



Historic England

HBMCE Comments on the d2 DCO submitted Deadline 3 (31 May 2019)

Application by

Highways England for an Order granting Development Consent for

the A303 Amesbury to Berwick Down

Deadline 4 Submission

PINS Reference No: TR010025

HBMCE Reference No: 20019871

INTRODUCTION

1. Historic England is more formally known as the Historic Buildings and Monuments Commission for England (HBMCE). We are the government's statutory adviser on all matters relating to the historic environment, including world heritage. It is our duty under the provisions of the National Heritage Act 1983 (as amended) to secure the preservation and enhancement of the historic environment. There is also, in this case, the requirement in Article 4 of the 1972 'Convention Concerning the Protection of the World Cultural and Natural Heritage' to protect, conserve, present and transmit the values of the Stonehenge, Avebury and Associated Sites World Heritage Site ("SAAS WHS").
2. These are the written representations of HBMCE on the second draft of the development consent order ("d2DCO") submitted by Highways England on 31st May 2019 arising out of the Issue Specific Hearing 1 ("ISH 1"). These representations should be read with our Written Representations submitted for Deadline 2.
3. We note that a further draft DCO is due to be submitted on 21st June and will be reviewing that document in light of our comments. We would encourage the Applicant to address the comments that we set out herein.
4. As noted during the session, a number of discussions are ongoing between HBMCE and Highways England. We are also engaging in discussion groups/meetings where we can be of assistance and where it is appropriate to do so. Again, where appropriate these discussions and meetings are referred to, and we would hope to update the Examining Authority in due course on the outcome.
5. We would trust that in providing the various detailed comments and queries in this document that this will provide scope for further discussions to enhance our understanding of the d2DCO as drafted, and that this would facilitate and assist the ability to resolve the issues set out in our comments.

6. We set out in these submissions our position through a general observations section before going on to set out specific commentary on the provisions in the d2DCO and then have a short concluding section.

GENERAL OBSERVATIONS

The World Heritage Site

7. The Stonehenge, Avebury and Associated Sites World Heritage Site (“the SAAS WHS”) was inscribed in 1986. The exceptional survival of prehistoric monuments and sites within this inscribed property is recognized by UNESCO as constituting “landscapes without parallel”¹ in a global context.
8. The Statement of Outstanding Universal Value (2013) includes a summary of the significance of the SAAS WHS described in terms of Attributes which express the Outstanding Universal Value.
9. The extent of the inscribed property is identified in the plan attached to the inscription, and whilst it does not have a “buffer zone”, it does have a setting in which it is experienced, and the significance of the wider landscape in which it sits reflects the value of this natural landscape to prehistoric and later communities. The importance of continuity and connectivity to the significance of the Stonehenge landscape are explored further in our Written Representations.
10. The proposed Scheme that would be authorised by the d2DCO would introduce a new piece of contemporary infrastructure which would traverse the Stonehenge element of the SAAS WHS.

The Different Roles of HBMCE

11. As we have previously detailed in our Written Representations, HBMCE has three roles:
 - a) A role as statutory adviser to the UK Government pursuant to section 33(1) of the National Heritage Act 1983 in relation to England to secure the preservation of ancient monuments and historic buildings (including their respective sites), together with the

¹ This was referred to in the draft Statements of Outstanding Universal Value – United Kingdom 2011”, page 39: There is an exceptional survival of prehistoric monuments and sites within the World Heritage Property including settlements, burial grounds, and large constructions of earth and stone. Today, together with their settings, they form landscapes without parallel. These complexes would have been of major significance to those who created them, as is apparent by the huge investment of time and effort they represent. They provide an insight into the mortuary and ceremonial practices of the period, and are evidence of prehistoric technology, architecture and astronomy.

promotion of the preservation and enhancement of conservation areas, and promoting and advancing the public's enjoyment and knowledge of ancient monuments and historic buildings. This role is more particularly referred to in The Town and Country Planning (Development Management Procedure) (England) Order 2015 and the Arrangements for Handling Heritage Applications – Notification to Historic England and National Amenity Societies and the Secretary of State (England) Direction 2015;

- b) A role as adviser to the Department of Digital, Culture, Media and Sport (“the DCMS”) who acts on behalf of the UK Government as the State Party pursuant to the 1972 Convention and on meeting and complying with the requirements of the Convention; and
- c) A role as a member of the Heritage Monitoring Advisory Group (HMAG) pursuant to the recommendation and particular purpose of the World Heritage Committee on the World Heritage Centre/ICOMOS mission 27- 30 October 2015.

12. Whilst mindful of our role and engagement with HMAG, we would note that any advice given by HMAG cannot bind HBMCE or vice versa, and it does not alter the discrete statutory function under s33 of the National Heritage Act 1983 in relation to the advice we provide to the UK Government in respect of the historic environment notably here the World Heritage Site, and the various Scheduled Monuments in and around the World Heritage Site, and their settings. We would note that any advice required to fulfill our statutory function should be requested separately from HMAG.

The Terms of the d2DCO regulating development within a World Heritage Site and its setting

13. We understand that the Scheme is the construction of a highway and as set out in the d2DCO an outline DCO – a “box” containing a notional highway line, tunnel, roundabouts, etc., and allows for flexibility within defined parameters of that box. We understood from subsequent clarification from Highways England that they take the view that the overall box is the redline, and that whilst the authorised development must be within the Order limits, the actual works can only move within that box from the situations shown in the works

plans and engineering sections to the extent allowed for in the limits of deviation applied to them. The Examining Authority will need to form its own assessment on this point.

14. The Planning Act 2008 permits a development consent order to be granted on terms that reflect an outline planning permission granted under the Town and Country Planning Act 1990. The relative degree of flexibility that this engenders will depend on the facts, but should also take account of the fact that the infrastructure would traverse a landscape without parallel and its setting to the west and east. In this respect, we have previously submitted Advice Note 9² with our Written Representations that sets out the law and guidance applicable to this Application. As we have previously set out in our Written Representations, the law remains clear in respect of what type of terms must be included in a consent aspiring to such flexibility. In particular:

33. ... [I]t is a further important principle that when consideration is being given to the impact on the environment in the context of a planning decision, it is permissible for the decision maker to contemplate the likely decisions that others will take in relation to details where those others have the interests of the environment as one of their objectives. The decision maker is not however entitled to leave the assessment of likely impact to a future occasion simply because he contemplates that the future decision maker will act competently. Constraints must be placed on the planning permission within which future details can be worked out, and the decision maker must form a view about the likely details and their impact on the environment.³

15. Part 1 of the DCO sets out preliminary matters including interpretation and the disapplication of legislative provisions. Part 2 sets out the Works Provisions which includes limits of deviation, protective works to buildings, and removal of human remains. Part 3 deals with the powers of acquisition and possession of land, Part 4 sets out the Operational Provisions with Part 5 then dealing with miscellaneous and general provisions including protective provisions, certification of plans and arbitration. There are a number of schedules to the d2DCO, in particular, Schedule 1 noting the “authorised development”; Schedule 2 detailing the “requirements”; Schedule 11 sets out Protective Provisions and Schedule 12

² Advice Note 9 - Rochdale Envelope published by the Planning Inspectorate.

³ *Smith v Secretary of State for the Environment* [2003] Env LR 32 at page 693, and paragraphs 24-29 and 33.

listing the documents to be certified. The remaining Schedules address specific highways issues and possession of land.

16. There are two specific observations that we would make at this juncture and which we will comment on in more detail in the section below.
17. Firstly, there are various plans that have been submitted, these include the Engineering Section Drawings, the Structures Drawings, and the General Arrangement Drawings. These are all expressed to be “for illustrative purposes only”.
18. HBCME reasonably considers that arising from this “illustrative purpose”, the Engineering Plans cannot ensure that a particular scheme will be executed, and the Structures Drawings and the General Arrangement Drawings do not describe the detail of what will actually be constructed. However we continue to have discussions with Highways England regarding the parameters and details and design commitments in relation to the scheme and we welcome these discussions. We will update the Examining Authority on those discussions in due course, and the Examining Authority will need to form its own assessment regarding the parameters and details provided on these matters.
19. Secondly we note that there is a division currently proposed between those provisions requiring the Secretary of State’s approval and other items approved by Highways England. Discussions during the ISH 1 highlighted the opposing views between the various parties on this point. This is an issue which will need to be resolved. We consider that in any event there would need to be engagement with HBMCE on matters relating to the historic environment and this is a point which is subject to further discussions to ensure that there is careful and objective regulation of the Scheme.

The subsisting concurrent roles of HBMCE and the proposed authorised development

20. As currently drafted, there is no provision for HBMCE to engage with, be consulted on, or provide support to Highways England in the delivery of this Nationally Significant Infrastructure Project which runs through and impacts on the SAAS WHS and its setting

and which also runs through and directly impacts on the Avenue⁴ and its setting and the setting of a number of other nationally designated heritage assets, including the Stonehenge monument itself.

21. We set out in APPENDIX 1 further commentary regarding the flexibility required and our role in the process.
22. We note however that positive discussions are ongoing regarding the level and focus of our involvement and we look forward to seeing this being reflected in the next iterations of the dDCO.

