

A303 Amesbury to Berwick Down

TR010025

Deadline 6

**8.37.9 - Responses to the ExA's Written Questions
- Draft Development Consent Order
(dDCO) (DCO.2)**

APFP Regulation 5(2)(q)

Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

July 2019



Infrastructure Planning

Planning Act 2008

The Infrastructure Planning (Examination Procedure)

Rules 2010

A303 Amesbury to Berwick Down

Development Consent Order 20[**]

Responses to the ExA's Written Questions - Draft Development Consent Order (dDCO) (DCO.2)

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9 Draft Development Consent Order (dDCO) (DCO.2)

Question DCO.2.1

Article 2 – “*the authorised development*”

The response to ExQ1 DCO.1.2 (ii) [REP2-030] and the Applicant’s DL4 written summary of oral submissions put at the dDCO hearing on 4 June 2019 [REP4-029] seek to justify the inclusion of the construction compounds as ‘ancillary works’ rather than listing them as specific work numbers in the dDCO. Nonetheless, they have basically been assessed by the ES as being in a specific location.

- i. For the avoidance of doubt, please specify precisely and justify the extent of the ‘limited degree of flexibility’ afforded for the location of the construction compounds that would currently be permitted by the DL4 OEMP [REP4-020] and the dDCO.
- ii. Please identify the other locations within the Order limits where the construction compounds could potentially be located.

Highways England response

- i. **For the avoidance of doubt, please specify precisely and justify the extent of the ‘limited degree of flexibility’ afforded for the location of the construction compounds that would currently be permitted by the DL4 OEMP [REP4-020] and the dDCO.**
 1. Having considered discussions to date on this point, Highways England wishes to simply commit to the location of the construction compounds. Item MW-G28 of the OEMP was amended at Deadline 4 and has been amended further at Deadline 6 to be clear that the construction compounds referred to in paragraphs 2.4.12 to 2.4.15 of the ES are to be located in line with those paragraphs and as shown on Figure 2.7.
- ii. **Please identify the other locations within the Order limits where the construction compounds could potentially be located.**
 2. Further to the OEMP amends at Deadline 6, construction compounds are not proposed in any other locations than shown in Figure 2.7.

Question DCO.2.2

Article 2 – “the authorised development”

The response to ExQ1 DCO.1.4 [REP2-030] refers to the ‘Government Guidance on associated development applications for major infrastructure projects’, paragraph 10, which states:

“As far as practicable, applicants should explain in their explanatory memorandum which parts (if any) of their proposal are associated development and why” and asserts that it would be impracticable to do so.”

The DL4 written summary of oral submissions put at the DCO hearing on the 4 June 2019 also suggests that there would be practical difficulties in separately identifying associated development [REP4-029].

- i. The relevant guidance is applicable to highway schemes and the practical difficulties highlighted would appear to be overstated. Explain further why it would be impracticable for all or any elements of associated development to be separately identified in the dDCO?
- ii. Would it not be helpful for the Secretary of State to have elements identified as associated development where practicable to do so to assist in the assessment of whether they are appropriately included in the application?

Highways England response

1. This response needs to be read alongside the response to SWQ CA.2.1.
2. The Applicant remains of the view that separating out the works listed in Schedule 1 to the draft DCO into the 'nationally significant infrastructure project' ("NSIP") and 'associated development' is impracticable. This is predominantly because, as set out in previous submissions, determining this is more an 'art' than a 'science' - for example, development that 'is' a NSIP, compared to development that is 'part of' a NSIP (some of which could also be said to be associated development) is not always clear cut. The Applicant does not consider there to be any benefit in explicitly categorising a particular element of the scheme in a particular way given this. In addition, the Guidance referred to, whilst helpful and needing to be taken into account, is just that – guidance – and not legally binding.
3. As set out in Highways England's response to FWQ DCO.1.4 [REP2-030], there is no requirement from a legal perspective to separate out the NSIP and associated development in a DCO. As the proposed scheme is located in England, any distinction between the NSIP and 'associated development' is academic and has no bearing on whether the development in question can be authorised by a development consent order under section 115 of the Planning Act 2008. Fundamentally, the Secretary of State needs to be satisfied that the development falls within either of the categories cited above and is appropriate to the scheme in question. This exercise can be

carried out by reference to the development listed in Schedule 1 to the draft DCO, regardless of labelling.

4. However, that being said, the Applicant does recognise that there could be some benefit to the Secretary of State of having an indicative list as to what parts of the development might constitute the NSIP and what might constitute 'associated development'. As such the Applicant has included a table below which lists types of development authorised in Schedule 1 and states, indicatively, whether this constitutes the NSIP, 'associated development' or both. It should be noted however, that Highways England does not propose to amend Schedule 1 to the DCO. As is clear from the below, there are a number of instances where development could potentially be both part of the NSIP and associated development and from a legal perspective, there is no need to separate out the development. Indeed, it is important to note that for ease of interpretation (particularly by reference to the plans), the Work Numbers in Schedule 1 are not split out into types of development, but rather into packages, which in a number of instances contain elements of the NSIP and associated development. As such, any complete restructure of Schedule 1 would also require wholesale revisions to the plans. This would have consequences in terms of ease of Interested Parties commenting on submissions, given, for example, previous references to documents would be invalid. This is considered an unnecessary burden on interested parties given the legal context and precedents available.

Type of development	NSIP, Associated development or both
Any alteration, improvement or construction of a highway for which Highways England is highway authority (including the widening and realignment of existing trunk roads, and associated slip roads and structures)	NSIP
Any alteration, improvement or construction of slip roads, local roads, rights of way and NMU routes (including associated structures) for which Highways England is not responsible	Associated development
New and altered means of access	Associated development
Landscaping	Both – could be integral to the newly altered, improved or constructed highways for which Highways England would be highway authority (so, part of

Type of development	NSIP, Associated development or both
	the NSIP) or, in any other context, as part of the associated development.
Utility diversions	Both – for the reasons set out above.
Drainage works	Both – for the reasons set out above.
Ecological mitigation	Associated development
Construction compounds	Associated development

Question DCO.2.3

Article 2 - “commence”

The definition of “commence” excludes certain operations and potentially allows for a large number of different types of works to be undertaken prior to the approval of the relevant Construction Environmental Management Plan (CEMP). Some of these activities are defined as “*preliminary works*” in Schedule 2, Part 1 and would be the subject of the preliminary works OEMP. However, the response to ExQ1 DCO.1.8 (v) identifies that there are some activities excluded from the definition of “commence” that are not defined as comprising “*preliminary works*” in Schedule 2, Part 1 [REP2-030].

- i. Should these activities not also be included within the definition of “*preliminary works*” and, if not, how would they be satisfactorily controlled by the DCO?
- ii. Please provide evidence to support the assertion that they should be regarded as being *de minimis* and thus not subject to control.

Response

1. Please see the response to question DCO2.32, which considers the same issue.

Question DCO.2.4

Article 2 - “*the environmental statement*”

The definition of “*the environmental statement*” refers to the documents of that description referenced in Schedule 12. That is presently described as “*The environmental statement, figures and appendices contained in document references 6.1, 6.2 and 6.3.*” The need for clarity in the scope of the certified ES is important given the reliance placed upon the detailed design and ‘as built’ parameters not leading to new or materially different effects than assessed in the ES.

- i. Given the various additional submissions, addenda, updated versions and the like please clarify and explain the contents of the ES that is to be certified.
- ii. Does the Schedule 12 reference currently include all that it should and/or does it require updating?

Highways England response

- i. **Given the various additional submissions, addenda, updated versions and the like please clarify and explain the contents of the ES that is to be certified.**
 1. It is worth noting that the references to the environmental statement in the DCO appear in three contexts, namely:
 - a. as a baseline against which "materially new or materially worse adverse environmental effects" are measured for the purposes of, for example, the Secretary of State considering whether any deviations from the limits of deviation set out in article 7 should be authorised and whether ancillary works are authorised in Schedule 1;
 - b. to determine the level of mitigation measures that need to be implemented (for example, in Requirements 6, 8 and 10); and
 - c. to identify the baseline of contaminated land in the context of Requirement 7.
 2. For this reason, Highways England's intention is that the documents that will be certified as "the environmental statement" under article 56 of the draft DCO are simply those that comprise the environmental statement submitted alongside the application (so those with document reference numbers 6.1, 6.2 and 6.3, as are currently listed in Schedule 12 to the draft DCO), with any necessary substitutions to account for updated versions of these documents submitted into the examination which directly impact the matters identified in paragraph 1.
 3. It is not intended that any additional submissions which do not substitute any of the documents originally comprising the environmental statement be

certified as part of the "the environmental statement". If these documents need to be certified, they will be listed and defined in their own terms.

ii. Does the Schedule 12 reference currently include all that it should and/or does it require updating?

4. The revised draft of the DCO submitted at Deadline 6 contains an updated Schedule 12, to account for certain documents submitted into the examination to date. This includes references to the latest versions of the road drainage strategy [REP2-009] and level 3 flood risk assessment [REP3-008]. Highways England will keep the list of documents under review and would expect to update it shortly prior to the end of examination, to capture any further relevant submissions to examination, e.g. the final OEMP.
5. It is noted that there is a minor overlap between the documents to be certified as "the Environmental Statement", which includes those documents with document reference 6.3, and the document to be certified as the Outline Environmental Management Plan ("OEMP"), which also falls within documents to be certified as "the Environmental Statement" as a document with reference 6.3. Highways England's view is that given its importance, the OEMP should remain as a document certified in its own right and this overlap does not give rise to any adverse consequences.

Question DCO.2.5

Article 2 - “maintain”

The response to ExQ1 DCO.1.12 (iv) rejected the inclusion of additional words referring to the ES on the grounds that to do so would impose an unnecessary administrative burden upon the undertaker [REP2-030].

Please explain why it would result in an unacceptable administrative burden for the Applicant to consider and record for each maintenance operation whether it fell within the scope of the ES? Is it not important that such an exercise be carried out?

Highways England response

1. Highways England remains of the view that the additional wording proposed for this definition is unnecessary for the various reasons set out at the DCO ISH under agenda item 3.3(i) (the summary of which is set out in REP4-029) and as set out in response Highways England’s answer to ExQ1 DCO.1.12. However having further reflected on the ExA’s proposed wording raised in First Written Questions in respect of the definition of ‘maintain’, namely that the definition should read: *“maintain” includes inspect, repair, adjust, alter, remove or reconstruct provided such works do not give rise to any materially new or materially different environmental effects to those identified in the Environmental Statement, and any derivative of “maintain” must be construed accordingly*”, Highways England considers that this wording would not significantly prejudice its ability to maintain the Scheme. As such, this wording has been added to the revised draft of the DCO submitted at Deadline 6.

Question DCO.2.6

Article 2 - “maintain”

The response to ExQ1 DCO.1.12 (iii) confirmed that all works comprised in the definition of “maintain” had been fully assessed in the ES [REP2-030]. The ES references included within that response mention maintenance and repairs but do not specifically refer to all the activities within the scope of the definition.

Please confirm that the ES has assessed the full scope of works of maintenance, including works of alteration, removal and reconstruction that would be permitted by Requirement 5 and identify where this is recorded.

Highways England response

1. As set out in Highways England's response to FWQ 1.12(iii), the key references to note in respect of maintenance are found in Chapter 2 of the ES [APP-040] (e.g. para 2.5), which is the scheme description. This provides the basis for the assessments contained in the ES – the scheme as described has been assessed in the topic chapters.
2. Paragraph 2.5.1 of the ES makes clear that the ES assessed the maintenance activities authorised under the DCO. The ES was issued at the same time as the draft DCO was submitted with the application. The definition of “maintain” in the draft DCO has not changed in substance since this first application draft.
3. It is therefore clear that the ES assessed the full scope of the works of maintenance comprised in the definition of “maintain” that would be permitted by Article 5 of in the DCO and that this is recorded in paragraph 2.5.1 of Chapter 2 of the ES. There is no need for the ES to list in granular detail each maintenance activity contained in the DCO as evidence of what has been assessed.

Question DCO.2.7

Other matters

Please consider the suggestion made by Wiltshire Council in its DL4 Review of the dDCO (Rev 2) [REP4-039] that a definition of “*Lead Local Flood Authority*” should be included within Article 2 and that the definition of planning authority should be amended to reflect the fact that Wiltshire Council is a Unitary Authority.

Highways England response

1. Highways England has responded to these points in its Response to Interested Parties’ Deadline 4 and 5 Comments on the Draft DCO, submitted at Deadline 6.
2. Wiltshire Council's suggested addition of “Lead Local Flood Authority” as a defined term in article 2 of the draft DCO has been considered by Highways England. However, given the term is not used anywhere in the draft DCO, it is not clear to Highways England the purpose of Wiltshire Council's proposal. It is noted that Wiltshire Council did propose a new requirement in respect of approval of the CEMP in its Deadline 4 submissions which did refer to the “Lead Local Flood Authority”. For the reasons set out in its responses to DCO.2.44, DCO.2.47 and DCO.2.65 below, Highways England does not consider this requirement is appropriate.
3. In the revised version of the DCO submitted at Deadline 4 [REP4-018], the definition of "planning authority" in article 2 was amended to simply refer to Wiltshire Council. It is hoped that this amendment has satisfactorily dealt with Wiltshire Council's concerns.

Question DCO.2.8

Article 3 – Disapplication of legislative provisions

Please provide an update on the progress of discussions with Wiltshire Council as regards protective provisions for the protection of drainage authorities.

