"> 1. In a scenario where the A19 Downhill Lane DCO is made, but the DLJ Scheme is not commenced within 5 years of the DCO being made (as per Requirement 2 of the dDCO), the Applicant would note that the Applicant would still construct Work No. 4 and this would provide certainty about what is being delivered. 2. On the assumption that the Downhill Lane Junction Order is made but then commencement is delayed, and Work No. 4 is under construction, the Testo's Order contains the necessary ancillary powers to deal with "un-doing" any partially completed element of Work No. 4 (as elaborated below). 3. In a scenario where the NMU provision proposed as part of Work No. 4 is open for use before the DLJ Scheme commences, the resolution listed in point 2 above would still apply. In other words, ancillary Testo's Order powers would enable the undertaking of minor works e.g. to fence off access to the cycleway once the public right of way had been extinguished (which, under the proposed drafting, would be on commencement of the DLJ Scheme). Likewise, the scope of the powers would allow for any minor works necessary to e.g. remove hard surfacing and re-landscape. 4. For completeness, in a scenario where the dDCO is not made, no changes will be made to the made Testo's Order. <p>The Applicant's view is that the ExA's proposed change would indeed have the effect of restricting the flexibility to integrate the Testo's and Downhill Lane Junction schemes (i.e., the DLJ Scheme) in the second scenario above, and so consequently reducing the scope for integration benefits.</p> <p>The ExA's proposed change is premised on the commencement of <i>Work No. 4</i> obviating the need for the amendment of the Testo's Order, and the partial completion of that Work not being able to be "undone" or reversed.</p>
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			<p>The Applicant would note the Testo's site works in this area <i>have already commenced</i> and are associated with a number of Works to construct the new southbound link road in the Testo's made Order (namely Work No. 7). The Testo's Order contains in Schedule 1 the lettered works (d), (h) and (o) – ancillary works associated with landscaping and fencing and any other works necessary to deliver the scheme which don't lead to materially new or different environmental effects.</p> <p>It would be possible to utilise these lettered/ancillary works associated with Work No. 7 to remedy any part (or indeed all) of Work No. 4. In this context it should be emphasised that the landscaping of the strips of land which had been intended for NMU provisions under Work No. 4 and/or the fencing off of the NMU provision under Work No. 4 are minor works and would not lead to materially new or materially different environmental effects.</p> <p>On that basis, the amendment of the Testo's Order should not turn on whether Work No. 4 has commenced under the Testo's Order, but whether the DLJ Scheme has commenced.</p> <p>For completeness, the changes to the plans, sections and drawings are explained below. These changes are required in line with the Applicant's submissions directly above:</p> <table border="1" data-bbox="1317 922 2136 1436"> <thead> <tr> <th data-bbox="1317 922 1727 954">Document</th> <th data-bbox="1727 922 2136 954">Change</th> </tr> </thead> <tbody> <tr> <td data-bbox="1317 954 1727 1257">Land Plans (TR010024/APP/2.3(1))</td> <td data-bbox="1727 954 2136 1257">The description of the "blue land" has been amended so that it now states "Land over which public rights of way are to be extinguished in order to integrate the proposals with the A19 Testo's scheme in accordance with Article 36 of the Development Consent Order."</td> </tr> <tr> <td data-bbox="1317 1257 1727 1436">Streets, Rights of Way and Access Plans (TR010024/APP/2.5(1))</td> <td data-bbox="1727 1257 2136 1436">Removal of the part of the B46 which was previously proposed to be reinstated. This is now shown as extinguished under the Testo's Order (as originally anticipated under that Order).</td> </tr> </tbody> </table>	Document	Change	Land Plans (TR010024/APP/2.3(1))	The description of the "blue land" has been amended so that it now states "Land over which public rights of way are to be extinguished in order to integrate the proposals with the A19 Testo's scheme in accordance with Article 36 of the Development Consent Order."	Streets, Rights of Way and Access Plans (TR010024/APP/2.5(1))	Removal of the part of the B46 which was previously proposed to be reinstated. This is now shown as extinguished under the Testo's Order (as originally anticipated under that Order).
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Land Plans (TR010024/APP/2.3(1))	The description of the "blue land" has been amended so that it now states "Land over which public rights of way are to be extinguished in order to integrate the proposals with the A19 Testo's scheme in accordance with Article 36 of the Development Consent Order."								
Streets, Rights of Way and Access Plans (TR010024/APP/2.5(1))	Removal of the part of the B46 which was previously proposed to be reinstated. This is now shown as extinguished under the Testo's Order (as originally anticipated under that Order).								