The current absence of regulating provisions expressly relating to heritage

23. We note that objectives for the Scheme have been formulated both to address identified problems and to take advantage of the opportunities that new infrastructure would provide. The stated Objectives defined by the Secretary of State/Department for Transport for the proposals are:
 - a) Transport – to create a high quality reliable route between the South East and the South West that meets the future needs of traffic;
 - b) Economic Growth – to enable growth in jobs and housing by providing a free flowing and reliable connection between the South East and the South West;
 - c) Cultural Heritage – to help conserve and enhance the World Heritage Site and to make it easier to reach and explore; and
 - d) Environment and Community – to improve biodiversity and provide a positive legacy for nearby communities.
24. The third objective – Cultural Heritage - is not stated in the current d2DCO and we would query the extent to which a decision maker in the subsequent approvals would be required

⁴ The full name of the Scheduled Monument is Stonehenge, the Avenue, and three barrows adjacent to the Avenue forming part of a round barrow cemetery on Countess Farm. The Scheme will remove the A303 which goes over the Avenue, and there will also be the provision of the restricted byway to replace the A303 over the Avenue.

to have particular heritage concerns as a stated aim in their decision making. This would not appear to comply with the fifth principle as set out in the *Smith*⁵ case.

25. The d2DCO contains some express terms concerning heritage matters:

- a. within Schedule 1, Ancillary Works, paragraph b)(vi) there is a reference to “archaeological mitigation”;
- b. in paragraph 1(1) of Schedule 2, Part 1, Requirements, there is a definition of “detailed archaeological mitigation strategy”, and “heritage” appears within that definition as “heritage management plan” – although it is not separately defined;
- c. in Requirement 8(2)(h) where “retained historic landscape features” appear;
- d. “preliminary works” is defined to include (a) archaeological mitigation works whereas Article 2(1) refers, without any clarification as to meaning, to “archaeological investigations and mitigations works” and includes these as excluded from the scope of “commence”;
- e. Requirement 5(1) - archaeology;
- f. Schedule 7, Column 3 includes various references to the purpose for which temporary [acquisition]/ [possession] of land may be taken including by reference to archaeological and ecological mitigation in relation to various Works proposed to be authorised development; and
- g. Schedule 12 identifies a “detailed archaeological mitigation strategy” as being a document to be certified.

26. However, although there are these isolated references, there is no comprehensive, holistic approach to heritage set out within the d2DCO as currently drafted. In our view this is an omission given it is a Nationally Significant Infrastructure Project which will traverse and become part of the SAAS WHS landscape and include works to and within scheduled monuments and their settings.

27. As stated in both our Relevant Representations and Written Representations, and again here, we remain supportive of the aspirations of the proposed Scheme because it has the

⁵ Ibid footnote 3 above.

potential to deliver a beneficial outcome for the historic environment. However the Scheme does give rise to a wide range of issues relating to the historic environment which need to be fully and properly taken into account.

28. As currently drafted, the d2DCO does not contain clear parameter terms that constitute “constraints *within which* future details” may be worked out in due course by other decision makers that may or may not have historic environment objectives. For example, current Requirement 3(1) includes no more than that a detailed design be “compatible” with the works plans and engineering drawings:

The authorised development must be designed in detail and carried out so that it is compatible with the works plans, the engineering section drawings (plan and profiles) and the engineering section drawings (cross sections) unless otherwise agreed in writing by the Secretary of State following consultation with the planning authority on matters related to its functions and provided that the Secretary of State is satisfied that any amendments to the works plans, the engineering section drawings (plan and profiles) and the engineering section drawings (cross sections) would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement.

29. We would query the reference to “compatible” as it does not in our view provide a clear constraint “within which” final details can be worked out. The phrase “*would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement*” results in an extrinsic baseline and not in a term of clear constraint.

30. Careful consideration should therefore be given to the revision of the d2DCO so that it includes express relevant provisions for the protection of the Historic Environment during the final detailed design of the Scheme, its construction, implementation and subsequent operation and use by vehicles and the public, and also its maintenance.

31. We would therefore wish to see within the dDCO appropriately worded legal parameters to secure the delivery of a scheme appropriate to the international importance of its location.

ISSUES ARISING FROM THE DRAFT 2 DEVELOPMENT CONSENT ORDER (d2DCO) (31st MAY 2019)

32. We set out in this section the issues arising from the drafting of the current d2DCO.

33. At the ISH 1 the Examining Authority set out in the agenda a number of matters that they were keen to hear on from the parties, and we engaged in this discussion. Since then, we have had an opportunity to undertake a fuller review of the draft document. We have therefore sought to provide in this section a comprehensive overview of the d2DCO which we trust will be of assistance, and that this takes account of what we said at the ISH 1, but also our overview of the document.

34. We have broadly followed the agenda order of ISH 1 and will use those headings as a guide to the points that we make. Our focus is to enable the Examining Authority to consider, as it set out in agenda item 3.1 and 3.2 the “definitions and descriptions as currently drafted and whether they encompass all necessary matters and work in a form that allows all parties to understand the fundamental parameters, structure, approach and limitations of the consent sought. Furthermore, the extent of the works, provisions and powers sought, and the implications or proportionality of rights sought over any land on a temporary or permanent basis.”

35. The format of this section has been laid out broadly in the format of identifying the provision, issue arising and why it is an issue for HBMCE, before proposing how the issue may be satisfactorily addressed.

36. Due to the length of the d2DCO, we set out a table of contents below for ease of reference.

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Part 1- Preliminary

Agenda item 3.3 - Draft Article 2 – Interpretation

- i) the extent of definitions, including the definitions of “authorised development”, “commence” and “maintain”.

“commence”

37. The draft provision “commence” is currently defined as:

“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 and mitigation works...investigations for the purpose of assessing and monitoring ground conditions and levels, remedial work in respect of any contamination or other adverse ground conditions, erection of any temporary means of enclosure, ... erection of construction plant and equipment, diversion and laying of underground apparatus and site clearance, and the temporary display of site notices or advertisements”.

The Issue for Heritage

38. There are two main issues arising from this definition. These relate to the scope of investigations and works; and the timing of investigations and works.

39. In relation to the “scope” – it is quite broad in its ambit and as we understand it these “works” will be outside the scope of the Requirements providing for protection of the historic environment, yet will have a bearing on archaeological remains in and out of the SAAS WHS that comprise an integral part of the landscape. There is a need to ensure that in view of the international obligations binding the State Party, that there is appropriate protection for the property whilst works are being undertaken.

40. In relation to the “timing” the exclusion of certain works from “commence” will result in preventing these works from satisfying section 155 (1) of the Planning Act 2008 and triggering the start period for the DCO. This then raises a query with regards the references to “Preliminary Works” and their status.

Why this is an Issue to HBMCE

41. Section 31 of the Planning Act 2008 provides that consent is required for development *to the extent that* the development is or forms part of a nationally significant infrastructure project. Section 33 (1) then provides: “to the extent that development consent is required for development, none of the following is required to be obtained for the development or given in relation to it...”. There are a wide range of works here which have been excluded (“excluded works”) from the definition of “commence” which prevents engagement of section 154 of the Planning Act 2008 and also creates confusion about whether such preliminary works qualify as being required to have development consent *per se*. On the basis that such works are not required to have development consent in themselves, then section 33(1) of the Planning Act 2008 cannot be satisfied. Consequently, rather than the provisions of the DCO applying, it would appear that scheduled monument consent(s) would be required, where appropriate, in relation to those works that would have been “excluded works” from the operation of the DCO.
42. Further, it is unclear to what extent, for the purposes of the Planning Act 2008, the execution of these “excluded works”, without first having satisfied section 154 of that Act, could result in such protections as the d2DCO may otherwise provide for such works. Unintended consequences may follow. For example, the laying down of pipes in the SAAS WHS through buried archaeological remains of a scheduled monument; or the placement of advertisements in a World Heritage Site without understanding the impact this can have on the significance of an “open” landscape. Such unintended consequences may occur but have not been assessed. Such works would be an offence if not appropriately authorised.
43. We note that the d2DCO terms aspire to a wide degree of flexibility in relation to *timing* of the delivery of the Scheme and Advice Note 9⁶ provides guidance to those seeking flexibility. The concept of preservation *in situ* is well understood as this allows for the assessment of the historic environment – in this case here the archaeological remains - by future generations with improved techniques. However it must be borne in mind that the works need to be carefully managed and monitored if consent was forthcoming.

⁶ Ibid – footnote 2 above

44. As currently drafted, the d2DCO appears to enable intrusive investigation (and by consequence of this, its removal) by categorising that as “excluded works” from the types of works that could “commence” the authorised development. The “excluded works” encompasses: “*archaeological investigations and mitigation works, ... investigations for the purpose of assessing and monitoring ground conditions and levels, remedial work in respect of any contamination or other adverse ground conditions, erection of any temporary means of enclosure, receipt and erection of construction plant and equipment, diversion and laying of underground apparatus and site clearance, and the temporary display of site notices or advertisements*”. Further, Schedule 2, Part 1, paragraph 1(1) also defines “preliminary works” to encompass a range of categories that include “archaeological mitigation works”; intrusive investigations; and specified Works comprising Nos 1H(viii) to (xiv); 5 and 7. Those Works include stoppings up, constructions works resulting in new roads and route realignments, and new means of access to land. Archaeological mitigation works and intrusive investigations would result in interventions to the landscape fabric of the World Heritage Site and monument settings.

45. However, the d2DCO (as presently drafted) does not itself ensure the actual execution of the Scheme project as a follow on from these works. Thus, it remains presently possible for archaeological remains to be excavated and for the nationally significant infrastructure project not to be commenced within the time period set out in the Order. There could therefore be the unintended consequence for archaeological mitigation works being carried out without the follow on of the delivery of the Scheme itself.