Highways England response

1. The protective provisions with Wiltshire Council in respect of drainage remain under discussion. As noted in Wiltshire's Deadline 5 response, they are content with the drainage disapplications in article 3 subject to these protective provisions being agreed.
2. Detailed comments of the Council on the protective provisions were received just before Deadline 6 and Highways England is currently actively considering them.

Question DCO.2.11

Article 7 – Limits of deviation

Article 7 would allow the exercise of limits of deviation (LoD) to be exercised to the extent (or so far as) the Undertaker considers necessary or convenient.

- i. Notwithstanding the details already provided please explain why, particularly within the WHS, the LoD should be permitted to be exercised where it would simply be “*convenient*” to do so?
- ii. Does that reflect the justification for the LoD within the WHS provided at the DCO hearing?

Highways England response

- i. **Notwithstanding the details already provided please explain why, particularly within the WHS, the LoD should be permitted to be exercised where it would simply be “*convenient*” to do so?**
 1. Highways England has considered this point in the context of comments submitted at Deadline 4 on the draft DCO and has responded accordingly in its Response to Interested Parties’ Deadline 4 Comments on the Draft DCO, submitted at Deadline 6.
 2. In summary, the limits of deviation in article 7 have been carefully crafted to allow a proportionate degree of flexibility within which the authorised development would be delivered, and this degree of flexibility has been assessed in the Environmental Statement, which is being examined and discussed in detail by all Interested Parties during the current examination process. As such, should the DCO be made, the limits of deviation will have been accepted by the Secretary of State so should be able to be utilised when the beneficiary of the DCO sees fit. Simply referring to a necessity test, rather than convenience too, would be an inappropriate restriction on the powers conferred by the DCO.
 3. In addition, it should be noted that a large number of made highway DCOs contain no wording restricting the use of limits of deviation to when it is 'necessary or convenient' (see, for example, the A19/184 Teso's Junction Alteration Development Consent Order 2018 and the M20 Junction 10a Development Consent Order 2017) - the relevant undertaker can simply exercise powers to the extent of the limits of deviation as they see fit. This is based on the rationale set out above, namely that the limits of deviation for a particular scheme would have been carefully considered by the applicant, assessed in the environmental statement and tested during the examination process. As such, Highways England is placing an element of control on the use of the limits of deviation which is not commonly adopted, namely that they can only be exercised when 'necessary or convenient' and not simply within

its absolute discretion. Highways England will need to have regard to this when constructing the scheme.

ii. Does that reflect the justification for the LoD within the WHS provided at the DCO hearing?

4. As explained in response to Point (i), the justification for the LoDs given at the DCO hearing in the submissions referred to above will, if accepted, underlie the making of the Order. As explained above, if the Order is made, the use of the LoDs therefore does not need to be subject to making out that justification again.

Question DCO.2.12

Article 7 – Limits of deviation

The response to ExQ1 DCO.1.29 (iii) indicates that any changes sought pursuant to Article 7 would necessarily be minor and would not need to be subject to public consultation obligations [REP2-030]. However, whether public consultation is justified does not necessarily depend upon there being new or materially worse adverse environmental effects but upon the nature and extent on the proposed changes and their potential significance to those who might otherwise be consulted.

Should the article therefore make further provision for consultation over and above that required with the planning authority?

Highways England response

1. Whilst Highways England remains of the view that given the scope of article 7(6), a blanket obligation for public consultation would be inappropriate (as articulated in its response to FWQ DCO.1.29(iii)), it does recognise that given the very carefully and tightly drawn vertical limits of deviation in the WHS and the sensitivity of the WHS, it may be that a change that does not result in materially new or worse environmental effects may nevertheless be of significance to certain interested parties, in particular circumstances. Highways England has therefore amended the draft DCO submitted at Deadline 6 to provide that the Secretary of State must consider this: s/he must consult with the planning authority and any other persons the Secretary of State considers appropriate, having regard to the proposed deviation in question, before providing the certification under article 7(6). It is considered this provides sufficient scope for additional consultation.
2. In addition to the above, it should be noted that Wiltshire Council, as planning authority, will always be consulted by the Secretary of State under the provisions of article 7(6). As such, Wiltshire Council will be able to seek the opinion of both the public and any other bodies or organisations to inform its consultation response as it considers necessary and appropriate.
3. Lastly, Highways England will be undertaking engagement during the detailed design process, including as committed to in the draft DCO and in the OEMP, so will be taking into account any views it receives as part of that in respect of the extent of any deviation, amongst other elements.

Question DCO.2.13

Article 7 – Limits of deviation

The response to ExQ1 DCO.1.27 [REP2-030] indicates that the location of the Green Bridges on the Rights of Way and Access Plans are “*illustrative*” as those plans do not account for the 3m centreline LoD. The Applicant’s DL4 written summary of oral submissions put at the DCO hearing on the 4 June 2019 [REP4-029] indicates that the position of the crossing of the Green Bridges over the A303 is shown by reference to the chainages on the Engineering Section Drawings (Plans and Profiles).

- i. For the avoidance of doubt, please indicate whether the documentation as submitted would allow any scope for changes to the points at which the Green Bridges cross the A303. How far, if at all, could their position be potentially moved along the line of the parent work?
- ii. Explain any implications that the LoD would have for the ultimate locations of the Green Bridges.

Highways England response

- i. **For the avoidance of doubt, please indicate whether the documentation as submitted would allow any scope for changes to the points at which the Green Bridges cross the A303. How far, if at all, could their position be potentially moved along the line of the parent work?**
 1. As noted in the question and in [REP4-029], the location of each crossing of the A303 by a Green Bridge is shown on the Engineering Section Drawings (Plan and Profiles) [APP-010] by reference to its chainage (see sheets 3, 4 and 5). The Engineering Section Drawings (Plan and Profiles) describe the key reference points from which the vertical limits of deviation for the Green Bridges are established by article 7(4). To fall within the vertical limit of deviation they must be located within the chainages indicated on the Engineering Section Drawings (Plan and Profiles). The Green Bridges therefore require to be provided at the chainages shown.
- ii. **Explain any implications that the LoD would have for the ultimate locations of the Green Bridges.**
 2. The parent works are permitted to deviate laterally from the centrelines by up to 3m. Where this is exercised the Green Bridges would necessarily adjust laterally to suit, but would remain within the chainage specified in the Engineering Section Drawings (Plan and Profile).

Question DCO.2.16

Article 11 – Temporary stopping up of streets

Please respond to the point made by Wiltshire Council in its Review of dDCO (Rev 2) submitted at DL4 [REP4-039] that highways cannot be temporarily stopped up and whether this has any implications for the drafting of the dDCO?

Highways England response

1. The point was initially made by Wiltshire Council in its response to the Examining Authority's first written question DCO.1.31, to which the Applicant responded at deadline 4 [REP4-036] at reference 6.2.4:

"The Applicant acknowledges that, in Highways Act 1980 terms, "stopping up" is understood to be a permanent extinguishment of a highway. However, the development consent order if made, would be made under the Planning Act 2008. The term "temporary stopping up" is used in article 11 of the Infrastructure Planning (Model Provisions) 2009 upon which article 11 of the draft development consent order is based. The term has been used in the majority of highways development consent orders, such that the Applicant considers its use to be widely accepted and understood in orders under the 2008 Act and sees no reason to depart from the established precedent in this case."

2. The Applicant considers there are no implications for the drafting of the DCO. The drafting is clear that any stopping up effected under this provision is temporary in nature and that the state of affairs that existed prior to its exercise would be restored on its cessation.
3. The Applicant notes that Wiltshire Council, in its Deadline 5 submission [REP5-009] at paragraph 2.4, indicates that it no longer has concerns with the use of the term.

Question DCO.2.17

Article 12 – Access to works

The response to ExA1 DCO.1.32 (ii) indicates that the exercise of this power would be subject to Requirement 4 which secures compliance with the OEMP and refers to MW-G28 as dealing with construction compounds generally (including access) [REP2-030].

- i. The OEMP MW-G28 deals with construction compounds generally [REP4-020]. Explain how it would satisfactorily cover or control the access to construction compounds?
- ii. Should further thought be given as to how access to construction compounds is considered by the OEMP?

Highways England response

1. Further to discussions with Wiltshire Council following the responses to the first written questions, the OEMP has been updated such that item MW-TRA4, which required a 'Site Access Plan' to be developed as part of the Traffic Management Plan required by Requirement 9 of the dDCO, has been further developed to enable sufficient controls on compound accesses.
2. As set out in MW-TRA4, this Site Access Plan will be developed in consultation with Wiltshire Council, identifying site access and egress routes and points that may be used by the main works contractor and the mechanisms for how they can be varied and the proposals and the process for the removal of such access and egress routes when no longer required for the scheme works.

Question DCO.2.19

Article 13 – Discharge of water

Please indicate whether the Environment Agency's proposed amendments to Article 13 in relation to groundwater have been received and considered? If so, please provide comments in relation thereto.

Highways England response

1. Highways England has considered the Environment Agency's proposed amendments to article 13, as set out in the EA's Deadline 4 submission [REP4-049]. The amendments sought are to article 13(5) so that provision would read as follows (proposed additions are underlined):

"(5) The undertaker must take such steps as are reasonably practicable to secure that any water discharged into a watercourse or public sewer or drain or to the ground under this article is as free as may be practicable from gravel, soil or other solid substance, oil or matter in suspension or dissolved pollutants."

2. As set out in its Response to Interested Parties' Deadline 4 and 5 Comments on the Draft DCO, submitted at Deadline 6, Highways England responded to this suggested drafting in its deadline 4 submission [REP4-036] at reference 12.2.2., which stated:

"The Applicant notes the Environment Agency's concerns which the Applicant considers to be unwarranted in the context of article 13.

The purpose and effect of article 13 is to establish a procedure whereby the Applicant can obtain the necessary proprietary right to discharge water, either to public sewers or drains, or watercourses. It does not authorise discharges to the ground. It imposes duties on the Applicant to obtain the consent of the appropriate owner before doing so (who may impose reasonable conditions) and to ensure that the water so discharged is visibly clear from "gravel, soil or other solid substance, oil or matter in suspension" to ensure that the Applicant is prevented from adversely affecting the functioning of the drainage system to which it connects.

However, the article is not concerned with pollution control, as is expressly acknowledged in paragraph (6), which makes clear that nothing in this article overrides the requirement to obtain an environmental permit.

Any discharge to a watercourse that constitutes a water discharge activity would be subject to the regulation of the Environment Agency under the Environmental Permitting (England and Wales) Regulations 2016. The Applicant further notes that the drafting of this article in the form contained in the draft development consent order is very well precedented, having been included in the majority of development consent orders made to date and has been subject to only modest changes (principally the change in

paragraph (6) to reflect changes in the regulation of the discharges of water and in paragraph 7(a) to reflect the change in name of the Homes and Community Agency).

As such, the Applicant considers that the change requested is unnecessary as it would duplicate regulation."

3. It should also be noted that item MW-WAT3 in the Outline Environmental Management Plan (a revised version of which has been submitted at Deadline 6) contains various controls and safeguards in respect of site drainage during construction.
4. The above response is also applicable to SWQ Fg.2.27.

Question DCO.22

Article 15 – Authority to survey and investigate the land

For the avoidance of doubt, please specify the relevant provisions in the OEMP [REP4-020] and DAMS [REP4-024] that would regulate any intrusive surveys that would be carried out.

Please confirm that such controls and the relevant dDCO Requirement securing those provisions would also apply to the carrying out of surveys on land outside the Order limits?

Highways England response

1. In respect of the DAMS [REP4-024], the measures that would apply to geotechnical and other intrusive surveys are set out in paragraphs 5.2.43 to paragraph 5.2.44 which confirm the application of the requirements of the DAMS in respect of such surveys. It also confirms that the requirements for any archaeological investigation carried out under article 15 would be contained within a SSWSI to be prepared in consultation with HMAG/WCAS. This was confirmed in the Applicant's written summary of submissions at the DCO ISH [REP4-029] under agenda Item 3.9. The updated DAMS submitted at Deadline 6 confirms that the SSWSI is required to be approved by Wiltshire Council (in consultation with Historic England, to the extent the works the subject of the approval would normally trigger the need for scheduled monument consent).
2. The Applicant confirms that the provisions of the OEMP apply to the carrying out of surveys and investigations carried out under this power. Indeed, the extensive obligations in the OEMP to carry out surveys are one of the main requirements for its inclusion in the draft DCO as set out in the Applicant's responses to question DCO.1.36 [REP2-030].
3. Of particular relevance to this article, but by no means exhaustively, are the measures contained in:
 - a. MW-CH8 in respect of a Ground Movement Monitoring Strategy which is to be prepared in consultation with the members of HMAG;
 - b. MW-WAT10 in respect of the Groundwater Management Plan to be developed in consultation with the Environment Agency and Wiltshire Council, MW-WAT11 in respect of the management of impact on abstraction boreholes; and
 - c. MW-NOI5 in respect of vibration monitoring which, if required, must be developed in consultation, and agreed, with Wiltshire together with requirements to consult occupiers.
4. Highways England confirms that surveys carried out outside the Order limits would also be subject to these controls as part of the authorised development under the Order.

Question DCO.2.27

Article 24 – Power to override easements and other rights

The response to ExQ1 DCO.1.45 expresses the view that sections 203 to 205 of the Housing and Planning Act 2016 would not supersede the effect of this Article [REP2-030].

- i. Is that correct or does section 203(4) not also have effect in respect of the use of land? If so, why would this not be sufficient for your purposes as it would allow for rights to be interfered with or overridden either when building or maintenance work is carried out or when the land is used for development authorised by the DCO.

Article 24(2)(b) extends this even further allowing the undertaker to interfere with or override rights when exercising any power authorised by the DCO.