			<table border="1"> <tr> <td data-bbox="1312 201 1727 379"></td> <td data-bbox="1727 201 2139 379"> Insertion of the extinguishment of the additional part of the B46 (Part 1/P to 1/Q) which will be extinguished on commencement of the DLJ Scheme. </td> </tr> <tr> <td data-bbox="1312 379 1727 624"> Engineering Drawings and Sections (TR010024/APP/2.6(2)) </td> <td data-bbox="1727 379 2139 624"> Amendment of Sheet 1 the Engineering Drawings (Highway General Arrangement) to show the proposed NMU alignment taking into account the construction of Work No. 6 of the Testo's scheme. </td> </tr> <tr> <td data-bbox="1312 624 1727 927"> Revised Testo's plans, drawings and sections (TR010024/APP/7.5(1)) </td> <td data-bbox="1727 624 2139 927"> Amendment of the text to ensure consistency with the submissions above. Amendment of the plans to show the construction (rather than removal) of Work No.6. Amendment of the plans to show the proposed stopping up of B46 provided the DLJ Scheme commences. </td> </tr> </table>		Insertion of the extinguishment of the additional part of the B46 (Part 1/P to 1/Q) which will be extinguished on commencement of the DLJ Scheme.	Engineering Drawings and Sections (TR010024/APP/2.6(2))	Amendment of Sheet 1 the Engineering Drawings (Highway General Arrangement) to show the proposed NMU alignment taking into account the construction of Work No. 6 of the Testo's scheme.	Revised Testo's plans, drawings and sections (TR010024/APP/7.5(1))	Amendment of the text to ensure consistency with the submissions above. Amendment of the plans to show the construction (rather than removal) of Work No.6. Amendment of the plans to show the proposed stopping up of B46 provided the DLJ Scheme commences.
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<p>N/A</p>	<p>N/A</p>	<p>In his schedule of recommended amendments to the Applicant's draft DCO, the ExA has recommended the following change to Schedule 1: "In connection with the construction of any of these works, further development within the Order limits consisting of... (o) such other works, working sites storage areas, works of demolition or works of whatever nature, as may be necessary or expedient for the purposes of, or for purposes associated with or ancillary to, the construction, operation or maintenance of the authorised development which do not give rise to any materially new or materially different environmental effects to those assessed in the environmental statement." but only insofar as they do not give rise to any materially new or materially different environmental effects from those assessed in the environmental statement."</p>	<p>The Applicant accepts the principle behind the ExA's amendment, and has proposed a drafting amendment along similar lines which achieves the same effect.</p>						

		The ExA's reasoning is that separation of the text is required so that the final statement applies to (a) – (o) as well as (o).	
12	Water Environment		
Q2.12.1	Applicant	Paragraph 14.8.16 of the ES refer to the limited change in water environment risks at the Testo's compound. Please clarify what the risk is?	Paragraph 14.816 is referring to the potential increase in pollution risk to the water environment referenced in the preceding paragraph 14.8.15, in Volume 1 of the ES (Application Document Reference: TR010024/APP/6.1) which states: <i>"Though the extended use of the Testo's scheme main site compound would mean a longer duration of exposing the environment to pollution risks from the Testo's compound, these would not be significant due to continued application of good construction practices (e.g. CEMP pollution controls) and the reduction of construction activity in the Testo's compound to mainly low risk general storage, traffic management and office-based administrative purposes."</i>
Q2.12.2	Applicant Local Authorities	In the SoCG with the Environment Agency [AS-029] under Other Matters it is stated any change to the Pond 6 layout would be a non-material design change for environmental benefit that would be secured through DCO Requirements 3, 5 and 8. Are the parties confident that <u>any</u> change to the Pond 6 layout would be non-material?	<p>Pond 6, north-west of A19 Downhill Lane junction, is currently shown on the Environmental Masterplan which is included in the final pages of the ES (application document reference TR010024/APP/6.1) as bare earth with surrounding grassland habitat. There may be an opportunity to adjust the pond layout without affecting the functionality of the attenuation pond; for example, the pond could be widened to incorporate a terraced area for wetland habitat, which would be of higher biodiversity value than the grassland habitat it would displace. As the changes would be refinement of the existing proposed attenuation pond and biodiversity habitat creation for the purpose of environmental benefit by achieving a high value biodiversity net gain habitat mix, it was concluded this change would be a non-material design change. This change would also be a normal part of the detailed design development, amendment and approval process that would be secured through DCO Requirements 3, 5 and 8 (Application Document Reference: TR010024/APP/3.1 Schedule 2).</p> <p>However, it is important to note that the topography and ground conditions of the area may prevent the pond being wet enough to support a permanent wetland habitat. Equally, the long-term responsibility for maintenance of the attenuation ponds and ditches would be handed over to South Tyneside Council, so the final design and long-term sensitive management of the drainage system would</p>

			<p>be subject to local authority approval of the drainage design system and landscape planting proposals.</p> <p>The Applicant would emphasise that any design change would not be approved under the referenced Requirements unless the Secretary of State was satisfied that it did not entail any materially new or materially different effects as compared with the environmental assessment.</p>
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