46. Further clarification is required as to whether the d2DCO terms become operative in advance of the commencement of the authorised development upon a grant of development consent. The Planning Act 2008 contains no express provisions for advance operation of unidentified parts of a DCO and not others. The d2DCO also contains no express provisions to that effect. Whilst we understand that the proposed “excluded works” from the definition of commence may have been used in other DCOs⁷, we would query the extent to which this should be the case here, as we understand that these DCOs did not

⁷ See page 24, response (vi) to ExA Question DCO 1.8 in Highways England “First Written Question [sic] – Draft Development Consent Order dDCO) (DCO.1), May 2019.

traverse a World Heritage Site. The SAAS WHS is without precedent and a particular DCO which recognises this is necessary for development traversing its landscape.

47. We understand that the position of Highways England is that the particular definition of “commence” “is necessary to make provision for the commencement of those preliminary works before it would be possible to discharge the pre-commencement requirements relating to the main works” and that “*it is not necessary that all of the requirements set out in Schedule 2 would need to apply... For any works carried out that do not fall within the definition, even if carried out prior to the appointment of the main contractor, they would be subject to the pre-commencement requirements*”. However we would note that (as currently *drafted*), draft d2DCO Schedule 2 contains Requirements 6(1), 8(1), 9(1), and 10(1), that are expressed in terms of “no part of the authorised development is to commence until ...”. By contrast, Requirement 5(1) that concerns intervention to, and removal of, archaeological remains in the World Heritage Site is only regulated by a requirement that the “authorised development must be carried out in accordance with the [DAMS, as defined in paragraph 1(1)]”.
48. We understood from Highways England during the ISH 1 that some of those terms within the definition of “commence” would be covered through the Preliminary Work OEMP. However, in Schedule 2, Part 1 of the d2DCO, the “preliminary works” are defined to include “archaeological mitigation works”, which does not correspond to the definition in “commence” which refers to “archaeological investigations and mitigation works”. In addition we would note that whereas there is an express provision in the requirements to the authorised development being carried out in accordance with the OEMP (Requirement 4(1)). This expressly excludes “the preliminary works” which can give rise to further uncertainty as to how such works are to be carried out.
49. As the Examining Authority is aware, the OEMP is currently subject to discussions, and is not yet a finalised document. As currently drafted, therefore, the OEMP submitted at D3, sets out in Table 3.2a reference to a Heritage Management Plan, which has not yet been produced, which is to be based on the Detailed Archaeological Mitigation Strategy. The “Preliminary Works OEMP” is therefore not a standalone document and as such this could give rise to uncertainty as to its scope as it is still the subject of discussion. There therefore

appears to be a gap and uncertainty in the scope and timing of such works being carried out as a consequence of the “excluded works” of “archaeological investigations and mitigation works”.

How the issue may be satisfactorily addressed

50. Further discussions are taking place on the OEMP, and this may assist in relation to better understanding the scope of the works that are to be considered as Preliminary Works. Notwithstanding, we would consider that amendments would be required to the definition of “commence” so as to avoid any unintended consequences in particular with regard to references to “archaeological investigations and mitigation works”, and “advertisements” and the word “underground”, from “underground apparatus” and further discussions on this point will be required to ensure that appropriate archaeological works are indeed covered by Preliminary Works.
51. Consideration is also required to be given as to the clarity of the drafting regarding the trigger for implementation of the Order and what provisions of d2DCO will be subject to this where a DCO is envisaged to be operational but not to have commenced for the purposes of the Planning Act 2008.
52. We would also note that those terms underlined in the definition of “commence” may have unintended consequences for the historic environment if not appropriately managed and monitored. We advise that further consideration is given to the drafting of this provision and there is the deletion of “convenient”. We would also note that, in light of our roles, there would need to be engagement from HBMCE as we could provide assistance in ensuring that should the deviation be exercised that the appropriate safeguards for the historic environment are in place in the dDCO. Further discussions will be required regarding the extent of engagement including that of a consultation mechanism that will be appropriate”.

Draft 2 of Article 2 - Interpretation – “maintain”

53. Draft provision “maintain” currently provides:

“maintain” includes inspect, repair, adjust, alter.....”

The Issue for Heritage

54. The ordinary meaning of “maintain” is broader than the draft definition. The use of “includes” results to incorporate the extended ordinary definition of “maintain”. However, this could result in works of maintenance not having been subject to assessment in relation to their environmental impact, bearing in mind that this infrastructure would traverse a World Heritage Site.

Why this is an Issue to HBMCE

55. We note that in the A303 Sparkford to Ilchester Dualling Scheme DCO (July 2018), Highways England adopted a different definition: (Emphasis added)

“maintain” includes, to the extent assessed in the environmental statement, inspect, repair, adjust, alter, remove, replace or reconstruct in relation to the authorised development and any derivative of “maintain” is to be construed accordingly ...

56. We also note that other definitions, on the whole, use “means”, or “has the same meaning as”. The issue here then is the extent to which it is clearly understood what is to be maintained, and that this should be exclusive to that which the Order gives consent for.

How the issue may be satisfactorily addressed

58. We advise that there needs to be further consideration of this definition in order to ensure that any gaps in the safeguards are addressed and appropriate safeguards provided.

ii) the justification for the degree of flexibility that reliance upon “illustrative” plans would allow.

Draft 2 of Article 2 - Interpretation “illustrative”

59. By way of example, the Engineering Section Drawings (cross sections) state in note 5 that “the design shown on these engineering section drawings is illustrative and will be subject to detailed design development...”

The Issue for Heritage

60. As was noted by the Examining Authority, there are a number of plans, which are “illustrative.”

61. Highways England has applied for development consent for a scheme on the terms set out in the d2DCO (“the Scheme”) and has submitted various drawings which are noted to be illustrative to enable flexibility in its deliverability. This does then give rise to the issue of the degree of flexibility that can be provided when the impact of the Scheme will be on “landscapes without parallel”, and the infrastructure will become an integral part of it in perpetuity.

62. In such a unique situation, it is unclear how particular interventions in that particular “landscape” can be considered to be matters of final detail. As currently drafted, d2DCO does not include relevant terms that can result in a *constraining* parameters regulating such interventions within and into this landscape and *within which* future “final details” can be worked out.

63. We would also note that some of the references in the drawings to the illustrative nature is on the basis that the subject matter of that drawing will be subject to “*detailed design development*” and that these – *i.e. the engineering section drawings (cross sections) and engineering section drawings (plan and profiles); and rights of way and access plans, will be certified documents. However other plans, also noted as “illustrative are not currently proposed to be tied to the d2DCO: these include:*

a) General Arrangement Drawings, that include in Note 3 to each plan that:

“The design of the scheme is shown here for illustrative purposes only and will be subject to detailed design development in accordance with the provisions of the development consent order”;

b) Structures Drawings, that include in Note 1 to each plan that: (Emphasis added)

“The design and location of the scheme is shown here for illustrative purposes only and will be subject to detailed design development in accordance with the provisions of the development consent order”.

64. It is therefore unclear the extent of reliance that can be placed on these plans in order to better understand the proposed Scheme.

Why this is an Issue to HBMCE

65. This is an issue as we are presently unable to finalise our view and to advise the Examining Authority, and the Secretary of State, in the required formulation of their own judgements at this stage about the effects of the proposals on the Site and its significance, and upon other heritage assets.
66. Whilst appreciating the generalised desire of Highways England that flexibility is necessary so as to ensure that the various elements would be able to link through, it is also clear that the “illustrative scheme” and structures shown in the Structures Plans are at a relatively advanced stage because they feature in the Environmental Statement. Further, the draft DAMS now includes fixed locations for archaeological works, shown in green, that assume the highway has in June 2019 now reached a fixed location.
67. At present therefore there would appear to be a gap between the d2DCO Scheme as a “box”, and the detail (yet not “final” detail) of the Scheme and the illustrations provided. There is currently a lack of clearly defined parameters within which the final details of the Scheme can be worked out, and the Examining Authority will need to form its own assessment of this. We do note and welcome however the ongoing discussions with Highways England regarding the parameters and design matters.
68. As noted in our Written Representations (paragraph 7.5.14) we noted that “it is essential that the complement of visualisations submitted demonstrate to the Examining Authority the full range of visual impacts on the OUV and experience of the SAAS WHS and the designated and non designated heritage asses in the same landscape.”
69. Visualisations are needed both to clarify the extent of the visual impact and visual intrusion of key elements of infrastructure, but are also required to demonstrate the effectiveness of design and mitigation in minimising those visual impacts. It is essential that the visual representations of the Scheme provide confirmation both of assessments of no or negligible change as well as major change regardless of whether this is positive or negative.(Para 7.5.18).
70. We reiterate that key engineering structures of the Scheme – including the relocated Longbarrow Junction, the tunnel approaches in retained cuttings and tunnel portals; Green

Bridge 4; and the tunnel canopies should be made subject to detailed outline parameters at this stage given the sensitivity of the landscape and its setting. That is, the “box” should contain express parameters for “sub-boxes” for each structure and terms to ensure the elements appears as shown in the Structures Plans.

71. We are pleased to note that discussions are and will be ongoing regarding these points, and on production of further visualizations, and would hope to be in a position to comment further once those have been received.

How the issue may be satisfactorily addressed

72. We advise that, in a landscape without parallel, further details are required, which we understand are being worked up in discussions with Highways England through development of the design commitments and principles in the OEMP, at this stage of the consent process to ensure that *final* details can be worked out in due course. This would ensure necessary, but legal, flexibility. We have been and will continue with discussions on this point.

iii) whether the scope of the “ancillary” works should be further defined, for example, in relation to the Order limits?

73. HBMCE notes here that are two issues

- a. aggregation of “ancillary” works; and
- b. The extent of the Order Limits.

“Ancillary works”

74. Section 120(4) of the Planning Act 2008 empowers the Secretary of State to provide for listed matters. Section 120(5)(c) empowers him to provide for any to be necessary or expedient for giving full effect to any other provision of the order. We understand from the discussions at the ISH 1 that there may be issues in disaggregating and discretely justifying each of the works that is to be included in the development consent order. However, it would be of assistance if this was done to enable clarity on which provision were to apply.