- ii. What does the Applicant have in mind here that would justify this power?
- iii. What other powers in the dDCO would be used other than building, maintaining or using the land which would involve interference with or overriding other rights?

Highways England response

- i. **Is that correct or does section 203(4) not also have effect in respect of the use of land? If so, why would this not be sufficient for your purposes as it would allow for rights to be interfered with or overridden either when building or maintenance work is carried out or when the land is used for development authorised by the DCO.**
 1. Section 203(4) Housing and Planning Act 2016 will be of some limited assistance to the Applicant in the circumstances of this Scheme, but does not provide for all circumstances in which it would be necessary to override easements and other rights in order to safeguard the delivery of the Scheme.
 2. In short, section 203, both in terms of subsection (1) "building or maintenance work" and subsection (4) "use", is subject to the condition that it can only override rights or restrictions from the date the relevant body has acquired or appropriated the land (see sections 203(2)(b), 203(3)(d), 203(5)(b), 203(6)(d)).
 3. Setting aside whether the activity relates to "building or maintenance works" or "use", section 203 will not apply in any of the following circumstances provided for by the DCO:
 - a. land over which the Applicant seeks temporary possession only under article 29;
 - b. land over which the Applicant seeks only the acquisition of rights or the imposition of restrictive covenants (listed in Schedule 4 of the DCO);

- c. land over which the Applicant seeks compulsory acquisition, but the land has yet to vest in the undertaker, if for example, it was temporarily possessed in order to carry out the works prior to acquiring the land required;
 - d. land possessed temporarily for the purposes of maintenance under article 30; and
 - e. land that has not been acquired that is subject to other powers in the DCO (discussed further in (iii) below).
- ii. What does the Applicant have in mind here that would justify this power?**
- 4. The Applicant has in the mind the powers under the Order that are not covered by article 23 (private rights) and would not be covered by section 203 Housing and Planning Act 2017 (for the reasons set out in (i) above). These are set out in response to (iii) below.
- iii. What other powers in the dDCO would be used other than building, maintaining or using the land which would involve interference with or overriding other rights?**
- 5. As outlined in (i) above section 203(1) and (4) apply only in relation to land that has been acquired outright at the time the interest is to be overridden. It could only ever be effective in respect of the land shown pink on the land plans, and then, only after the land has been acquired.
 - 6. The Applicant has taken a proportionate approach to the level of interference to existing rights in the compulsory powers it seeks in the Order. Where it is required the Order provides for outright acquisition under article 19. In those circumstances article 23(1) provides for the extinguishment of existing rights. Where the acquisition of rights or imposition of restrictive covenants over land is sufficient, article 23(2) provides for the extinguishment of existing rights in so far as their continuance is inconsistent with the rights or restrictions under the Order. Where temporary possession is required, article 23(3) provides for the suspension of existing rights for the duration of the temporary possession.
 - 7. There is a further class of function which article 23 does not cater for. These are the functions under the following articles:
 - a. Article 14 (Authority to survey and investigate land);
 - b. Article 15 (Protective works to buildings); and
 - c. Article 17 (Felling and lopping of trees and hedgerows).
 - 8. In respect of article 14 (Authority to survey and investigate land), the surveying power allows the entry on land, but does not dispossess the owner or occupier of it. It is a lesser form of interference than temporary possession and it is necessary, to enable this, that private rights are overridden.

9. In respect of article 15 (Protective works to buildings), the whole rationale behind the function is to protect buildings *belonging to another*. It may be necessary to override private interests to carry out those protective works.
10. In respect of article 17 (Felling and lopping of trees), the function is required for the operational lifetime of the Scheme in order to prevent trees or shrubs from obstructing or interfering with the construction, maintenance or operation of the Scheme or from constituting a danger to persons using the Scheme. Its exercise may be required after the expiry of the temporary possession powers in articles 29 and 30 and, in such circumstances, it may be necessary to override private interests to protect the Scheme and those using it.
11. As outlined above and in its answer to DCO.1.45, then, the Applicant is clear that section 203 Housing and Planning Act 2016 alone is insufficient and the inclusion of article 24 in the draft DCO remains necessary.

Question DCO.2.28

Article 29 – Temporary use of land for constructing the development

The duration of the Temporary Possession is limited by reference to the completion of the works for which Temporary Possession is taken, plus one year to allow for restoration of the land. However, unless and until the works are completed the one-year restoration period does not begin meaning that the temporary use could potentially continue indefinitely.

Whilst it is stated that the compensation that would be due would provide an incentive to keep Temporary Possession to a minimum, is it reasonable for reliance to be placed upon the payment of compensation in this way or should an overall time limit for the exercise of powers of Temporary Possession be included within this Article?

Highways England response

1. The Applicant maintains that the approach in article 29 in respect of the duration of temporary possession, once land has been entered, is reasonable, necessary and proportionate.
2. The justification for the temporary possession power is that the land is needed for the construction of the Scheme and, without its use, the Scheme and the public benefits it offers, would not be able to be delivered. It is also justified in respect of other land where a need for a greater interference such as outright acquisition or the acquisition of rights, has been justified, as temporary possession would be a lesser interference and the power would allow a more proportionate exercise of those greater powers. In either case, the underlying driver is that the land is required to construct the Scheme.
3. The drafting in article 29 is carefully crafted to align the need for the temporary use of the land, with the duration of the temporary possession. So long as the land is needed for the construction of the Scheme, the Applicant is justified in taking temporary possession of the land. Once that need has been satisfied the Applicant is afforded a reasonable period to restore the land and return it, in accordance with article 29(3) and (4). When it no longer needs the land, the Applicant would not be justified to possess it. This is reflected in the drafting of article 29.
4. The Applicant is of the firm view that it would be unreasonable to impose a finite maximum duration of the period of temporary possession. A duration limit, by its nature, would give rise to a risk of land still being required for the construction of the Scheme beyond the duration limit, as a result of circumstances beyond Highways England's control. This would risk the delivery of the Scheme and its wider public benefits. To avoid this risk the duration would have to be set very conservatively, which calls into question whether the imposition of the limit would achieve its objective. The Applicant considers that its approach, of aligning the need for the land with the

duration of temporary possession, is reasonable, proportionate and necessary to secure the delivery of the public benefits of the Scheme.

5. The Applicant further notes that it is unaware of any development consent order where a maximum duration of temporary possession has been imposed. Although that measure is proposed in Part 2 of the Neighbourhood Planning Act 2017, as the Applicant has noted in its response to the Examining Authority's First Written Question DCO.1.18 and at the DCO ISH [REP4-029] (under agenda item 3.4), those provisions are not yet in force and there is no certainty as to when, or whether, they will come into force.

Question DCO.2.29

Article 31 – Statutory undertakers

Please identify the relevant Statutory Undertakers where Protective Provisions have not yet been agreed and provide an update on the progress of such negotiations?

Highways England response

1. Please see Highways England's response to CA.2.23 for an update on all negotiations relating to protective provisions.

Question DCO.2.30

Article 38 – Crown land

Please provide an update as regards obtaining the necessary consents under section 135(1) and 135(2) PA2008 from the Secretary of State for Defence and the Secretary of State for Digital, Culture, Media and Sport.

Highways England response

1. Please see the Applicant's response to the Examining Authority's Second Written Question CA.2.31.

Question DCO.2.31

Article 53 – Operational land for the purposes of the 1990 Act

- i. Please explain further why it is necessary to ensure that the Applicant enjoys the full range of permitted development afforded to it under the Town and Country Planning (General Permitted Development) Order 2015 and outline how it is envisaged that the exercise of permitted development rights would operate in practice?
- ii. Given the particular circumstances of this project and site location is there justification for the restriction of permitted development rights in this case?

Highways England response

- i. **Please explain further why it is necessary to ensure that the Applicant enjoys the full range of permitted development afforded to it under the Town and Country Planning (General Permitted Development) Order 2015 and outline how it is envisaged that the exercise of permitted development rights would operate in practice?**
 1. Highways England's existing permitted development rights have been conferred on it by the Secretary of State under the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the 2015 Order") to ensure that Highways England can operate its extensive highway network effectively and efficiently.
 2. The DCO would authorise the construction, maintenance and operation of the proposed scheme, but the powers conferred by the DCO do not extend to Highways England exercising its functions generally, whereas the permitted development rights do. There is a risk that if Highways England's permitted development rights do not apply in respect of the proposed scheme, the DCO's powers may not be wide enough in scope and there could be a regulatory 'gap' which would cause difficulties in the continuing operation of the proposed scheme in future.
 3. It would be curious if, just because the proposed scheme falls to be a nationally significant infrastructure project and therefore authorised by a DCO, that it should be treated differently to other road schemes in Highways England's road network terms of its powers in respect of the proposed scheme's operation.
 4. In practice, Highways England would likely use the powers of the DCO in the first instance, but in the circumstances raised above (i.e. if there was a 'gap' in the DCO) in respect of business as usual activities, Highways England would need to rely on its permitted development rights.
 5. It should be noted that under Part VA of the Highways Act 1980, Highways England is under a duty to carry out environmental impact assessments of certain works which it proposes to carry out under its general powers, prior

to carrying them out, including in relation to certain improvements to the highway. In addition, Highways England is under certain constitutional restrictions, as described further below. As such, the use of permitted development rights would not be unregulated.

ii. Given the particular circumstances of this project and site location is there justification for the restriction of permitted development rights in this case?

6. Highways England's view is that there is no justification to restrict the use of permitted development rights in respect of the proposed scheme. As set out above, these permitted development rights have been conferred on Highways England to enable it to operate its highway network effectively and efficiently. The proposed scheme would form part of this highway network and therefore is required to operate consistently with other parts of that network. The application of the permitted development rights in question is critical to that, to ensure Highways England can undertake its day to day operations. There are no geographic restrictions on where these permitted development rights apply (in contrast to other permitted development rights) clearly indicating that the Secretary of State did not consider it necessary for site-specific restrictions to apply in the case of Highways England's particular permitted development rights.
7. It should be noted that Highways England is under separate obligations under its constitutional framework to operate within certain parameters. For example, under its licence, under paragraph 4.2, it is required to:
 - "g. Minimise the environmental impacts of operating, maintaining and improving its network and seek to protect and enhance the quality of the surrounding environment;*
 - h. Conform to the principles of sustainable development."*
8. Clearly, this would involve, in respect of the proposed scheme, exercising any of its functions taking into account the nature of the surrounding environment, including the World Heritage Site, and ensuring that it is protected.
9. Further information on Highways England's constitutional framework, and how it is relevant to ensuring sufficient safeguards are in place in relation to the proposed scheme, is contained in Highways England's responses to SWQs DCO.2.44 and 47.
10. As such, Highways England does not consider it is necessary or justified for its permitted development rights to be restricted in the case of the proposed scheme.

Question DCO.2.32

Requirement 1 – Interpretation

- i. Please confirm that the following activities are both excluded from the definition of “*commence*” and do not fall within the definition of “*preliminary works*”, namely, ecological surveys, investigations for the purposes of assessing ground levels, investigations for the purposes of monitoring ground conditions and levels, receipt and erection of construction plant and equipment, and temporary display of site notices or advertisements.
- ii. Please explain the means whereby these activities would be controlled and regulated and how this would be secured by the DCO?
- iii. In relation to site clearance, which is part of the preliminary works, please respond to Wiltshire Council’s request that REAC table 3.2a of the OEMP [REP4-020] should include an action/ commitment for site drainage, similar to that which has been included in REAC table 3.2b for the main works. If that is not agreed, please explain why?

Highways England response

- i. **Please confirm that the following activities are both excluded from the definition of “*commence*” and do not fall within the definition of “*preliminary works*”, namely, ecological surveys, investigations for the purposes of assessing ground levels, investigations for the purposes of monitoring ground conditions and levels, receipt and erection of construction plant and equipment, and temporary display of site notices or advertisements.**
 1. Further to the latest version of the dDCO submitted at Deadline 4, the following items are included in the exclusions within the definition of commence and not in the definition of 'preliminary works': ecological surveys, investigations for the purpose of assessing and monitoring ground levels, investigations for the purposes of monitoring ground conditions, receipt and erection of construction plant and equipment, and temporary display of site notices or advertisements.
- ii. **Please explain the means whereby these activities would be controlled and regulated and how this would be secured by the DCO?**
 2. Noting also that the exclusions in the 'commence' definition are subject to the rest of the controls of the DCO outwith the requirements, the Applicant does not propose to make any further changes to these provisions as it is considered that the activities are de minimis and do not need to be further regulated. This is for the following reasons:

Activity	Explanation
ecological surveys	<p>Such activities are not intrusive or invasive and do not constitute 'development' which needs to be controlled.</p> <p>Controls for the protection of the species themselves exist pursuant to existing legislation and guidance (e.g. licensing method statements).</p>
investigations for the purpose of assessing and monitoring ground levels	<p>Such activity involves using GPS and laser equipment - there is no 'intrusion' so to speak. Access to land for such surveys would be subject to voluntary agreement or article 15 of the dDCO.</p>
investigations for the purposes of monitoring ground conditions	<p>The monitoring of ground conditions would occur after the initial assessment of them (which is controlled through the preliminary works OEMP). The monitoring itself would therefore not cause any likely significant effects that need to be controlled, and would otherwise fall to be controlled pursuant to other regulatory regimes such as the Water Resources Act 1991.</p>
receipt and erection of construction plant and equipment	<p>The Applicant notes again that the inclusion of this carve out is well preceded over time, having been included in recent DCOs for projects such as Millbrook Power Station and Tilbury, as well as older orders such as White Moss Landfill Extension and East Northants Resource Management Facility, where it was accepted by various Secretaries of State that these activities are not of such a nature as to need to be controlled.</p> <p>The activities are not development, constituting simply construction equipment arriving on site at the start of the project.</p>
temporary display of site notices or advertisements	<p>The Applicant notes that:</p> <ul style="list-style-type: none"> • the display of such notices would be a consequence of, for example, seeking to temporarily possess land pursuant to the DCO and so will need to be of sufficient standard to meet the requirements of the DCO; • such wording is well preceded, as noted in the FWQ response and at the DCO ISH item 3.3 [REP4-029]; • that building work notices benefit from 'deemed consent' under the Town and Country Planning (Control of Advertisements) Regulations (albeit with conditions) meaning there is already support for the fact that such notices are de minimis; and • notices attached to hoardings would not be used until hoardings are erected pursuant to the controls in the OEMP, so are already controlled (see item MW-G28 which refers to the approach

Activity	Explanation
	<p>to hoardings, including notices and signs, needing to form part of the CEMP).</p> <ul style="list-style-type: none"> To avoid any doubt on this point, the DCO has been amended at Deadline 6 to remove references to advertisements within the exclusions in the definition of 'commence'. <p>As such the Applicant considers that no other controls are required through the DCO.</p>

iii. In relation to site clearance, which is part of the preliminary works, please respond to Wiltshire Council's request that REAC table 3.2a of the OEMP [REP4-020] should include an action/ commitment for site drainage, similar to that which has been included in REAC table 3.2b for the main works. If that is not agreed, please explain why?