“Order limits”

75. Once executed, the infrastructure would remain in perpetuity in the SAAS WHS. However, once constructed, there would be no need for the extent of the order limits (the red line) to extend other than to encompass in three dimensions the new highway and its supporting structures and embankments and relevant subsoil. Consequently, to ensure minimal effect upon the integrity of the SAAS WHS, it would therefore appear to be appropriate for the provision be made in d2DCO to reduce upon completion of the construction operations the extent of the order limit (its red line) to align with the edge of the then as built carriageway and supporting structures alone. No more extent can be justified in the context of the Site and its unparalleled landscape.

iv) whether the construction compounds should be listed as specific numbered works and shown on the works plans, rather than including them as ancillary works”?

“Authorised development / construction compounds”.

Draft 2 of Article 2 – Interpretation – “authorised development/ construction compounds”

76. Draft provision “the authorised development” currently provides:

“means the development and associated development described in Schedule 1 (authorized development) or any part of it and any other development authorized by this Order, which is development within the meaning of section 32 (meaning of development) of the 2008 Act.”

77. Schedule 1 then lists Work No 1 - Work No 9 and then sets out Ancillary Works which comprise a number of works within highways, and then “other works and development”. These do not include construction compounds.

The Issue for Heritage

78. We understood that these Ancillary Works are to be in connection with Work No1 – Work No 9 and are to be within the Order limits. However there are number of provisions within these Ancillary Works which, due to their nature, are unclear in extent and it is unclear whether they would be governed by the existing safeguards within the current draft DCO. This is particularly the case of ancillary or related development “which does not give rise to

any materially new or materially worse adverse environmental effects to those assessed in the environmental statement”.

Why this is an Issue to HBMCE

79. What is not clear from this reference here is the extent to which this ancillary or related development has been assessed by the Environmental Statement, and the extent to which, if these works are to take place they would be subject to scrutiny. We would consider it is important in light of the sensitivity of the landscape that clarity is given as to where these works are to take place and what approvals mechanism is to be in place to regulate such works.
80. There are a number of issues here. During the Issue Specific Hearing, we referred to “construction compounds” and understood from the discussion that the compounds themselves are to be in fixed locations, but they may not take up the entire area allocated as a construction compound. Whilst we recognise the generalised desire for flexibility within this for configuration of the use of that area, we would advise that due to the close proximity of the construction compounds to the WHS and the potential to impact on the significance that there ought to be some fixing of elements. As such, we consider that the construction compound should be categorised as a work due to the size and intrusive activities that will be incurring therein and there should be an illustration of it so that it can be assessed. We note that a series of additional visualisations were provided at Deadline 3 for the compound areas and we are in the process of reviewing these in discussion with Highways England before providing our detailed comments.
81. In addition to this, and although not commented on at the ISH 1, we would also raise a query as to the provisions relating to the following provisions set out in Ancillary works a) works within highways, consisting of iii) relocation or provision of new road traffic signs... iv), works to place, alter, remove... lights, fencing and other boundary treatments; ...b) other works and development- i) for the strengthening, alteration, or demolition of any building, ii) place, alter, divert, relocate... lights... fencing and other boundary treatments; and the following paragraphs in their entirety - iii) ramps/byways ; iv) embankments ; vi) landscaping ; vii) – x) ; xii) , and xiv) . This is because of the potential for unintended

consequences to the historic environment arising from the ancillary works. There appears to be a gap in the safeguards to the historic environment in relation to these works.

How the issue may be satisfactorily addressed

82. We consider that further consideration of these provisions is required in order to ensure that the gaps in the safeguards are addressed and the appropriate safeguards can be resolved.

vi) whether any other definitions should be included within Article 2?

Draft 2 of Article 2 – Interpretation

83. Draft provision 2 (4) currently provides:

“All distances, directions, areas and lengths referred to in this Order are approximate and distances between points on a work comprised in the authorized development are taken to be measures along that work.”

The Issue for Heritage

84. There is a query here as to the potential degree of approximation that may be applied to the matter. The ordinary meaning of the word “approximate” is vague. Whilst understanding that this is usually seen as a standard provision, we would query its appropriateness in view of the works being undertaken in a World Heritage, it does give rise to the extent to which there may be tolerances applied. A tolerance of 10% - 20%, then on a proposed limit of deviation of 200m (as seen in relation to the commencement of work 1E and termination of work 1F – second table in Article 7), this could result in a shift of 20 – 40 metres applied to that deviation.

Why this is an Issue to HBMCE

85. The reference to “approximate” and the potential then for a tolerance of say 10 – 20% is of importance when considering structures within the SAAS WHS and close to scheduled monuments, some of which – such as Green Bridge 4 has been the subject of extensive discussions from the heritage perspective because of its potential impact. We have, however understood that the location of Green Bridge 4 can be fixed in our reading of the

response to Examining Authority questions – DCO1.6, Highways England noted that the position of Green Bridge 4 is not affected by the construction of the tunnel at the maximum limits of deviation if required by the constructor’s detailed design.

How the issue may be satisfactorily addressed

86. It is likely that this particular point can be resolved through amended drafting – either by excluding the location of the relevant Work Number from the approximation, or by clarification the range of tolerance that can be expected regarding the approximation.

Agenda Item Part 2 – Works Provisions

Draft 2 of Article 4 (1) – Development consent, etc. granted by the Order

87. Draft provision 4 (1) currently provides:

“...the undertaker is granted development consent for the authorised development.”

The Issue for Heritage

88. The Order Limits are currently defined in Article 2(1):

the Order limits” means the limits of land to be acquired permanently or used temporarily as shown on the land plans, and the limits of land within which the authorised development, as shown on the works plans, may be carried out ...

89. Article 4(1) would grant development consent for the authorised development. Schedule 1 defines the authorised development. Article 5 would empower the undertaker to “maintain” the authorised development. Schedule 1 defines the authorised development to comprise specified Works and “for the purposes of or in connection with the *construction* of any of the works”

90. Article 39 permits the undertaker to operate the tunnel.

91. We would therefore note the *broad* nature of the “authorised works” is proposed to be sought to be useable *outside* of the scope of the Order Limits for infrastructure to be constructed which would traverse a World Heritage Site and, once constructed, be perpetually situated in that landscape. This needs further consideration.

92. Whilst there may be arguments for this provision to apply during the construction, we would query whether maintenance of the original extent of Order Limits previously required for the construction of the highways and their structures is appropriate in perpetuity which covers the SAAS WHS. Once constructed, we would advise that the extent of Order Limits after construction could be the physical presence and use, by those passing and re-passing, of the highway infrastructure. Consequently, there would be no need for the extent of the Order Limits beyond the actual extent of infrastructure and necessary supporting structures and subsoil.

Why this is an Issue to HBMCE

93. As the Examining Authority will be aware from the various Issue Specific Hearings that have taken place, HBMCE has been in and continues to have detailed discussions with Highways England on a whole range of matters regarding the Scheme and the implications for the historic environment.

94. We are undertaking these discussions primarily as the Government's adviser and statutory consultee on the historic environment.

95. However we are also engaged as a member of the HMAG, within the confines of HMAG's particular role to provide a steer to Highways England on its Scheme. We would anticipate continuation of these discussions and working closely on the implementation of the Scheme should it be consented. However there needs to be clarity as to the extent to which the work of maintaining the structures will need to encompass the breadth of the Order limits, in particular in relation to the ongoing extent of the Order in perpetuity in the SAAS WHS.

How the issue may be satisfactorily addressed

96. There is the scope for confusion in the roles and management of the historic environment without such limitation and clarification of application. We would therefore advise that the geographical area covered by the Order limits is reduced following completion of the construction which will then enable the parties such as Wiltshire Council and HBMCE to discharge their respective statutory duties in accordance with the appropriate legislation.

Draft 2 of Article 4 (2) - Development consent, etc. granted by the Order

97. Draft provision 4 (2) currently provides:

“Any enactment applying to land within or adjacent to the Order limits has effect subject to the provisions of this Order.”

The Issue for Heritage

98. As a general observation we are surprised with this provision that “any enactment.....has effect subject to the provisions of this Order as it would seek to elevate a statutory instrument above an enactment and it does not appear to be necessary because section 33(1) of the Planning Act 2008 results to remove the need for consents that would otherwise be required under the Ancient Monuments and Archaeological Areas Act 1979 and under the Planning (Listed Buildings and Conservation Areas) Act 1990.

99. The ordinary meaning of “adjacent” means lying near to or, adjoining, contiguous to”. The use of “adjacent” in draft Article 4(2) in d2DCO would purport to usurp our role as regulator in judging the extent of land adjacent to scheduled monuments not inside the Order Limits. For example, Stonehenge scheduled monument lies close to the edge of the Order Limits but is outside of that Limit but could, as a consequence of “adjoining” be caught by this provision.

100. Further, whilst section 33(1) of the Planning Act 2008 disapplies the need for consents under the Ancient Monuments and Archaeological Areas Act 1979 and the Planning (Listed Buildings and Conservation Areas) Act 1990 within the Order Limits, the terms of Article 4(2) appear to result in an implied strip of unknown geographical extent extending an unknown distance from the northern and southern edge of the Order Limits.

Why this is an Issue to HBMCE

101. As can be seen from the red line of the Order limit, the Scheme will traverse the SAAS WHS and will be situated permanently in a sensitive landscape. As currently drafted, with the consequence of the Planning Act 2008 dis-applying heritage legislation, including the Ancient Monuments and Archaeological Areas Act 1979, there will be no control over works due to scheduled monuments if this reference to “adjacent” land is retained.