3. This change has been made to the OEMP at Deadline 6.

Question DCO.2.35

Requirement 3 (1) and (2) – Preparation of detailed design etc

Please explain further why it would not be appropriate for any other relevant stakeholders in addition to the planning authority to be consulted by the Secretary of State when he or she is considering whether to approve a departure from the plans specified in Requirement 3.

Highways England response

1. Given the scope of the provisions in question in paragraphs 3(1) and (2) of Schedule 2 to the draft DCO, Highways England does not consider the scope of any amendments sought by it under them would be of such a nature as to require extensive engagement and consultation (given it would have to be demonstrated that the amendments would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement).
2. However, that being said, consistent with DCO.2.12 and its thoughts on Article 7(6), Highways England does recognise the unique nature of this scheme and that, in certain, appropriate circumstances, a minor change may nevertheless be of potential significance to certain interested parties.
3. As such, the revised version of the draft DCO submitted at Deadline 6 has been amended such that the Secretary of State must consider this and consult both the planning authority and any other persons it considers appropriate, having regard to the proposed amendments in question. Highways England considers that this provides adequate scope for appropriate additional consultation by the Secretary of State.
4. It should also be noted that Wiltshire Council, as a consultee, will be able to seek views from persons it considers appropriate to inform its consultation response.

Question DCO.2.36

Requirement 3 (1) and (2) – Preparation of detailed design etc

The DL4 written summary of oral submissions put at the DCO hearing on 4 June 2019 [REP4-029] indicates that the updated OEMP includes further design commitments, design principles and a stakeholder consultation mechanism that has emerged from ongoing consultation with heritage stakeholders [REP4-020].

Please provide an update on those ongoing discussions with stakeholders in relation to such matters and indicate whether it is agreed that the dispute mechanism proposed in section 4 of the updated OEMP would be adequate.

Highways England response

1. Highways England has continued to engage with stakeholders (including heritage stakeholders) in respect of the OEMP and the matters discussed since the last draft submitted at deadline 4 are reflected in the revised OEMP submitted at Deadline 6, including a revised section 4.
2. In relation to the dispute resolution mechanism in section 4 of the OEMP, the Applicant considers that it remains appropriate. This is for the reasons set out in more detail in the responses to questions DE.2.5, DCO.2.44 and DCO.2.47.
3. Regard should also be had to the separate document submitted at Deadline 6 which sets out Highways England's written responses to the comments made on the OEMP at Deadline 4 and Deadline 5 by these parties - the updated OEMP reflects these responses.

Question DCO.2.38

Requirement 3 (1) and (2) – Preparation of detailed design etc

The DL4 written summary of oral submissions put at the DCO hearing on 4 June 2019 [REP4-029] confirms the Applicant's view that Requirement 3 should not include reference to the Environmental Masterplan.

- i. For the avoidance of doubt, please confirm the status of the Environmental Masterplan and its relationship with the Environmental Statement.
- ii. There seems to be an inconsistency in the Applicant's approach to the use of the terms "*indicative*" and "*compatible*" in its rejection of any specific reference to the Environmental Masterplan in this Requirement. Explain further why the inclusion of such a reference would unduly constrain the flexibility of the detailed design and of mitigation?
- iii. Given the particular circumstances and value of the WHS, is there not a need for the clarity and certainty in design terms that a specific design parameters document could provide and to which specific reference could made in this Requirement?

Highways England response

- i. **For the avoidance of doubt, please confirm the status of the Environmental Masterplan and its relationship with the Environmental Statement.**
 1. The Environmental Masterplan is included in, and forms part of, the Environmental Statement. It is included in Schedule 12 (Documents to be certified), through its inclusion in the Environmental Statement, and would be certified under article 56 (certification of plans, etc.) of the draft DCO.
 2. The role the Environmental Masterplan plays in the environmental assessment is set out in Chapter 2 of the Environmental Statement [APP-040] paragraphs 2.3.59 to 2.3.62. The mitigation set out in the ES is illustrated in the Environmental Masterplan and would be secured through:
 - a. The OEMP;
 - b. The other requirements; and
 - c. The scope of the development consent sought by the Applicant, including the parameters described in article 7 (limits of deviation).
- ii. **There seems to be an inconsistency in the Applicant's approach to the use of the terms "*indicative*" and "*compatible*" in its rejection of any specific reference to the Environmental Masterplan in this Requirement. Explain further why the inclusion of such a reference would unduly constrain the flexibility of the detailed design and of mitigation?**

3. The Applicant is not aware of any inconsistency in its use of the terms "indicative" and "compatible". While not expressed in the question the Applicant understands the thrust of the query relates to its responses to the Examining Authority's First Written Questions DCO.1.80 and DCO.1.84, in relation to the use of the term "compatible" in requirement 3 and on its concerns regarding the suggested inclusion of the Environmental Masterplan in requirement 3. The Applicant expanded on the use of the word "compatible" at the DCO ISH and in its post hearing note in its written summary [REP4-029], under agenda item 4.2(iv). The Applicant assumes that the reference to "indicative" is to its use in paragraph 2.3.59 of the Environmental Statement, but unfortunately it is not clear from the question.
4. In its written summary of oral submissions at the DCO ISH [REP4-029] (under agenda item 4.2(iv)) the Applicant set out the very limited degree of flexibility that the use of the word 'compatible' offers. Elsewhere, in its 'signposting' document [AS-009] (paragraph 3.2.2), and in response to questions DCO.1.1 and DCO.1.27 [REP2-030], and in its DCO ISH summary (under agenda item 3.3(ii)) the Applicant has explained the flexibility offered by the term illustrative (which the Applicant regards as synonymous with indicative). "Compatible" and "indicative/illustrative" have different meanings, as the Applicant has maintained throughout.
5. A requirement to design the Scheme in detail so as to be "compatible" with the Environmental Masterplan would therefore represent a severe constraint on the flexibility necessary to deliver the Scheme. The Applicant's concerns are so grave that it considers that to do so could render the Scheme undeliverable or, in the best case, would almost inevitably require the amendments to the Order, delaying the delivery of this Nationally Significant Infrastructure Project.
6. As noted in the Applicant's post hearing submission, *"The Oxford English Dictionary defines the term "compatible" as "able to exist....without...conflict" and "consistent or in keeping"*. The Environmental Masterplan is highly granular, showing the location of all elements of the Scheme with precision and includes the locations of aspects such as bunds, and planting and the levels of landscape contouring.
7. The level of granularity is such that the Environmental Masterplan could not be prepared in such a way as to include in it limits of deviation or other flexibility deliberately preserved in the description of the scheme being applied for. The Masterplan is like the General Arrangement Drawings; it shows one way in which the scheme could be built out within the parameters of the DCO application. This is why the Environmental Masterplan is referred to in the Applicant's responses as being "indicative" or "illustrative".
8. Take for example Figure 2.5C (which corresponds to Sheet 3 of the Works Plans [APP-008]). If there is a requirement to adjust the centreline 3m to the north it would have a knock-on effect to the elements shown on the Environmental Masterplan. The carriageway would be located on the strip of

land identified for species rich chalk grassland on the Environmental Masterplan. To the south of the adjusted alignment the Applicant would be prohibited from placing species-rich chalk grassland, as the Environmental Masterplan would require this land to be occupied by the carriageway. This would also preclude the Applicant from adjusting the line of the hedge, shown to the south of the carriageway, 3m north of the location shown, to fit. It would require the Applicant to acquire the land for the hedge when it may not have otherwise needed to do so, in the light of the detailed design for the Scheme.

9. The inflexibility of the Environmental Masterplan means that a requirement to design the Scheme to be compatible with it almost certainly would require the Applicant, at the detailed design stage, to apply to vary the Order in order to substitute the Environmental Masterplan with a new Environmental Masterplan reflecting the detailed design of the Scheme. This would significantly delay the implementation of the Scheme.
 10. At a more fundamental level, it would remove almost all of the flexibility built into the scheme description and therefore frustrate the very good reasons – and indeed requirements - for that flexibility in the delivery of a nationally significant infrastructure project, set out throughout the Applicant’s submissions to the examination, including the ‘signposting’ document [AS-009], its response to question DCO.1.81 and in its summary of oral submissions of the DCO ISH.
 11. In any event, a requirement to design the Scheme in detail to be "compatible" with the Environmental Masterplan is unnecessary because all mitigation relied upon in the Environmental Statement is secured through other mechanisms, chiefly the OEMP, but also the other pre-commencement requirements. This is set out in detail on an item by item basis in the Consolidated Environmental Mitigation Schedule (“CEMS”) [REP4-026].
- iii. Given the particular circumstances and value of the WHS, is there not a need for the clarity and certainty in design terms that a specific design parameters document could provide and to which specific reference could be made in this Requirement?**
12. The Applicant takes seriously the particular circumstances and value of the WHS and considers that an additional design parameters document secured in requirement 3 would be unnecessary.
 13. As set out in the ‘sign posting’ document [AS-009], the Applicant’s responses to the detailed first written questions in respect of the limits of deviation (DCO.1.21 to DCO.1.29) and the Applicant’s written summary of its DCO ISH submissions [REP4-029], the parameters of what the DCO would authorise are already clearly set out and secured in the draft DCO and its accompanying relevant documents. The approach taken to describing those parameters is well established on highways DCOs.

14. The description of what may be constructed is set out in detail in Schedule 1. The parameters of where the authorised development can be constructed have been carefully set out in article 7 (Limits of deviation) by reference to the authorised development described in Schedule 1 and by reference to the Works Plans [APP-008], the Engineering Sections Drawings (Plan and Profiles) and (Cross Sections) [APP-010] and [APP-011] and the Tunnels Limits of Deviation Plan [APP-019]. The limits of deviation in article 7 describe the degree of flexibility afforded to the Applicant for the linear works in terms of the lateral deviation from the centrelines, the deviation from the locations of the commencement/termination points of the numbered works and the vertical limits of deviation. These have all been carefully considered in the Environmental Statement as set out in Chapter 2 [APP-040].
15. Within the parameters described by the limits of deviation, the Applicant has made a series of design commitments in relation to specific aspects of the Scheme. These are recorded in the OEMP REAC tables, denoted by the "-D" suffix, and have been developed in consultation with key stakeholders prior to the application and are continuing to be developed through the examination. Compliance with these design commitments is secured through requirement 4 of the draft DCO.
16. In addition to these design commitments the Applicant has included section 4 of the OEMP that includes design principles, intended to guide the detailed design of the Scheme, backed up with a robust mechanism for stakeholder consultation on key aspects of detailed design. This enables the views of those stakeholders to be considered in the round in the development of the detailed design. Section 4 of the OEMP has been further updated for submission at Deadline 6 to include a wider design vision for the Scheme, intended to guide the detailed design further, producing a sensitive and imaginative design. Again, compliance with all of these measures is secured by requirement 4.
17. Other key mechanisms for settling the details of the design are set out in the requirements, most notably requirements 8 (landscaping) and 10 (drainage), which provide for the Secretary of State's approval, following consultation with the relevant bodies, of those details of the scheme. Both requirements make it clear that the details must be based on the mitigation set out in the Environmental Statement. Mitigation elements of the Scheme relied upon in the Environmental Statement are secured principally via the OEMP and the DCO Requirements as set out above, and evidenced in the CEMS.
18. In view of these matters, in the Applicant's view the inclusion in the Requirement of reference to a further document is unnecessary, since it would duplicate the well-established mechanisms of securing those parameters outlined above. Those mechanisms have been clearly explained throughout the Applicant's submissions to (and before) the examination.

Question DCO.2.41

Requirement 3 (1) and (2) – Preparation of detailed design etc

The response to ExQ1 DCO.1.81 (ii) recognises the need to give key stakeholders confidence that the detailed design of the scheme would be carried out appropriately [REP2-030].

Please provide an update as regards the discussion of an appropriate mechanism for achieving that with heritage stakeholders and whether any further changes to the OEMP are envisaged in that respect.

Highways England response

1. Further to the First Written Questions, section 4 was added to the OEMP, setting out design principles, and engagement commitments for detailed design, focussed on the heritage context of the Scheme and the need to give key stakeholders confidence that the detailed design of the scheme will be carried out appropriately. Similarly the list of specific design commitments contained in the OEMP was significantly expanded, giving stakeholders clear and specific details of the detailed design of key aspects of the scheme and therefore giving them confidence that the detailed design will be carried out appropriately.
2. In the most recent draft OEMP submitted at Deadline 6, section 4 has been further substantially extended. It includes a 'Design Vision' for the Scheme which builds on the Design and Access Statement and the design work undertaken to date. This vision has informed the Design Principles set out in that section 4 and will underpin the development of the detailed design and consultation with stakeholders moving forward. It is designed to give further confidence that the detailed design will be carried out appropriately, setting further overarching principles with which the detailed design contractor must abide. As before, the updated OEMP also contains additional commitments and design principles and adds to the list of key aspects of the Scheme upon which Highways England commits to consult heritage stakeholders.
3. The development of the OEMP has been and will continue to be discussed with stakeholders and Highways England anticipates that further refinements to the document will be made as those discussions progress to the close of examination.
4. Please see also the responses to question DCO 2.36 and De 2.2.

Question DCO.2.42

Requirement 3 (1) and (2) – Preparation of detailed design etc

The DL4 written summary of oral submissions put at the DCO hearing on 4 June 2019 [REP4-029] confirms the Applicant's view that Requirement 3 should require the detailed design to be carried out so that it is "*compatible*" with the listed plans rather than in "*accordance*" with them and suggests that to do otherwise would contradict the LoD.

- i. However, could this not be overcome by drafting the Requirement to include reference to the LoD?
- ii. If "*compatible*" is to be read as the Applicant suggests what is the objection to the use of the term "*accordance*" in this Requirement?

Highways England response

- i. **However, could this not be overcome by drafting the Requirement to include reference to the LoD?**
 1. The Applicant has given careful consideration to this question but remains of the view that the use of the term "compatible" is appropriate in this requirement. As noted in its written summary of oral submissions at the DCO ISH [REP4-029] the term "compatible" when tested does not offer an unacceptable degree of flexibility. Please see the explanation given at agenda item 4.2(iv) of [REP4-029].
 2. The Applicant further notes that the use of the term "compatible" is precedented, having been included in the M20 Junction 10a Development Consent Order 2017 and the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016. The Applicant further notes that there are no precedents in highways development consent orders for the inclusion of drafting in this requirement that accounts for the limits of deviation.
- ii. **If "*compatible*" is to be read as the Applicant suggests what is the objection to the use of the term "*accordance*" in this Requirement?**
 3. In the Applicant's view "accordance" would convey a higher degree of alignment between the detailed design and the drawings and plans referred to in requirement 3 than is appropriate at this stage of the Scheme's design. The OED defines "accordance" as including "agreement, conformity, harmony" and in this context is likely to be construed as requiring the detailed design to reflect precisely what is shown in the corresponding plans and drawings, without acknowledging the degree of flexibility afforded by the limits of deviation or the necessary flexibility the Applicant requires to deliver the Scheme. The Applicant is of the view that "compatible" with its definition in the OED and as "able to... exist without... conflict" or "consistent or in keeping" would provide the limited degree of flexibility necessitated by those needs. Indeed it is clear that 'compatible' contains a limited element of

flexibility that 'accordance' does not, from the various questions raised on the point by the ExA.

Question DCO.2.44

Requirement 4 – Outline Environmental Management Plan

The DL4 written summary of oral submissions put at the DCO hearing on 4 June 2019 [REP4-029], in relation to the CEMPs, points to the fact that each CEMP would require the approval of the Authority, in consultation with relevant stakeholders and that measure MW-G6 of the OEMP requires consultation if a CEMP is being materially revised.

How would that provide sufficient safeguards given that the Authority is still ultimately the approving body?

Highways England response

1. The Authority is defined in the OEMP as Highways England, which will be the approving body in a number of instances in respect of obligations contained therein.
2. It is important to note, in the first instance, that Highways England (as the Authority) is required to consult with a number of bodies in advance of various approvals. The concept of 'consultation' is not a unique or novel concept. Consultation has been defined by the courts on numerous occasions, and Highways England would clearly have regard to the relevant principles set out in that case law - principally, that it should conscientiously have regard to any responses that it receives in any consultation (see Highways England's response to SWQ DCO.2.63 which comments more on the relevant consultation principles).
3. As such, in the context of the relevant obligations in the Outline Environmental Management Plan ("OEMP"), Highways England must take into account comments received from consultees when finalising the details in question where consultation is required - it cannot act in isolation. Indeed, this is further buttressed by the provisions in the OEMP that require the submission by the contractor of a consultation report along with the management plan for which approval is sought from the Authority, to provide appropriate information on the consultation undertaken in the preparation of the plan in question (see, for example, items MW-G5 and MW-G7). This report needs to include reasons where consultation responses are not reflected in the details submitted for approval.
4. It should also be noted that Highways England is not a 'run of the mill' private sector developer. By virtue of the provisions of the Infrastructure Act 2015 (the "2015 Act"), it is, by its nature, limited in its actions by the Secretary of State and under various statutory duties which are of relevance in the present context.
5. Highways England is a company which is limited by shares and wholly owned by the Secretary of State (s.1 of the 2015 Act) and therefore funded by the Government. Under section 5 of the 2015 Act, Highways England is

under a statutory duty to have regard to the effect of the exercise of its functions on, amongst other things, the environment.

6. In addition, under section 6 of the 2015 Act, the Secretary of State may give Highways England guidance, from time to time, as to the manner in which it should exercise its functions. Highways England's Licence¹ constitutes such guidance, as acknowledged in paragraphs 2.1 and 3.1 of the Licence.
7. Paragraph 4.2(g) of the Licence states that Highways England must "*minimise the environmental impacts of operating, maintaining and improving its network and seek to protect and enhance the quality of the surrounding environment*".
8. Paragraph 5.23 of the Licence, which relates to Highways England's environmental objectives and duties which are binding, adds more detail. This states:

"In complying with 4.2(g) and its general duty under section 5(2) of the Infrastructure Act 2015 to have regard to the environment, the Licence holder should:

- a. Ensure that protecting and enhancing the environment is embedded into its business decision-making processes and is considered at all levels of operations;*
- b. Ensure the best practicable environmental outcomes across its activities, while working in the context of sustainable development and delivering value for money;*
- c. Consider the cumulative environmental impact of its activities across its network and identify holistic approaches to mitigate such impacts and improve environmental performance;*
- d. Where appropriate, work with others to develop solutions that can provide increased environmental benefits over those that the Licence holder can achieve alone, where this delivers value for money;*
- e. Calculate and consider the carbon impact of road projects and factor carbon into design decisions, and seek to minimise carbon emissions and other greenhouse gases from its operations;*
- f. Adapt its network to operate in a changing climate, including assessing, managing and mitigating the potential risks posed by climate change to the operation, maintenance and improvement of the network;*
- g. Develop approaches to the construction, maintenance and operation of the Licence holder's network that are consistent with the government's plans for a low carbon future;*

¹ Published April 2015

h. Take opportunities to influence road users to reduce the greenhouse gas emissions from their journey choices."

9. As a Government-owned statutory body, Highways England will always seek to operate in a compliant manner. In the event that it did not, however, non-compliance with the Licence is not without consequences. It could result in action being taken by the Office of Rail and Road under section 11 of the 2015 Act, including the imposition of fines.
10. It is clear then, that Highways England must have regard to numerous environmental objectives as a result of the provisions of the Licence in undertaking its functions. These will be taken into account in exercising any approval role in respect of the obligations under the OEMP.
11. In addition, Highways England has an internal assurance structure set up to ensure that there is sufficient oversight of the work that project teams, and appointed contractors, are undertaking. The Safety, Engineering and Standards ("SES") team sits separately from project teams, and ensures Highways England's standards are applied to its projects. SES would independently review any submissions for approval under the OEMP and provide advice prior to any formal approvals. Highways England has operated this structure for a number of years in respect of different projects. In addition, the need for fairness and transparency means that Highways England, acting as the Authority, should act in a transparent manner. The concept of the consultation reports, as described above, aids this.
12. Parallels can therefore be drawn between the situation proposed for this scheme and that deployed by local authorities where they are both developer and regulatory body – there would be a clear separation of functions between the project team, and the team who would be responsible for approving the relevant obligations in the OEMP.
13. Indeed, examples of local authorities being both developer and 'approver' can be seen in DCOs that have been made by the Secretary of State, illustrating his acceptance of such structures. See, for example the Cornwall Council (A30 Temple to Higher Carblake Improvement) Order 2015, the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013 and Norfolk County Council (Norwich Northern Distributor Road (A1067 to A47(T))) Order 2015 – there is therefore precedent for the arrangement proposed (in relation to, for example, the sign off of the CEMPs on those schemes).
14. It should also be remembered that Highways England has unsurpassed expertise when it comes to the strategic road network, of which the proposed scheme would form part, given its role as the appointed highway authority for them. For example, it is responsible for the Design Manual for Roads and Bridges, which contains the current standards, advice notes and other documents relating to the design, assessment and operation of trunk roads, including motorways. Highways England is therefore uniquely placed to have

the requisite knowledge and experience to approve the relevant measures in the OEMP as it is the acknowledged authority for all matters relating to the strategic road network.

15. In summary, then, Highways England's position is that whilst it has an ultimate approval role in respect of various 'plans' under the OEMP, it will need to conscientiously consider any plans submitted by the contractor and (a) take into account any consultation responses received by third parties; and (b) comply with the various statutory duties and guidance it is subject to, bearing in mind its position as a strategic highways company under the 2015 Act. As such, it cannot act simply in its own interests, notwithstanding it is the approval body in respect of various matters under the OEMP - it will be acting as a suitable regulatory body in respect of the chosen contractor. As such, Highways England considers that, notwithstanding its position as ultimate approver of certain plans under the OEMP, sufficient safeguards are in place.

Question DCO.2.47

Requirement 4 – Outline Environmental Management Plan

The response to ExQ1 DCO.1.86 indicates that the relevant contractor would be the author of the CEMP and appropriate assurance of scrutiny would be provided by the Requirement in the OEMP for the contractor to consult with Wiltshire Council and the Environment Agency in its development of the CEMP before approval by the Applicant [REP2-030]. Further details are provided in the DL4 written summary of oral submissions put at the DCO hearing on 4 June 2019 [REP4-029]. Nonetheless, the CEMP would still be drafted by a contractor in a contractual relationship with the ultimate approver of that document.

- i. How would that provide an appropriate level of independent scrutiny of the CEMP?
- ii. Please provide other examples in addition to the A14 DCO to support the view that it is well-established for applicants that carry out public functions to have an approval role on CEMPs or Codes of Construction Practice on such schemes.
- iii. Please provide evidence to support the view that the discharge of pre-commencement Requirements by Wiltshire Council, as opposed to the Authority, would cause undue delay?
- iv. Does the Wiltshire Council not also have the expertise, experience and resources to carry out the approval function?
- v. Please explain further with reference to statute and case law, as appropriate, the Applicant's duty to act reasonably in this respect and the scope for supervision by the court.

Highways England response

- i. **How would that provide an appropriate level of independent scrutiny of the CEMP?**
 1. Please see Highways England's response to the ExA's SWQ DCO.2.44 for detailed consideration of the appropriate safeguards that would be in place around approval of the CEMP and its management plans.
 2. The draft OEMP now requires wider consultation on the CEMP than just with Wiltshire Council and the Environment Agency. See for instance items PW-G1, MW-G5 and MW-G7 of the draft OEMP submitted at Deadline 6.
 3. The term 'consultation' has a well known, established, meaning well defined by the Courts. Highways England as approver and, indeed, the contractor as producer of plans and documents, could not simply disregard any consultee responses received in respect of the CEMP or any other management plan. Instead, such responses would need to be conscientiously considered when finalising the relevant details. Indeed, this is demonstrated by the provisions in the OEMP that require the submission by the contractor of a consultation

report along with the management plan for which approval is sought from the Authority, to provide appropriate information on the consultation undertaken in the preparation of the plan in question (see, for example, items MW-G5 and MW-G7). This report needs to include reasons where consultation responses are not reflected in the details submitted for approval.

4. In addition, when approving any details, Highways England as "the Authority" would be required to have regard to its statutory duties as a strategic highways company under the Infrastructure Act 2015 and comply with the conditions of its licence, which contain specific provision for environmental protection (considered in detail in DCO.2.44).
 5. As set out in more detail in DCO.2.44, there would be independent advice provided within Highways England in respect of any submissions submitted for approval by 'the Authority',;
 6. Lastly, Highways England, as a responsible Government-owned strategic highways company and bearing in mind its statutory duties summarised above, will include certain contractual obligations and duties in the contract entered into between it and any contractor appointed to ensure suitable and appropriate standards are maintained.
- ii. Please provide other examples in addition to the A14 DCO to support the view that it is well-established for applicants that carry out public functions to have an approval role on CEMPs or Codes of Construction Practice on such schemes.**
7. A number of non-Highways England DCOs have been made which provide for applicants that carry out public functions to have an approval role in respect of various key matters (including CEMPs). This includes Cornwall Council in respect of the Cornwall Council (A30 Temple to Higher Carblake Improvement) Order 2015 (including the CEMP in that instance), Luton Borough Council in respect of the M1 Junction 10a (Grade Separation) Order 2013 and Norfolk County Council in respect of the Norfolk County Council (Norwich Northern Distributor Road (A1067 to A47(T))) Order 2015.
- iii. Please provide evidence to support the view that the discharge of pre-commencement Requirements by Wiltshire Council, as opposed to the Authority, would cause undue delay?**
- iv. Does the Wiltshire Council not also have the expertise, experience and resources to carry out the approval function?**
8. In response to points iii and iv: Whilst it is acknowledged that Wiltshire Council does have significant expertise in respect of its various statutory functions, Highways England wishes to point out that the nature of the scheme in question is unusual - it is classified as a nationally significant infrastructure project ("NSIP") under the Planning Act 2008. Such a scheme has not come forward within Wiltshire Council's area previously and NSIPs do present unique challenges to local planning authorities in respect of scale in particular. Fundamentally, limited parallels can be drawn between NSIPs

and applications for planning permission under the Town and Country Planning Act 1990.