102. We would also note that as d2DCO is currently drafted that this would remain the situation in perpetuity, with works taking place on Scheduled Monuments that Highways England or a third party contractor, judge fall within the scope of “adjacent” to the Order Limits. As an example – the site of the Stonehenge monument structure itself could be considered as rationally “adjacent” to the Order Limits because the structure is in relative proximity to the Order limits. On that basis, that structure may be caught by these provisions.

103. We note from the Explanatory memorandum to the DCO that Article 4(2) is inserted due to “precedent” in previous DCOs such as the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and to the Silvertown Tunnel Order 2018 and secondly, that it is to ensure that the “historic and redundant Georgian and Victorian instruments authorising turnpike roads in the county of Wiltshire do not adversely affect the Scheme.” We do not consider that either of the two DCOs establishes a precedent in a World Heritage Site.

How the issue may be satisfactorily addressed

104. We advise that further consideration is given to the drafting of this provision and there is the deletion of “adjacent to”. If there are issues regarding the Wiltshire turnpikes then Article 4(2) could be refined so that it addresses that particular point.

Agenda item 3.5 – Article 7 – Limits of Deviation

i) the extent of and justification for the limits of deviation (LoD) set out in the dDCO, including those in respect of the bored tunnel, the cut and cover section of the tunnel and the green bridges.

ii) whether provision should be made for consultation with stakeholders before the proposed LoD for the tunnel could be invoked?

iii) whether the deviations from the specified limits permitted by Article 7(6) should include provision for public consultation?

Draft 2 of Article 7(2)

105. Draft provision Article 7 (2) currently provides:

“In constructing and maintaining the non –linear works comprised in the authorised development, the undertaker may deviate laterally within the limits of deviation for those works shown on the works plan, to the extent that the undertaker considers necessary or convenient.”

The Issue for Heritage

106. We note that Draft Article 2(1) defines *“the limits of deviation”* means the limits of deviation referred to in article 7 (limits of deviation) ... and that Draft Article 7(3) currently provides:

In constructing or maintaining the linear works comprised in the authorised development the undertaker may deviate laterally from the lines or situations shown on those the works plans to the extent of the Order limits, so far as the undertaker considers to be necessary or convenient, save that— ...

107. HBMCE is concerned at the relationship between elements of Article 7(2) and other elements of that Article in circumstances where Article 2(1) defines the “limits of deviation” to mean those referred to in Article 7. Article 7(2) concerns “non-linear works”, being the structures that are envisaged to be constructed along the proposed highway. For example, tunnel portals and Green Bridges.

108. Whilst there may be a basis for deviation that is “necessary”, and appreciating that Highways England desire flexibility, the provision of deviation at present would enable deviation in a World Heritage Site and its setting on the basis of “convenience”.

Why this is an Issue to HBMCE

109. In light of our role as the adviser to DCMS acting on behalf of the Government as the State Party pursuant to the 1972 Convention, and as statutory adviser to the Government in relation to the historic environment, we consider there needs to be appropriate and sufficient safeguards in place in relation to this Scheme. It is currently unclear as to the basis for “convenience” within this provision. The relationship between elements of Article 7(2) and other elements of that Article in circumstances where Article 2(1) defines the “limits of deviation” to mean those referred to in Article 7 also needs to be better understood. There is also a potential issue with regards the potential impacts of the limits of deviation resulting in the position of key elements of the Scheme being adjusted which

would have a bearing on the assessment of impact and effect in relation to the SAAS WHS and its setting.

How the issue may be satisfactorily addressed

110. We advise that further consideration is given to the drafting of this provision and there is the deletion of “convenient”. We would also note that, in light of our roles, there would need to be engagement from HBMCE as we could provide assistance in ensuring that should the deviation be exercised that the appropriate safeguards for the historic environment are in place in the dDCO. Further discussions will be required regarding the extent of engagement including that of a consultation mechanism that will be appropriate.

Draft 2 of Article 7 (6)

111. Draft provision 7 (6) currently provides:

“The maximum vertical limits of deviation referred to in paragraphs (4) and (5) do not apply where it is demonstrated by the undertaker to the Secretary of State’s satisfaction and the Secretary of State certifies accordingly, following consultation with the planning authority, that a deviation in excess of these limits would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement.”

The Issue for Heritage

112. We understand that an assessment has been made of the potential illustrative scheme in the Environmental Statement but this is not reflected in the current terms of the dDCO in the absence of Protective Provisions, Design principles and requirements. We would therefore expect that the terms of the dDCO would mesh the scheme within that which has been assessed and would want the limits of deviation to secure additional positive benefit rather than reduction in benefit or increase of negative effects (as noted in our response to the EXA questions at DCO 1.30), and this may be picked up in future iterations of the document.

113. This draft provision however may also have an unintended consequence in restricting the potential of future archaeological research, which is an obligation under the 1972 Convention and a policy within the WHS Management Plan.

Why this is an Issue to HBMCE

114. In light of our role as the adviser to DCMS acting on behalf of the Government as the State Party pursuant to the 1972 Convention, and as statutory adviser to the Government in relation to the historic environment, the potential for restricting archaeological research needs careful consideration. As noted in our Written Representations (paragraph 7.6.132) the limits of vertical deviation are relevant and important and represent a critical element of the Scheme, and there should not be a compromise in the ability to continue research.

How the issue may be satisfactorily addressed

115. We note and welcome the discussions that are currently ongoing with Highways England in this matter. We advise that further consideration is given to the drafting of this provision and also note that, in light of our roles, there would need to be engagement from HBMCE as we could provide assistance in ensuring that should the deviation be exercised that the appropriate safeguards for the historic environment are in place in the dDCO. Further discussions will be required regarding the extent of engagement including that of a consultation mechanism that will be appropriate.

Draft 2 of Article 7 (7) (a)

116. Draft provision 7 (7) (a) currently provides:

“deviate ...in relation to the points of commencement and termination of the parts of the authorised development referred to in column (1) of the table below, the undertaker may deviate from those points of commencement and termination in so far as the undertaker considers it necessary or convenient, in a generally westerly direction by the corresponding limit set out in column (2)...”

The Issue for Heritage

117. As has been noted above, the Scheme that would be authorised by the d2DCO would introduce a new piece of contemporary infrastructure which would traverse the Stonehenge element of the SAAS WHS. During the discussions at the ISH, it was noted that deviation to the east was proposed at 30m, whilst deviation to the west was 200m in relation to the point of commencement of Work 1H and the termination of 1G, and the point of commencement of 1F and the termination of 1E respectively. The 200m deviation was by far the largest deviation being proposed. Both sets of work would lie within the SAAS WHS.

Why this is an Issue to HBMCE

118. The d2DCO as currently drafted might be viewed as part of a standard and well-established approach to highways projects notwithstanding that it is envisaged to traverse a landscape which is without parallel. We understood from the session that Highways England confirmed that the position of Green Bridge 4 was secured in engineering terms – the line could be moved laterally but would be fixed in the crossing points and that the basis for such a deviation was led by the tunneling works to give flexibility in case of geological or hydrological reasons. It is understood that certain key engineering elements can be fixed, we would welcome this clarification in the drafting of this provision in the next iteration of the dDCO.

119. In light of our role as the adviser to DCMS acting on behalf of the Government as the State Party pursuant to the 1972 Convention, and as statutory adviser to the Government in relation to the historic environment, we consider that it is essential that construction of Green bridge 4 at a width of no less than 150m is secured in the DCO. This, together with its precise location in relation to the scheduled monuments it is designed to reconnect, represents a critical element of the Scheme.

How the issue may be satisfactorily addressed

120. We note and welcome the discussions that are currently ongoing with Highways England in this matter. We advise that further consideration is given to the drafting of this provision and also note that, in light of our roles, there would need to be engagement from

HBMCE as we could provide assistance in ensuring that the appropriate safeguards for the historic environment are in place in the dDCO. Further discussions will be required regarding the extent of engagement including that of a consultation mechanism that will be appropriate.

Draft 2 of Article 7 (7) (b)

121. Draft provision 7 (7) (b) currently provides:

“In constructing or maintaining Work Nos 1E, 1F and 1G, deviate from the design of any tunnel or tunnel structure and vary the number of tunnel cross- passages... to the extent that to do so would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement.”

The Issue for Heritage

122. There are two issues here – firstly, the works cover not only the tunnel (work 1F), but also the cut and cover section of the tunnel and construction of the western portal Work 1E, and the cut and cover section of the tunnel and construction of the eastern portal Work 1G – all three works within the SAAS WHS and the design aspect of these critical engineering elements are subject to ongoing discussion because of the heritage implications as a consequence of their location. Secondly, there is no reference to any consultation in these amendments.

Why this is an Issue to HBMCE

123. As noted above, there has been and continues to be discussion regarding the design aspects of these engineering elements. Without the necessary details of design being presented, then clear parameters of the design of these elements must be provided. We are working with Highways England on these matters and the extent to which they are to be provided for within the appropriate documentation.

124. We would note that the in Article 7 (6) reference is made to the Secretary of State’s satisfaction and certification following consultation with the planning authority. However there is no similar provision in Article 7 (7) (b) which relates to deviation from the design of

the tunnel or tunnel structure in relation to constructing Work numbers 1E, 1F and 1G, which refer to the cut and cover sections of the tunnel and tunnel portals. In light of the ongoing discussions and the issues that have been raised regarding design and the implications on the historic environment it is surprising that the provision in Article 7 (6) is not replicated here.