9. For example, the proposed scheme is a complex project with a myriad of separate but inter-related issues needing to be considered. For example, should Wiltshire Council be the discharging authority, there are numerous management plans that would need to be considered in detail (to discharge Wiltshire Council's duty in that scenario), consulted upon and approved. A number of these would go to issues that would be novel or outwith Wiltshire Council's day to day expertise. This would quickly swallow up significant, already limited, resource within the Council. It is at this juncture that delays could occur. Highways England, by contrast, is set up and resourced to deal with the complexities of delivering major infrastructure projects, given that that is one of its core functions.
10. Highways England therefore considers that the most efficient mechanism for involving local planning authorities in respect of NSIPs is through consultation and on-going engagement, rather than those authorities having an ultimate approval role in respect of key matters. Highways England values Wiltshire Council's input, but having an ultimate approval role in respect of such matters would be burdensome on Wiltshire Council (particularly bearing in mind the scale of the scheme in question) and could therefore result in delays given the nature of the matters requiring consideration.
11. In addition, Highways England is the appointed strategic highways company under the Infrastructure Act 2015. As described in the response to the ExA's SWQ DCO.2.44, it has particular expertise in respect of strategic highways which needs to be taken into account – fundamentally, it knows what needs to be implemented to ensure such highways are constructed, and operate, efficiently, effectively and safely. Whilst Wiltshire Council is the local highway authority, it does not have expertise or experience in designing, constructing and operating the strategic road network, nor is it necessarily resourced to deal with the long list of required approvals mentioned above. By their nature, strategic roads throw up issues of a different scale and nature, particularly relating to standards and construction and operational requirements and realities. Indeed, the works will be interacting with one of Highways England's existing assets – the A303 - which it clearly has knowledge of operating and managing.
12. Finally, it should be noted that it is Highways England's understanding that Wiltshire Council is not proposing they should have an ultimate approval role. Rather, Wiltshire Council is proposing that the Secretary of State should have a wider approval role.

v. Please explain further with reference to statute and case law, as appropriate, the Applicant's duty to act reasonably in this respect and the scope for supervision by the court.

13. As set out in Highways England's response to the ExA's SWQ DCO.2.44, Highways England is the appointed strategic highways company under the Infrastructure Act 2015 (see ss 5 and 6). By virtue of the Licence granted by the Secretary of State, Highways England is bound by certain obligations in respect of its functions. Fundamentally, it needs to act according to certain standards which would be encompassed in respect of any approval role, or otherwise, it has in respect of developing the proposed scheme.
14. In addition, certain fundamental concepts (such as 'consultation') are well defined in case law (explored in more detail in Highways England's response to SWQ DCO.2.63) and need to be borne in mind by Highways England when exercising its functions and roles under the DCO and OEMP.
15. In addition, Highways England would be, as a company wholly owned by the Secretary of State, subject to general public law principles, and statutory duties (e.g. under the Highways Act 1980). As such, it is not equivalent to a private sector developer - instead, it needs to act in accordance with its statutory duties which would be entirely within the purview of the courts to regulate, as required, by way of judicial review. It is through this mechanism that certainty can be provided that Highways England's can be held accountable for its conduct – specifically, that it has acted rationally and properly in exercising its public functions. Highways England would be held to the same standards as the Secretary of State (and indeed Wiltshire Council) in this regard.
16. Finally, it should be noted that if Highways England does not act in accordance with the DCO and OEMP, it would be committing an offence under section 161 of the Planning Act 2008.

Question DCO.2.49

Requirement 4 – Outline Environmental Management Plan

The response to ExQ1 DCO.1.93 rejects the suggestion that any of the commitments in the OEMP, Table 3.2b DCH1-DCH13 such as the provision of visual screening earth bunds (D-CH1) and those actions relating to lighting (DCH8-12) should include provision for consultation and/ or be the subject of specific Requirements in the dDCO [REP2-030].

Given that these represent key aspects of detailed design please indicate whether the Applicant's position in relation to consultation on these matters has changed during the course of the examination and, if not, why not?

Highways England response

1. Since the responses to the First Written Questions, as flagged in its responses to First Written Questions, the Applicant developed part 4 of the OEMP, to commit to consultation on key aspects of the detailed design of the scheme. In addition, the draft DCO Requirements and the OEMP are peppered with obligations to consult in the discharge of requirements and the preparation of OEMP subsidiary management plans. The Applicant's fulfilment of those obligations is made transparent by the obligations in the DCO and the OEMP to report on the consultation done, explaining why any consultees' comments are not reflected. In general, then, the Applicant embraces, not rejects, consultation on the scheme. Consultation has been at the heart of the development of the scheme to date and will continue to be central to its further design.
2. Turning to the specific examples, in respect of lighting, this is provided for specifically in respect of the Longbarrow and Countess junctions, and would form part of the detail of the tunnel service buildings and portal structures which are also provided to be consulted upon within section 4.
3. In respect of bunds, these will form a key part of the landscaping scheme required to be based on the Environmental Statement consulted upon with Wiltshire Council and, where specified, Historic England, and approved by the Secretary of State under Requirement 8. They will also be informed by the Design Vision and the provisions of the Design Principles in table 4.1 of the OEMP which discusses the need for external scheme components to have a palette in keeping with the surrounding landscape and to echo local materials.
4. The Applicant is therefore committed to consultation on the Scheme going forward. The design commitments contained in the OEMP come out of that ongoing consultation with stakeholders. As a general rule, though, those design commitments are intended to be specific commitments, such that there is little left to consult on and, pursuant to requirement 4 of the dDCO; they are definitive in terms of what the Applicant needs to deliver.

Question DCO.2.50

Requirement 4 – Outline Environmental Management Plan

There has been concern expressed by various parties as regards the lack of control over the design of lighting at the tunnel portals.

Does the updated OEMP provide sufficient controls in that respect and/ or should the approval of the design of the lighting scheme specifically be the subject of a dDCO Requirement?

Highways England response

1. Tunnel portal lighting is controlled by the following items in the OEMP:
 - D-CH9: Tunnel portal lighting will be designed to minimise light spill outside of the portals' footprint.
 - D-CH10 to D-CH12 control lighting provisions, with D-CH11 in particular requiring no road lighting of the Scheme during operation except under Green Bridge Four and Countess Roundabout.
 - D-CH20: There will be no external lighting on the cutting retaining walls, or the external facades of the tunnel control buildings and tunnel portals within the WHS.
 - Para 4.4.3: Consultation with the SDCG on portal structures.
2. There is therefore sufficient control of lighting at the tunnel portals and more generally, secured by Requirement 4. No further requirement is justified or necessary.
3. Please also see our response to DCO.2.65 in respect of whether highway lighting ought to be subject to a requirement.

Question DCO.2.54

Requirement 5

Please consider whether this Requirement should be amended as sought by Wiltshire Council in its DL4 Review of the dDCO (Rev 2) [REP4-039]?

Highways England response

1. The amendments to requirement 5 suggested by Wiltshire Council in its Review of the dDCO (Rev2) would read as follows:

"Archaeology

(1) The authorised development must be carried out in accordance with the approved Detailed Archaeological Mitigation Strategy (DAMS) and Overarching Written Scheme of Investigation (OWSI).

(2) No development shall commence (including preliminary works) on each scheme area until:

a. A site specific written scheme of investigation (SSWSI) has been submitted to and approved by the Local Planning Authority;

b. The approved programme of on-site archaeological work has been carried out in accordance with the approved details;

c. the approved programmes of off-site work such as the analysis, publishing of the results and delivery of outreach programme have commenced within the timescales set out in the DAMS; and

d. suitable resources for the provisions for long term storage of the archaeological archive has been agreed with the Local Planning Authority."

2. The Applicant notes that there is no difference of substance between the Applicant's draft of paragraph (1) and Wiltshire Council's. There is no need to define "DAMS" or refer to the Overarching Written Scheme of Investigation as "detailed archaeological mitigation strategy" is defined in paragraph (1) of Schedule 2 and that definition includes the overarching written scheme of investigation, heritage management plan, site specific written schemes of investigation and method statements.
3. The second paragraph would prohibit development until such time as each of the matters in sub-paragraphs a to d are satisfied. Setting aside minor drafting points, the Applicant's in-principle objection to the drafting is that, with one exception, the matters listed in paragraphs a to d are already catered for in the DAMS, compliance with which is secured in paragraph (1). The exception is for the approval of the site-specific written schemes of investigation ("SSWSI") to fall to Wiltshire Council and the requirement to

"agree" suitable resources for the provision of long term storage of the archaeological archive. These points are addressed further below.

4. Turning to each of the sub-paragraphs; the requirement for SSWSI's to be completed prior to the commencement of the relevant preliminary or main works is set out in paragraph 6.1.3 of the updated draft DAMS submitted at Deadline 6, which requires the SSWSI's to be prepared, consulted on and approved prior to those works commencing. The DAMS submitted at Deadline 6 reflects that SSWSI's are to be consulted upon with HMAG (within the WHS) and WCAS (outside the WHS), then ultimately approved by Wiltshire Council, in consultation with Historic England (to the extent the subject of the approval would ordinarily trigger the need for scheduled monument consent). Further detail is provided in this respect in response to written question CH.2.1.
5. Sub-paragraph b. would require all of the activities set out in the relevant SSWSI to be completed prior to the commencement of works. The DAMS, at section 8.4, already provides for a process for confirmation of the satisfactory completion of archaeological work at sites. It provides for the archaeological contractor to submit a completion statement to the Technical Partner's Archaeologist for approval in consultation with HMAG.
6. The reference in sub-paragraph c. to "off-site works" is understood to refer to post-excavation works relating to the Post-Excavation Assessment Report (PEAR) set out in section 9 of the DAMS. The DAMS already makes provision for post excavation assessment. It requires, following the completion of fieldwork, the production of an interim statement to provide a basic account of the results of the investigations. This interim report is also required to set the timescales for the production of the PEAR (see paragraph 9.1.2). The Applicant considers this approach to be sensible as at this stage it would be imprudent to fix a timeline for the production of the PEAR; clearly the time required will reflect the nature of the investigations carried out and the significance of its findings. It does not follow that that work will or should be started before works commence on the relevant investigated and closed up scheme area, therefore that pre-commencement element of paragraph (c) is not justified. The outreach programme (referred to in the DAMS as the Public Archaeology and Community Engagement Strategy ('**PACE**')) and its resourcing referred to in paragraph c. is secured through Appendix E of the DAMs [REP4-025]. Paragraph E.14.6.1 sets out the parties to be involved in the development of the PACE programme (including Wiltshire Council), confirming that it "*will be developed in close consultation with HMAG and ASHRG, and the Stonehenge and Avebury World Heritage Site Steering Committees and WHS Partnership Panel. Other potential consultees may include representatives of museums, Wiltshire Council Arts and Community Services, community networks, civic fora and local archaeology and history groups*". Paragraph E.14.6.2 is clear that "*The PACE strategy, programme and resourcing will be required to be in place at the beginning of the PW stage.*"

7. Sub-paragraph d would require Wiltshire Council's agreement to the provision of long term storage of the archaeological archive. Again, the DAMS makes provision for this, in section 10 of that document. Paragraph 10.1.1 is clear that "*The Archaeological Contractor will be responsible for the care of the site archive (records and finds) in their possession and should ensure that adequate resources are in place prior to the start of fieldwork, including the materials necessary for long-term storage and access to an archaeological conservator.*" Section 10 also confirms "*Any charges levied by the Museum for the long-term storage of the archive will be met by the project*". Section 10 goes on to explain that agreement in principle has been reached with Salisbury Museum to accept the documentary, digital and photographic archive for long term storage. The Applicant takes the view that the requirement to agree with Wiltshire Council suitable resources for long term storage of the archive is unnecessary. The Applicant has clearly committed to meeting these costs and the quantum of those costs is a matter between the Applicant and the conservator.
8. On the basis set out above, the Applicant remains of the view that the substance of the amendments sought by Wiltshire Council are unnecessary as they are already provided for in the DAMS and are secured by Requirement 5 in the draft DCO.

Question DCO.2.56

Requirement 7 – Contaminated land

- i. The Applicant notes that any timeline for the carrying out of remediation would be set out in the “*programme*” that is required to be submitted for approval. For the avoidance of doubt, should the Requirement be drafted to ensure that this is made explicit on its face?
- ii. Although Requirement 7(3) makes provision for the submission of a written scheme and programme for remedial measures there is no timeline within which the actual submission to the Secretary of State must take place. Part 2 Schedule 2 only sets a timeline post-submission of any application for approval. Please consider whether the Requirement needs amendment in this respect?
- iii. Requirement 7(3) leaves it to the undertaker to determine whether remediation of contaminated land is necessary. Should this decision be made in association with the Environment Agency and the planning authority?

Highways England response

- i. **The Applicant notes that any timeline for the carrying out of remediation would be set out in the “*programme*” that is required to be submitted for approval. For the avoidance of doubt, should the Requirement be drafted to ensure that this is made explicit on its face?**
 1. In the Applicant’s view, it already is explicit. The Requirement requires at sub-paragraph (3) a written scheme and programme, for the remedial measures to be taken to render the land fit for its intended purpose, to be submitted for approval. That is the same as saying that a timeline for the carrying out of remediation must be submitted for approval. Indeed it is arguably more prescriptive in that it is clear that the measures must render the land fit for its intended purpose.
 2. The Applicant has noted that paragraph (4) refers only to compliance with the approved “scheme”. This is an oversight that has been corrected in revision 4 of the draft DCO to require compliance with approved the scheme and programme.
- ii. **Although Requirement 7(3) makes provision for the submission of a written scheme and programme for remedial measures there is no timeline within which the actual submission to the Secretary of State must take place. Part 2 Schedule 2 only sets a timeline post-submission of any application for approval. Please consider whether the Requirement needs amendment in this respect?**
 3. The Applicant has amended requirement 7(3) to make it clear that the written scheme and programme for remedial measures must be submitted as soon as is reasonably practicable following the determination that remedial measures are necessary.

- iii. **Requirement 7(3) leaves it to the undertaker to determine whether remediation of contaminated land is necessary. Should this decision be made in association with the Environment Agency and the planning authority?**
4. Requirement 7(1) obliges the Applicant to report contamination to the Environment Agency and the planning authority and then complete a risk assessment in consultation with them. Like any contaminated land assessment, that risk assessment will involve an assessment of whether remediation is necessary. Therefore there is already provision for the decision to be made in association with both those bodies.
 5. Regarding the ultimate decision on whether remediation is necessary, the Applicant maintains that it is appropriate for it, as the body with overall responsibility under the Order for delivering the Scheme, to make the determination as to the necessity of remediation of unexpected contaminated land. This justification is borne out by precedent e.g. the A19/A184 Testo's Junction Alteration Development Consent Order 2018, the M20 Junction 10a Development Consent Order 2017, the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and others besides. As explained previously, the Applicant would have to make that assessment with due regard to its legal duties not to cause or permit pollution under environmental legislation. Both Wiltshire Council and Environment Agency would be consulted on the preparation of the risk assessment required by paragraph (1) and would have copies of the final risk assessment as set out in paragraph (2) and so would participate in, and be fully apprised of, the Applicant's assessment of the risks. The Applicant would have to have due regard to their representations in order to satisfy its obligation to consult them. The nature of the established legal duties in respect of consultation are summarised in response to question DCO.2.63.
 6. Should Wiltshire Council or the Environment Agency disagree with the Applicant's assessment, each has powers under Part 2A Environmental Protection Act 1990 and other environmental legislation to take enforcement action to require the Applicant to take appropriate steps.
 7. The net effect of this Requirement is therefore full engagement with the Environment Agency and the local planning authority, production of documentation justifying decision-making in consultation with them, and following that detailed consultation, having satisfied its obligation to take their views into account, a decision on necessity of remediation taken by the Applicant, which in the highly unlikely event of the 'wrong' decision being made, could be vetoed by exercise of the powers of the EA and Wiltshire Council under the background environmental legislation. All of these things mean that it is highly unlikely that steps that have not been approved by the EA and WC will not be taken. As with many other standard NSIP requirements, then, this provision ensures the efficient and effective delivery of the scheme by leaving the final decision with the Applicant, but only within

a detailed framework of protections to ensure that the right decision will be made.

Question DCO.2.58

Requirement 8 – Landscaping

Please consider whether this Requirement should be amended as sought by Wiltshire Council in its DL4 Review of the dDCO (Rev 2) [REP4-039], including reference to an implementation programme or programmes for all landscaping works and a programme for maintenance of the scheme. If this revised wording is not agreed, please provide reasons for the rejection of this proposed amendment.

Highways England response

1. Highways England has considered Wiltshire Council's comments, some of which were raised at the DCO issue specific hearing and responded to by Highways England in its summary of oral submissions made at that hearing [REP4-029].
2. At Deadline 4, Highways England amended Requirement 8 in the draft DCO [REP4-018] to take into account these comments, where a change was considered appropriate – in particular paragraph 3(g) has been added to provide that a scheme submitted for approval needs to include an implementation timetable (which must be adhered to, by virtue of Requirement 8(4), as it would form part of the approved scheme – as such Wiltshire Council's proposed change to Requirement 8(3) is not required).
3. In respect of Wiltshire Council's further comments, Highways England has set out its response to each in turn below - as an overarching point, it should be noted that the terms of Requirement 8(2) are intended to capture high level concepts which need to be captured within a submitted landscaping scheme, and not detailed provisions – that is for the scheme itself:
 - a. Highways England has retained the reference to 'based on' in Requirement 8(2) as opposed to 'in accordance with'. The term 'based on' allows an appropriate level of flexibility for detailed design, which will itself be subject to careful scrutiny by the consultees and ultimately the Secretary of State.
 - b. Highways England does not consider there to be a need for the planning authority to opine on whether a tree or shrub is dead, seriously diseased or seriously damaged given (i) the fact that there is very limited scope for argument and interpretation of those terms and (ii) the landscaping obligations contained in the Outline Environmental Management Plan, which would provide sufficient controls. These would be through measures such as the development of the Landscape and Ecology Management Plan (under item MW-LAN1) which must be developed in accordance with industry good practice and then be one of the components which forms the basis for the Handover Environmental Management Plan (under item MW-G11). In

addition, item MW-LAN4 contains obligations in respect of the maintenance of planting, including the failure of such planting. In any event, Highways England would, in the ordinary course of business, take into account any comments received from the planning authority in respect of the condition of any trees or shrubs that form part of the scheme. As set out in other responses to the ExA's SWQs, Highways England is under various duties, including under its licence from the Secretary of State, to have regard to the protection of the environment when exercising its functions. This would clearly include the condition of landscaping for which it is responsible.

- c. As touched upon above, detailed provisions as to landscaping measures would be contained in the approved scheme – Highways England therefore considers it inappropriate to refer to weed and vermin control on the face of Requirement 8, as otherwise it is difficult to justify excluding other detailed measures. The key point is that Wiltshire Council will be able to influence the Secretary of State's approval process through the consultation mechanics.
- d. Again, given the Secretary of State will have ultimate approval of the landscaping scheme, or schemes, the Secretary of State will need to be satisfied that a sufficient maintenance programme is in place, whether that be through the scheme itself or through the provisions of the Outline Environmental Management Plan (OEMP) (e.g. through MW-LAN4 above and the Landscape and Ecology Management Plan). As such, a specific reference to a maintenance programme is unnecessary. Further, as set out above, Highways England is under certain duties, including under its Licence from the Secretary of State, to have regard to the protection of the environment when exercising its functions. The adequate maintenance of landscaping for which it is responsible would clearly fall within the scope of this. In practice, the landscaping would be maintained by Highways England as part of its routine operations and so it is not necessary to stipulate it in the requirement.
- e. There is no need to refer to the LEMP in Requirement 8, as this would duplicate regulation. The production of a LEMP is required under items MW-G7 and MW-LAN1 of the OEMP, compliance with which is secured by Requirement 4. MW-G7 explicitly provides that the LEMP must be worked up in consultation with certain stakeholders, including Wiltshire Council, and produced, and approved by the Authority, prior to the relevant works commencing. For reasons set out in other submissions, such as REP4-029, Highways England does not consider it necessary for the Secretary of State to approve 'subsidiary' plans such as the LEMP, which are produced under the framework contained in the OEMP, as the Secretary of State will have approved that framework by certifying the OEMP under the DCO.

Question DCO.2.59

Requirement 8 – Landscaping

As previously noted, Requirement 8(2)(b) only specifies “*noise fences and walls*” as opposed to fences or walls designed for other purposes. The Applicant acknowledges that within the WHS, the location and appearance of fences could be important.

Given the importance of safeguarding the WHS, should the landscaping works associated with all fences and walls within it not be subject to this Requirement in addition to the OEMP (D-CH14) in order to provide adequate protection for this area?

Response

1. As alluded to in the ExA's question, Highways England has responded to a similar question in FWQ DCO.1.102. There, it was stated that "*Fences and walls for other purposes are generally not of sufficient import to landscape and visual effects so as to require their final location to be approved as part of landscaping plan*" but noise fences and walls are of a different nature so their location is required to be precisely secured. Highways England remains of this view.
2. It should be noted however, as was explained at the Issue Specific Hearing on the DCO (a summary of Highways England's submissions is found at [REP4-29] item 4.3(v)), that the Outline Environmental Management Plan (OEMP) has evolved since the response to FWQ DCO.1.102 was submitted. Item D-CH14, which was cited in that response, remains, and requires the provision of fencing and surfacing within the WHS to be developed in consultation with the National Trust, Historic England, English Heritage Trust and Wiltshire Council. Other original provisions relating to fencing also remain, including items PW-CH4, PW-CH5, PW-LAN1, MW-CH1, MW-CH3. However, additional obligations have been added, for example:
 - a. D-CH24 – "*Boundary fencing and gates in the WHS shall be visually recessive and have a low reflectivity finish. Within the WHS, all fencing above the top of the cuttings shall be post and wire with stock-proof netting, and be consistent with other fencing within the WHS. Within the WHS, gates shall be provided at appropriate points to facilitate access. All gates shall be timber, unless otherwise agreed.*"
 - b. D-CH25 – "*The top of new highway boundary fencing within the western cutting shall be no higher than the ground level at the top of the cutting alongside which the fencing runs.*"
 - c. P-PWS03 – which requires the retaining walls adhere to certain requirements.

- d. P-PRoW2 - *"Timber posts and strained wire fences to be used to separate PRoWs from adjacent private land in accordance with Highway Construction Details in the Manual of Contract Documents for Highway Works (MCHW) and Design Manual for Road and Bridges (DMRB). Where necessary for adjacent land use, appropriate stock-proof netting to be added to strained wire fences."*
3. As such, whilst 'normal' fences and walls do not need to form part of the landscaping scheme submitted to the Secretary of State for approval under Requirement 8, the provisions in the OEMP provide appropriate standards and consultation obligations in respect of the final designs within the WHS. The importance of safeguarding the WHS is therefore recognised and fully dealt with in the OEMP.
4. Since the obligations contained in the OEMP are secured by Requirement 4 of the DCO, duplicating those safeguarding provisions in Requirement 8 is unnecessary.

Question DCO.2.60

Requirement 8 – Landscaping

Please reconsider whether Historic England should be consulted on any submission for approval under Requirement 8 insofar as it relates to landscaping within the WHS?

Although the planning authority is specified as consultee, as is normally the case, most applications would not affect such historic areas.

Highways England response

1. Highways England added a new Requirement 8(2) to the draft DCO submitted at Deadline 4 [REP4-018], to provide that Historic England must be consulted prior to a landscaping scheme relating to works within the WHS (or Work No. 4) being approved by the Secretary of State. This provision remains in the latest version of the DCO submitted at Deadline 6.
2. Please also see Highways England's response to SWQ LV.2.6.

Question DCO.2.61

Requirement 9 – Traffic management

Please consider whether this Requirement should be amended as sought by Wiltshire Council in its DL4 Review of the dDCO (Rev 2) [REP4-039], namely, that the words “*which makes clear provision for traffic management proposals required to facilitate the construction of that phase of the development*” should be inserted in Requirement 9(1)? If not, please provide reasons for the rejection of this clarification.

Highways England response

1. The Applicant has considered the amendment proposed by Wiltshire Council in its Review of the dDCO (Rev 2) [REP4-039] and considers it to be appropriate, save for the omission of "clear" the inclusion of which is unnecessary and the amendment of “that phase of the development” with language consistent with the defined terms and with the other requirements . The amendment is included in Revision 4 of the dDCO to be submitted at Deadline 6.

Question DCO.2.62

Requirement 10 – Drainage

Please consider and respond to the amendment to this Requirement proposed by Wiltshire Council at DL4, namely, that it would prefer the wording “*on matter related to drainage functions*” to be removed, or if not agreeable, for the wording to be replaced with the following: “*on matters related to its drainage and flood risk functions*” [REP4-039].

If not, please provide reasons for the rejection of this clarification.

Highways England response

1. The Applicant has considered Wiltshire Council's proposed amendment in its Review of the ((Rev2) dDCO [REP4-039]. The Applicant agrees to amend requirement 10 such that it refers to consultation with Wiltshire Council "*on matters related to its drainage and flood risk functions*". This amendment is included in revision 4 of the dDCO to be submitted at deadline 6.

Question DCO.2.63

Requirement 11 - Details of consultation

Please consider and respond to the alternative wording for this Requirement proposed by Wiltshire Council at DL4 [REP4-039].

If this revised wording is not agreed, please provide reasons for the rejection of this amendment.

Highways England response

1. The Applicant has considered the alternative drafting for requirement 11 provided by Wiltshire Council in its Review of the (Rev2) DCO [REP4-039] at section 3.3.9.
2. The Applicant notes that many of the components of the suggested drafting are already present in the Applicant's draft requirement 11 and the Applicant will incorporate some elements of the drafting in revision 4 of the DCO to be submitted at deadline 6.
3. The most substantial difference between the Applicant's draft of requirement 11 and Wiltshire Council's proposed drafting is in sub-paragraph (3) that states:

"The undertaker must ensure that any consultation responses are reflected in the details submitted to the Secretary of State for approval under this Schedule, but only where it is appropriate, reasonable and feasible to do so, taking into account considerations including, but not limited to, cost and engineering practicality."
4. There is an established body of case law governing the approach of public bodies to consultation that are well understood. These are encapsulated in the Sedley principles elucidated in *R v Brent LBC Ex p. Gunning (1985) 84 L.G.R 168* which have been endorsed by the Supreme Court in *R (OAO Moseley) v London Borough of Haringey [2014] UKSC 56*. Those principles require consultation:
 - a. be at a time when proposals are still at a formative stage
 - b. the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response;
 - c. adequate time must be given for consideration and response; and
 - d. that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.
2. In conscientiously taking into account the consultees' views, it is self evident that the Applicant will be considering whether it is appropriate, reasonable and feasible to do so and that, given the Applicant's statutory role and duties, that will include considerations of cost and engineering practicality. It therefore serves no purpose to spell that out in the Requirement.