How the issue may be satisfactorily addressed

125. We would advise that further consideration is given to the wording of this provision in light of the ongoing discussions. We would also note that, in light of our roles, there would need to be engagement from HBMCE as we could provide assistance in ensuring that the appropriate safeguards for the historic environment are in place in the dDCO. Further discussions will be required regarding the extent of engagement including that of a consultation mechanism that will be appropriate.

Agenda item 3.6 Article 12 – Access to works

i) the scope of and necessity for the general power sought by Article 12.

ii) whether the drafting of this provision should make the exercise of the power subject to third party approval?

Draft 2 of Article 12 – Access to works

126. Draft provision 12 currently provides:

“the undertaker may form and lay out 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.”

The Issue for Heritage

127. As currently drafted there is the power for means of access to be provided at any such location within the Order limits as may be reasonably required. This is quite broad in its ambit and as we understand it may have a bearing on archaeology in and out of the SAAS WHS that comprise an integral part of the landscape. There is a need to ensure that in view

of the international obligations binding the State Party, that there is appropriate protection for the property whilst works are being undertaken.

Why this is an Issue to HBMCE

128. We understood from the Issue Specific Hearing session that this provision needed to be read in association with the OEMP and also the requirements in relation to Traffic Management and Site Access Management Plan, and that these would then be subject to consultation with the planning authority. However, this provision does not have these limitations set out as it is currently drafted. We further understood that it was specifically in relation to access to the construction compounds.

129. As has been noted previously, in light of the works taking place in the sensitive landscape of the Stonehenge World Heritage Site, there needs to be great care given to the drafting of the dDCO as what may be considered to be standard provisions. We welcome the clarification from Highways England that it is subject to limitation and that it was intended to relation to access to the construction compounds and may be reflected in the next iteration of the dDCO.

How the issue may be satisfactorily addressed

130. We advise that further consideration is given to the drafting of this provision and also note that, in light of our roles, there would need to be engagement from HBMCE as we could provide assistance in ensuring that the appropriate safeguards for the historic environment are in place in the dDCO. Further discussions will be required regarding the extent of engagement including that of a consultation mechanism that will be appropriate.

Agenda item 3.7 Article 13 – Discharge of Water

ii) whether any amendments to Article 13 are necessary to ensure adequate protection?

Draft 2 of Article 13

131. Draft provision 13 currently provides:

“...the undertaker...for that purpose may lay down, take up and alter pipes and may, on any land within the Order limits, make openings into, and connections with, the watercourse, public sewer or drain.”

The Issue for Heritage

132. The issue here is that of the potential for unintended consequences and where the laying down and taking up of pipes in a landscape which has a wealth of archaeological remains, with no appropriate safeguarding provisions are in place.

Why this is an Issue to HBMCE

133. There does not appear to be any safeguard at present for the manner in which these works would be conducted. Whilst understanding that this provision, as noted in the Explanatory memorandum, sets out the circumstances in which water can be discharged, and that the owner’s consent is required and that there is no obviation of the need for an environmental permit for discharge where relevant, it does not appear to take account for the fact that laying of pipes through an area which may have archaeological remains of national, if not international interest is one that needs to be undertaken in a controlled manner with appropriate monitoring taking place. If there is no detail to hand of where these pipes etc. might be laid, then having the appropriate parameters of likely locations and how the work is to be carried out and monitored would be required.

How the issue may be satisfactorily addressed

134. We advise that further consideration is given to the drafting of this provision and also note that, in light of our roles, there would need to be engagement from HBMCE as we could provide assistance in ensuring that the appropriate safeguards for the historic environment are in place in the dDCO. Further discussions will be required regarding the extent of engagement including that of a consultation mechanism that will be appropriate.

Agenda item 14 – Protective Works to buildings

The scope of, necessity for and reasonableness of the powers sought including in relation to buildings outside the Order limits.

Draft 2 of Article 14 (1) Protective works to buildings

135. Draft provision 14 (1) currently provides:

“Subject to the following provisions of this article, the undertaker may ...carry out such protective works to any building lying within the Order limits or which may be affected by the authorised development as the undertaker considers necessary or expedient.”

The Issue for Heritage

136. We understand that no designated heritage assets have been identified which would require the application of this provision, either within the Order limit red line or as noted in the wording above any building “affected by the authorised development”. It is therefore unclear as to why this Article is required.

Why this is an Issue to HBMCE

137. The Planning Act 2008 in disapplying the provisions of the Planning (Listed Buildings and Conservation Areas) Act 1990 means that the usual requirements together with the associated checks and balances around the authorisation of such works, and the subsequent implementation, monitoring and maintenance would not apply. Provision can be made within the dDCO to address this, but this does not appear to have been done. Due to the uncertainty around the need for this provision, and in particular with regards heritage assets that might be inadvertently caught by the provisions, the issue that therefore arises is the extent to which HBMCE may discharge its statutory duties if there are no provisions for this within the development consent order, and we would advise that the next iteration of the dDCO makes provision for this.

138. We also note that the provision has a 5 year period from the date it is first opened which gives rise to issues as to the wide ranging nature of being able to do such work to buildings without any relevant controls imposed.

How the issue may be satisfactorily addressed

139. We advise that further consideration is given to the drafting of this provision and also note that, in light of our roles, there would need to be engagement from HBMCE as we could provide assistance in ensuring that should the deviation be exercised that the appropriate safeguards for the historic environment are in place in the dDCO. Further discussions will be required regarding the extent of engagement including that of a consultation mechanism that will be appropriate.

Agenda item 3.9 Article 15 Authority to survey and investigate the land.

The need for and intended operation of this provision.

Draft 2 of Article 15 Authority to survey and investigate land

140. Draft provision 15 (1) currently provides:

“The undertaker may for the purposes of this Order enter on –

a) Any land shown within the Order limits; and

b) Where reasonably necessary, any land which is adjacent to, but outside the Order limits, and

i) survey or investigate the land...

ii) without limitation on the scope of sub-paragraph (i), make any excavations or trial holes....

iii) without limitation on the scope of subparagraph (i) carry out ..archaeological investigations on such land, including making any excavations or trial holes on the land for such purposes; and

iv) place on, leave on and remove from the land apparatus for use in connection with the survey and investigation of land and making of trial holes and boreholes”.

The Issue for Heritage

141. We understand that it was noted by the Examining Authority in the Issue Specific Hearing session that this is very broad provision with regards to archaeological remains and the nature of the area, and concur. We understand from Highways England that this provision is to be linked through to the OEMP and DAMS and that the thrust of the

provisions relate more to giving notice and potential compensation issues. In an area such as the SAAS WHS, provisions which enable excavations, trial holes, boreholes, archaeological investigations “as the undertaker thinks fit”, with a lack of clarity or limitation as to basis for such work as currently drafted, and in addition to this, that such works can be undertaken not only on land within the Order limits but also “any land which is adjacent to” is exceptionally broad.

Why this is an Issue to HBMCE

142. Discussions are ongoing regarding the works that are proposed to take place within the Order limits and the potential parameters for these works being set out in the OEMP and DAMS. What is not clear however is how this will then relate to works “adjacent to”, and how this will be properly regulated and controlled? This issue was also one raised in connection with draft Article 4 (2) – see above, and the potential unintended consequences that could arise. In light of the works taking place in an unparalleled landscape of the SAAS WHS, there needs to be great care given to the drafting of the dDCO as what may be considered to be standard provisions.

How the issue may be satisfactorily addressed

143. We welcome the discussions with Highways England with regards the OEMP and DAMS. However we advise that further consideration is given to the drafting of this provision and also note that, in light of our roles, there would need to be engagement from HBMCE as we could provide assistance in ensuring that the appropriate safeguards for the historic environment are in place in the dDCO. Further discussions will be required regarding the extent of engagement including that of a consultation mechanism that will be appropriate.

Agenda item 3.10 – Article 16 Removal of human remains

The necessity for and the reasonableness of this provision

Draft 2 of Article 16 – removal of human remains

144. Draft provision 16 (2) currently provides:

“Before the undertaker carries out any development or works which will or may disturb any human remains in the specified land it must remove those human remains from the specified land, or cause them to be removed, in accordance with the following provisions of this article.”

The Issue for Heritage

145. What is not particularly clear here is that there may be some overlap here with the Preliminary Works that are to be carried out and whether it is envisaged that all archaeological work would be completed first.
146. Whilst understanding from the Explanatory memorandum that this provision has been included to ensure that “archaeological remains are recovered appropriately without causing unacceptable delay to the implementation of this nationally significant infrastructure project”, we would note that this provision is inappropriate for the Order due to the nature of the SAAS WHS and the surrounding area.

Why this is an Issue to HBMCE

147. The removal of archaeological artefacts – whether human remains or otherwise – is the subject of ongoing discussions and it will be important to have the right provisions captured in the dDCO as well as in the Preliminary Works OEMP, OEMP and DAMS. In addition we would note that the procedure as set out here appears to relate to modern burial grounds or burial ground, however this provision is inappropriate as what is actually needed here is the reference to an appropriate procedure for the treatment/recovery of archaeological human remains. We have already highlighted this in the discussion on the DAMS with Highways England.

How the issue may be satisfactorily addressed

148. As noted above, discussions are continuing with Highways England which we welcome. However we advise that further consideration is given to the drafting of this provision and also note that, in light of our roles, there would need to be engagement from HBMCE as we could provide assistance in ensuring that the appropriate safeguards for the historic environment are in place in the dDCO. Further discussions will be required regarding the extent of engagement including that of a consultation mechanism that will be appropriate.

Draft 2 of Article 17 – Felling or lopping of trees and hedgerows

149. Draft provision 17 (1) currently provides:

“The undertaker may fell or lop any tree or shrub within or overhanging land within the Order limits, or cut back to its root, if the undertaker reasonably believes it is to be necessary to do so to prevent the tree or shrub...”

The Issue for Heritage

150. As a general approach to trees on scheduled monuments, if they are to be felled, it is important that there is no/minimal interference in the ground, so the usual practice is to leave the tree roots in situ, so that archaeological remains in the ground will remain undisturbed.

Why this is an Issue to HBMCE

151. As the Government’s adviser in relation to scheduled monument consent applications, we give advice on how best to address the situation of tree roots in scheduled monuments. There does not appear to be any safeguard at present for the manner in which these works would be conducted. Whilst understanding the general thrust of this provision, it does not appear to take account for the fact that removing tree roots through an area which may have archaeological remains of national, if not international interest is one that needs to be undertaken in a controlled manner with appropriate monitoring taking place.

How the issue may be satisfactorily addressed

152. We advise that further consideration is given to the drafting of this provision and also note that, in light of our roles, there would need to be engagement from HBMCE as we could provide assistance in ensuring that should the deviation be exercised that the appropriate safeguards for the historic environment are in place in the dDCO. Further discussions will be required regarding the extent of engagement including that of a consultation mechanism that will be appropriate.

Agenda item Part 3 – Powers of acquisition and possession of land

Draft 2 of Article 29

153. Draft provision 29 (1) b) currently provides:

“remove any buildings and vegetation from that land referred to in sub-paragraph (a)”.

The Issue for Heritage

154. This provision links through to Schedule 7 – land of which only temporary possession may be taken – and the purposes of the temporary possession are set out in column 3 of the table set out therein as including “archaeological mitigation”. What is unclear therefore is how the provision for removal of buildings might be considered as being archaeological mitigation.

155. **Why this is an Issue to HBMCE**

156. The Planning Act 2008 in disapplying the provisions of the Planning (Listed Buildings and Conservation Areas) Act 1990 means that the usual requirements together with the associated checks and balances around the authorisation of such works, and the subsequent implementation, monitoring and maintenance would not apply. Provision can be made within the dDCO to address this, but this does not appear to have been done. As heritage assets might be inadvertently caught by the provisions, the issue that therefore arises is the extent to which HBMCE may discharge its statutory duties if there are no provisions for this within the current draft development consent order, and we would advise that the next iteration of the dDCO makes provision for this.

How the issue may be satisfactorily addressed

157. We advise that further consideration is given to the drafting of this provision, with clarification provided on the extent of archaeological mitigation that might be encompassed through demolition of a building and also note that, in light of our roles, there would need to be engagement from HBMCE as we could provide assistance in ensuring that should the deviation be exercised that the appropriate safeguards for the historic environment are in place in the dDCO. Further discussions will be required regarding the extent of engagement including that of a consultation mechanism that will be appropriate.

Draft 2 of Article 31 – Statutory undertakers

158. Draft provision 31 (1) b) currently provides:

“extinguish the rights of, remove or reposition the apparatus belonging to statutory undertakers over or within the Order land”.

The Issue for Heritage

159. We understand from the Explanatory memorandum that it is impracticable to show and describe all such apparatus and so a general power for the extinguishment of rights and the removal or relocation of apparatus belonging to statutory undertakers over or within any of the Order land is required.

160. The issue here is that of the potential for unintended consequences and where the removal or repositioning of apparatus in a landscape which has a wealth of archaeological remains, with no appropriate safeguarding provisions are in place.

Why this is an Issue to HBMCE

161. There does not appear to be any safeguard at present for the manner in which these works would be conducted. Whilst understanding the thrust of this provision, it does not appear to take account for the fact that the removal or relocation of apparatus through an area which may have archaeological remains of national, if not international interest is one that needs to be undertaken in a controlled manner with appropriate monitoring taking place.

How the issue may be satisfactorily addressed

162. We advise that further consideration is given to the drafting of this provision, as it does not appear to take account for the fact that removal of repositioning of apparatus through an area which may have archaeological remains of national, if not international interest is one that needs to be undertaken in a controlled manner with appropriate monitoring taking place. In light of our roles, there would need to be engagement from HBMCE as we could provide assistance in ensuring that should the deviation be exercised that the appropriate safeguards for the historic environment are in place in the dDCO. Further discussions will

be required regarding the extent of engagement including that of a consultation mechanism that will be appropriate.

Part 5 – Miscellaneous and General

Draft 2 of Article 56 – Certification of plans

163. Draft provision 56(1) currently provides:

“As soon as practicable after the making of this Order, the undertaker must submit copies of each of the plans and documents set out in Schedule 12 (documents to be certified) to the Secretary of State for certification as true copies of those plans and documents,”

The Issue for Heritage

164. As the Examining Authority will be aware, there are ongoing discussions regarding a number of documents to be certified - these include the DAMS and the OEMP, all of which have a bearing on how the Scheme will be implemented in the SAAS WHS and surrounding area.

Why this is an Issue to HBMCE

165. As the Examining Authority will be aware, there are ongoing discussions regarding a number of documents to be certified - these include the DAMS and the OEMP frameworks. As a consequence further discussions will be required on the content of these documents and the proposed certification. We will of course continue with discussions and update you as appropriate to the position.

166. There are a number of frameworks proposed by Highways England and we are engaged in discussions on the details contained therein with the aim that these will be appropriately drafted *clear* framework terms that contain language expressed in constraining terms (e.g. “shall”; “must”) and address the various issues raised. In light of the considerable reliance placed on a number of frameworks by Highways England, together with emerging derivative documents, we advise that consideration be given for the frameworks to be discretely listed in a new “Schedule of Parameter Frameworks” together

with a new Article provision requiring adherence to the objective terms of each Framework therein. This will enable a reader of the DCO to recognise the objective terms of the DCO⁸.

167. However we also note that the Environmental Statement is also to be a certified document and note that as discussions are continuing about measures within this document there may be confusion and it would be inappropriate if the Environmental Statement were to be certified in its entirety. Extracts of the Environmental Statement are more likely to be more appropriate for certification.

How the issue may be satisfactorily addressed

168. We advise that further consideration is given to the drafting of this provision, and that further discussions will need to take place regarding these documents.

Draft 2 of Article 58 – Arbitration

⁸See *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85: “33. ... third parties may have an interest in a public document, such as a planning permission or a consent under section 36 of the 1989 Act, in contrast with many contracts. As a result, the shared knowledge of the applicant for permission and the drafter of the condition does not have the relevance to the process of interpretation that the shared knowledge of parties to a contract, in which there may be no third party interest, has. There is only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission or a section 36 consent: *R v Ashford Borough Council, Ex p Shepway District Council* [1999] PLCR 12, per Keene J at pp 19C–20B; *Carter Commercial Developments Ltd v Secretary of State for Transport, Local Government and the Regions* [2003] JPL 1048, per Buxton LJ at para 13 and Arden LJ at para 27. It is also relevant to the process of interpretation that a failure to comply with a condition in a public law consent may give rise to criminal liability...

34. When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense...”

169. Draft provision 58 currently provides:

“Except where otherwise expressly provided for in this Order and unless otherwise agreed in writing between the parties, any difference under any provision of this Order.....must be referred to and settled by....or, failing agreement, to be appointed on the application of either party....by the President of the Institution of Civil Engineers.”

The Issue for Heritage

170. Whilst acknowledging that this is a transport infrastructure project, it must also be acknowledged that this will be a project going through a landscape without parallel of international significance. We note that draft Article 58 provides for Arbitration and for the arbitrator to be a Civil Engineer. However, the Secretary of State’s stated Objectives include a Cultural Objective that is relevant and appropriate for the execution of the Scheme and it would appear from this to be appropriate to have reference to a relevant arbiter to address this.

Why this is an Issue to HBMCE

171. As noted above, the Secretary of State’s stated Objectives include a Cultural Objective that is relevant and appropriate for the execution of the Scheme. The d2DCO does not currently state those Objectives in its terms. We also note that new terms of Part 5 of Schedule 10 recognise the discrete regulatory and advisory function of the Environment Agency. In light of the permanent establishment of a highway infrastructure in the landscape of the World Heritage Site, HBMCE considers one possible way of dealing with the matter could be for Schedule 10 to include a new Part 6 that provides for the Protection of the World Heritage Site and in which the functions of HBMCE can be set out together with an equivalent dispute resolution provision to paragraph 47 of Part 5 (but with final recourse to the Secretaries of State for Culture, Media and Sport, and for Transport). This may also enable the Examining Authority and Secretary of State to form a view at this stage of the acceptability of the details of the Scheme in advance of a grant of development consent for that Scheme because a new Part 6 would ensure that it would be rationale for the Examining Authority and Secretary of State to contemplate the likely decisions that others, here HBMCE, will take in relation to details where those others have the interests of the historic environment as one of their objectives.

How the issue may be satisfactorily addressed

172. We advise that further consideration be given to the drafting of the provision and that discussions take place.

SCHEDULES

173. Please note that some of the issues referred to in the Schedules have already been picked up in the relevant sections above (i.e reference to Ancillary Works, Certification of Documents) and we do not repeat them in this section. We would also ask the Examining Authority to note that as there is to be a further revised draft DCO submitted on 21 June, we have not commented in detail on these Schedules as we expect there will have been amendments made to reflect the discussions and points raised at the Issue Specific Hearing.

174. In addition to this, a number of discussions and meetings have been taken place which will we expect have resulted in further consideration being given to the draft documentation with amendments being proposed.

175. We have therefore sought to focus our attention on highlighting aspects which relate to the historic environment for the Examining Authority to bear in mind and will provide a more detailed analysis of the Schedules following the next iteration of the dDCO.

176. We would ask the Examining Authority to note that the following paragraphs will contain both issues raised as part of the agenda items of discussion at, and also points that arise from discussions with Highways England and general observations on the d2DCO. We have put in the headings whether these were matters raised at the to reflect the agenda item.

Draft 2 of Schedule 1 - Authorised development

Work No.1D

177. Draft provision Work No1D currently provides for a number of structures to be constructed – these include Green Bridge Four and a western portal.

The Issue

178. Discussions continue regarding the details for these structures due to their location in the SAAS WHS. Bearing in mind the discussion that took place at the Issue Specific Hearing regarding the limits of deviation and design discussions referred to above, we would advise that the inclusion of Work No.1D (i) with works number 1D (ii) – (vii) is carefully considered. We advise that further consideration is given to the drafting of this provision, on the basis of those continuing discussions.

Agenda item 4 Schedule 2 – Requirements

Item 4.1 Requirement 1 (1) Interpretation

- i) The scope of the definition of “preliminary works”**
- ii) Whether the items listed within that definition are themselves adequately defined?”**

This issue has also been considered in relation to the definition of “commence”. We would reiterate here that there needs to be clarification as to what is to be covered by Preliminary Works to make sure that there are no gaps in coverage and that appropriate safeguards are included under which these works must take place. We will provide more detailed comments on the revised dDCO.

Draft 2 of Requirement 2 b) interpretation

179. Draft provision 2 (b) currently provides:

“...approved details, scheme, plan or other document must be taken to include any amendments or revisions subsequently approved by the Secretary of State”

The Issue

180. As the Examining Authority will be aware, there was much discussion at the on this particular point. This may be clarified in the next iteration of the dDCO. We would note however that as currently drafted is unclear to what extent any amendments or revisions to

that which has been subject to discussions and then signed off by the Secretary of State will be presented back to the Secretary of State for further sign off. Whilst recognizing that there may be instances where amendments and revisions to the document are required, there does not appear to be any provision for a procedure to be followed for document amendment and revision.

181. We advise that further consideration is given to the drafting of this provision, with clarification provided and also note that, in light of our roles, there would need to be engagement with HBMCE to provide assistance in ensuring that the appropriate safeguards for the historic environment are in place in the dDCO. Further discussions will be required regarding the extent of engagement including in relation to what would constitute an appropriate consultation mechanism in this situation.

AGENDA ITEM 4.2 Requirement 3(1) and (2) – Preparation of detailed design

182. There were lengthy discussions during the Issue Specific Hearing session regarding these provisions and we can confirm that discussions are ongoing with Highways England on these matters to agree if possible, clearly defined parameters for the design.

183. In addition, discussions were continuing regarding the OEMP which would further inform the development of appropriate principles and assist in the potential application of the illustrative drawings/plans of elements of the scheme.

Agenda item 4.3 – Requirement 4 – Outline Environmental Management Plan

184. As noted above, discussions continue on this matter between HBMCE and Highways England, and also discussions are taking place through heritage design meetings on the OEMP. HMBCE will be submitting further commentary on this document as part of our submissions due on 21 June.

Agenda item 4.4 – Requirement 5 – Archaeology

185. Detailed discussions also continue between HBMCE and Highways England, and also discussions are taking place through HMAG meetings on the DAMS.

186. Subsequent to the Issue Specific Hearing on this topic, in discussions with Highways England, we understand that Highways England will be submitting a revised version of the DAMS at Deadline 4 to support their responses to the comments submitted by Interested Parties in relation to this document at Deadline 2. HBMCE will look to review this latest version of the document in detail at that stage and provide Highways England

Agenda item 4.6 – Requirement 7 – Contaminated land

Draft 2 of Requirement 7 (2) Contaminated land and groundwater

187. Draft provision 7 (2) currently provides:

“Where the undertaker determines that remediation of the contaminated land is necessary, a written scheme and programme for the remedial measures to be taken to render the land fit for its intended purpose, must be submitted to and approved in writing by the Secretary of State, following consultation with the planning authority and the Environment Agency”.

The Issue

188. Due to heritage assets that might be inadvertently caught by the provisions, the issue that arises is the extent to which HBMCE may discharge its statutory duties if there are no provisions for this within the current development consent order. We remain in discussions with Highways England regarding how requirements for contaminated land and archaeological mitigation can be addressed coherently through discussion about the DAMS and OEMP. We would advise that the next iteration of the dDCO makes provision for this on the basis of those discussions.

Agenda item 4.7 – Requirement 8 - landscaping

189. There was discussion at the Issue Specific Hearing regarding this topic – including that of the extent to which there should be a timetable for implementation of the landscaping scheme so that it was not left until the end of the construction programme;. It was

discussed that the landscaping works should not just be restricted to “noise fences and walls”, but fences/walls generally and we expect that these points are likely to be picked up with more detail provided in the next iteration of the dDCO.

Requirement 11 – Consultation

Draft 2 of Requirement 11 – Consultation

190. Draft provision 11 (2) currently provides

“If any consultation responses are not reflected in the details submitted to the Secretary of State for approval under this Schedule, the summary report must state the undertaker’s reasons for not including them.”

The Issue

191. This is a new provision, and following the discussions at the regarding the extent and engagement of the parties in the consultation and approval process, there may be further amendments to this provision in the next iteration.

CONCLUDING REMARKS

192. As can be seen from our submissions, there are a number of issues that have been raised regarding the d2DCO as currently drafted. These range from the detailed commentary on interpretation and the works provisions through to general approaches being taken and possible unintended consequences to the historic environment and an overarching commentary on the extent of our engagement in the sign off of documents.

193. We are pleased to note that positive discussions are taking place with Highways England on a whole range of matters and it is possible that these will be reflected in the next iteration, or subsequent iterations of a dDCO.

194. We will continue with these discussions, and review the further iteration of the dDCO which is due to be submitted on 21 June and will update the Examining Authority accordingly.

APPENDIX 1

THE ROLE AND ENGAGEMENT OF HISTORIC ENGLAND AND THE DCO

195. As noted in our submissions on the current draft d2DCO, there is no explicit reference to HBMCE to engage with, be consulted on, or provide support to Highways England in this Scheme at present. This contrasts with the position that would have arisen if the Scheme was to be considered under the usual planning process, whereby HBMCE would have a clear and involved role.

196. Under the provisions of the Town and Country Planning Act 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Ancient Monuments and Archaeological Areas Act 1979, we assist or lead on proposals which impact on the historic environment. This then ensures that the duty we have under section 33(1) of the National Heritage Act 1983: to secure the preservation of ancient monuments and historic buildings; to promote the preservation and enhancement of the character and appearance of conservation areas; and to promote the public's enjoyment of, and advance their knowledge of, ancient monuments and historic buildings situated in England and their preservation; can be discharged.

197. Applications for Nationally Significant Infrastructure Projects are however dealt with through the Planning Act 2008 which regulates the grant and scope of development consent.

198. By section 32 of the Planning Act 2008: (Emphasis added)

1) In this Act (except in Part 11) "development" has the same meaning as it has in TCPA 1990"

This is subject to subsections (2) and (3).

2) ...

3) *For the purposes of this Act (except Part 11) the following works are taken to be development (to the extent that they would not be otherwise) —*

a) *works for the demolition of a listed building or its alteration or extension in a manner which would affect its character as a building of special architectural or historic interest;*

b) *demolition of a building in a conservation area;*

c) *works resulting in the demolition or destruction of or any damage to a scheduled monument;*

d) *works for the purpose of removing or repairing a scheduled monument or any part of it;*

e) *works for the purpose of making any alterations or additions to a scheduled monument;*

f) *flooding or tipping operations on land in, on or under which there is a scheduled monument.*

4) *In this section —*

“conservation area” has the meaning given by section 91(1) of the Listed Buildings Act; ...

“listed building” has the meaning given by section 1(5) of the Listed Buildings Act;

“permitted” means permitted by planning permission or development consent; ...

“scheduled monument” has the meaning given by section 1(11) of the Ancient Monuments and Archaeological Areas Act 1979 (c. 46) ...

199. By section 33 of the Planning Act 2008: (Emphasis added)

- 1) To the extent that development consent is required for development, none of the following is required to be obtained for the development or given in relation to it —
 - a) *planning permission; ...*
 - f) to the extent that the development relates to land in England, consent under section 2(3) or 3 of the Ancient Monuments and Archaeological Areas Act 1979;
 - g) to the extent that the development relates to land in England, notice under section 35 of the Ancient Monuments and Archaeological Areas Act 1979;
 - i) to the extent that the development relates to land in England, consent under section 8(1), (2) or (3) of the Listed Buildings Act;
 - j) to the extent that the development relates to land in England, consent under section 74(1) of the Listed Buildings Act.

200. As can be seen from the above, the usual requirements together with the associated checks and balances around the authorisation of such works, and the subsequent implementation, monitoring and maintenance would not apply. Rather, as set out in section 120 of the Planning Act, the order that grants development consent may impose requirements which include requirements corresponding to conditions which could be imposed on the grant of any permission, consent or authorization, or the giving of any notice, which but for section 33 (1) would have been required for the development.

The issue that therefore arises is the extent to which HBMCE may discharge its statutory duties if there are no provisions for this within the development consent order. In our view the Examining Authority could consider the extent to which appropriate provisions are within the DCO for HBMCE to discharge its statutory duties. We would also note in this regard that as the adviser to the Department of Digital, Culture, Media and Sport (“the DCMS”) who acts on behalf of the UK Government as the State Party pursuant to the 1972 Convention and on meeting and complying with the requirements, the lack of provision within the d2DCO as currently drafted results in a query as to how this role would be met.