5. The Applicant does consider that it would be appropriate to spell out that a copy of the consultation report will be sent to the consultees promptly after submission of the application for the Secretary of State's approval, and has introduced a new sub-paragraph (2) in revision 4 of the draft DCO.
6. The Applicant considers that this drafting strikes an appropriate balance. The Applicant would remain under a duty to abide by the *Sedley* principles and would be required, where it takes a different view to that of any of the consultees, to set out its reasons. Taken together with the report under sub-paragraph (1) the Secretary of State would be in possession of all the information required to decide whether or not to approve the Applicant's submission, taking into account the views expressed by consultees and, in cases of disagreement, the Applicant's reasons for adopting the details it proposes.

Question DCO.2.65

Additional Requirements

- i. Please consider whether the additional Requirements sought by Wiltshire Council in its DL4 Review of the dDCO (Rev 2) [REP4-039] should be imposed, namely, those relating to the CEMP, traffic monitoring and mitigation, highway lighting scheme, traffic management during tunnel closures, flood risk assessment and approval and amendment of approved details. If not, please provide reasons for the rejection of this additional Requirements.
- ii. Please also explain why it is regarded as being appropriate for Highways England to approve the CEMP, rather than the Secretary of State or the Wiltshire Council in consultation with other key stakeholders.
- iii. Whilst MW-G5 of the OEMP requires the main works contractor to prepare a CEMP in accordance with the OEMP, given the critical nature of the obligation should this not be a matter that is specifically secured within the DCO?
- iv. Likewise, should specific reference of the conversion of the CEMP to the HEMP not also be included within a DCO Requirement as proposed by Wiltshire Council?

Response

- i. **Please consider whether the additional Requirements sought by Wiltshire Council in its DL4 Review of the dDCO (Rev 2) [REP4-039] should be imposed, namely, those relating to the CEMP, traffic monitoring and mitigation, highway lighting scheme, traffic management during tunnel closures, flood risk assessment and approval and amendment of approved details. If not, please provide reasons for the rejection of this additional Requirements.**

1. Wiltshire Council's additional requirements include:

"Construction Environmental Management Plan

(1) No part of the authorised development is to commence until a CEMP has been prepared in consultation with the relevant planning authority, the local highway authority and the lead local flood authority and submitted to and approved in writing by the Secretary of State.

(2) The CEMP must be substantially in accordance with the Outline Environmental Management Plan.

(3) The authorised development must be constructed in accordance with the approved CEMP.

(4) Upon completion of construction of the authorised development the CEMP must be converted into the HEMP and the authorised development must be operated and maintained in accordance with the HEMP.”

2. The Applicant considers that this proposed requirement is not necessary. The substance of its subject matter is addressed in the OEMP, compliance with which is secured in the existing draft of requirement 4. The question of approval of CEMPs is addressed in the Applicant's responses to DCO2.44 and DCO.2.47; it remains the Applicant's view, as the strategic highways company, owned by Government, operating within the regulatory constraints imposed on it under the Infrastructure Act 2015 and within the detailed framework of the requirements in the OEMP, that it is appropriate for the contractors' CEMPs to be approved by the Authority, in consultation with the appropriate bodies, as required by the OEMP measures PW-G1 and MW-G5 generally, in addition to consultation on specific matters as identified in the OEMP. In this regard paragraph (1) would appear to exclude consultation with those other bodies, requiring consultation only with Wiltshire Council in its various capacities.
3. Paragraph (1) of the proposed requirement also fails to address the careful division between preliminary works regulated under the preliminary works OEMP, and the main works, regulated under the remainder of the OEMP.
4. Paragraph (2) of the proposed requirement fails to acknowledge that the development of the CEMPs is as much a process, involving consultation with the relevant bodies, as it is a list of matters that must thereafter be developed in detail. These matters are addressed clearly and in detail in the OEMP. Seeking to partially replicate them in the body of the requirement is only likely to give rise to ambiguity rather add clarity. Paragraph (4) is addressed in response to question (iv) below.

“Traffic Monitoring and Mitigation

(1) No part of the authorised development is to commence until written details of a traffic impact monitoring and mitigation scheme has been submitted to and approved in writing by the highway authority.

(2) The traffic impact monitoring and mitigation scheme must include –

- a. *A before and after survey to assess the changes in traffic;*
- b. *The locations to be monitored and the methodology to be used to collect the required data;*
- c. *The periods over which traffic is to be monitored;*
- d. *The method of assessment of traffic data;*
- e. *Control sites to monitor background growth;*
- f. *The implementation of monitoring no later than 3 months following the opening of the twin tunnels for public use;*

- g. *Agreement of baseline traffic levels;*
- h. *The submission of survey data and interpretative report to the highway authority; and*
- i. *A mechanism for the future agreement of mitigation measures.*

(3) The traffic impact and monitoring scheme shall be implemented [by the undertaker] as approved prior to commencement of development or in accordance with a programme to be agreed as part of the scheme, and the mitigation measures included within the scheme shall be maintained and / or implemented [by the undertaker], again, in accordance with a programme to be agreed as part of the scheme.”

5. The Council's proposed requirement would prohibit the commencement of any part of the Scheme until a traffic impact monitoring mitigation has been approved by it.
6. The Applicant's Transport Assessment [APP-247] assesses the Scheme's operational effects which are summarised in paragraph 6.14.1. In short, no mitigation or monitoring is assessed as being required.
7. The Council have not articulated in their review the reasons why it considers the above requirement to be necessary, besides referring to its inclusion in its A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016. In this regard, the Applicant notes that the A14 and the current Scheme are very different projects with different impacts.
8. On the basis that no impacts have been identified that require monitoring or mitigation the Applicant considers the proposed requirement to be unnecessary and not relevant to planning contrary to the tests in paragraph 4.9 of the National Policy Statement for National Networks; it should therefore not be included in the draft DCO. Despite its firmly held view on this matter in respect of the draft DCO, the Applicant is in discussions with Wiltshire Council on how, outside the Order, any residual concerns in this regard could be addressed.

“Highway Lighting Scheme

(1) No part of the authorised development is to commence until a written scheme of the proposed highway lighting and traffic signals controls to be provided for that part of the authorised development and a programme for its implementation has been submitted to and approved in writing by the Secretary of State, following consultation with the local planning authority and, (in the case of proposed lighting or traffic signals for any highway for which the undertaker is not the highway authority), the local highway authority.

(2) The standard of the highway lighting to be provided by the Scheme referred to in subparagraph (1) must either reflect the standard of the highway lighting included in the environmental statement or, where the

standard of the highway lighting proposed materially differs from the standard of the highway lighting identified in the environmental statement, the undertaker must provide evidence with the written scheme submitted for approval that the standard of the highway lighting proposed would not give rise to any materially new or materially worse adverse environmental effects in comparison to those reported in the environmental statement taking into account the lighting identified in it. The scheme must specify the specification, level of provision, light spillage, intensity, brightness and uniformity of the highway lighting.

(3) The authorised development must be carried out in accordance with the scheme approved under sub-paragraph (1) including the programme for its implementation.

(4) Nothing in this requirement restricts lighting of the authorised development during its construction or where temporarily required for maintenance."

9. The effect of the Council's proposed requirement would be to prohibit commencement of the authorised development until such time as a written scheme of highway lighting and traffic signals control has been approved by the Secretary of State, following consultation with Wiltshire Council. The Council indicates that this is required "*in the interests of highway safety.*"
10. The Applicant notes that an important feature of its Scheme is that it is to be largely unlit. It has committed to measures in the OEMP [REP4-021] to ensure this (D-CH8, D-CH9, D-CH10, D-CH11, D-CH12, D-CH20). Where lighting is proposed, such as under Green Bridge Four, or the tunnel, this is lighting of the new A303, a highway for which the Applicant will be responsible. The Applicant, as strategic highways company, is responsible for the safety of the trunk road network under the terms of its licence granted by the Secretary of State and its duties under the Highways Act 1980. It is not clear why, on safety grounds, it would be necessary to require the Secretary of State to determine those details when they would normally be determined by the Applicant in the course of its functions, nor why no part of the authorised development should commence until those details were determined.
11. The Applicant also notes that it has committed to consult the Stakeholder Design Consultation Group, of which Wiltshire Council would be a member, on the external appearance of signing and lighting at the new Longbarrow Junction and Countess Junction, in accordance with the consultation procedure set out in section 4 of the OEMP, compliance with which would be secured under requirement 4.
12. It is also worth noting in passing that highway lighting and traffic signals would only need to be determined prior to the relevant part of the Scheme opening for public use.

13. The Applicant notes that it proposes, with Wiltshire Council's support, to change the DCO such that the existing Countess Roundabout would be detrunked and would revert to Wiltshire Council to maintain as highway authority. The Applicant notes that it has committed, through measure D-CH12 of the OEMP, to replace the existing lighting units at Countess Roundabout with models that minimise light spill. The Applicant and the Council are discussing matters pertaining to the adoption of roads by the Council as a result of the Scheme and the Applicant anticipates that its concerns can be addressed through that mechanism, to be set out in the Applicant's separate agreement with the Council. With respect to traffic signals, the same principles apply.

“Traffic Management during Tunnel Closures

(1) The Undertaker shall prepare and submit to, and obtain the approval from, the Secretary of State, prior to first use of either of the tunnels by traffic (other than construction traffic), a Tunnel Closure Management Plan (TCMP) prepared in consultation with the local highway and planning authority. The Plan shall cover the following:

- a. Procedures to be followed for the planned closure of a single bore, including use of temporary or part-time signing, and advance information proposals.*
- b. Procedures to be followed for unplanned closures of a single or both tunnel bores, either during or outside a planned closure, with particular reference to:

 - i. Method of control of access to the eastbound or westbound or both merge slips at Longbarrow and Countess junction respectively.*
 - ii. Signage to be employed at the start of, and on, the approved diversion route.*
 - iii. Measures to be taken at a local / regional / sub-national level to promptly alert drivers of A303 tunnel closure.**

(2) On first use of the tunnels by traffic (other than construction traffic) and thereafter the Plan shall be implemented as approved as and when necessary.

(3) The undertaker shall liaise with Wiltshire Council's Streetworks Team and the police in relation to any future changes to the approved TCMP, and operate all closures in accordance with the approved TCMP (as amended).”

14. The Applicant notes that it included in the OEMP submitted for deadline 3 [REP3-007] a new measure, MW-TRA12 that addresses substantially the same subject matter as this draft Requirement. MW-TRA12 will require the contractor to prepare in consultation with Wiltshire Council, prior to the

handover of the works, a Tunnel Closure Management Plan. On that basis the Applicant considers the proposed requirement to be unnecessary as its subject matter is already addressed in the OEMP and secured by Requirement 4.

15. Wiltshire Council's proposed requirement would also require the Secretary of State to approve the TCMP. Both Wiltshire Council and the Applicant, in their capacities as network management authorities of their respective network, are under the general network management duty in section 16 of the Traffic Management Act 2004. Co-ordination between network management authorities is important, acknowledged by the Applicant through MW-TRA12, but the Applicant considers it would be inappropriate to supersede the existing framework by requiring the Secretary of State to determine the arrangements for tunnel closures.

16. **Flood Risk Assessment**

(1) Subject to sub-paragraph (2), the authorised development must be carried out in accordance with the flood risk assessment, including the mitigation measures detailed in it, so that no part of the authorised development is predicted to result in any exceedance of the flood levels to properties and land shown in the flood risk assessment.

17. *(2) Sub-paragraph (1) does not apply in any circumstance where the undertaker proposes to carry out a part of the authorised development other than in accordance with the flood risk assessment and either demonstrates to Wiltshire Council's and the Environment Agency's satisfaction that the part of the authorised development concerned would not result in an exceedance of the flood levels shown in the flood risk assessment or demonstrates that all affected landowners accept the predicted exceedance of the flood levels shown in the flood risk assessment."*

18. The Applicant notes that the Council considers that this requirement is necessary to account for perceived shortcomings in requirement 10 (Drainage) in respect of flood risk. The Council further notes that the drafting is taken from the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016. The Council do not articulate why it considers requirement 10 to be inadequate in respect of flood risk.
19. In response, the Applicant notes that its Flood Risk Assessment [REP3-008] concludes that flood risk to and from the permanent features of the scheme from fluvial, surface water, groundwater and sewer flooding would be either low or negligible.
20. Requirement 10 is not intended to address all aspects of flood risk. Its purpose is to provide a mechanism for the written details of the drainage system for the Scheme to be determined. This will be important in respect of the Scheme's effect to flood risk during operation. In this regard, the Applicant submitted an update to the Road Drainage Strategy [REP2-009] at deadline 2, which forms part of the Environmental Statement. Requirement

10 is clear that it must be based on the mitigation measures included in the Environmental Statement. As consultees under requirement 10, Wiltshire Council and the Environment Agency would have every opportunity to consider, and provide their views on, the written details of the drainage system before the Secretary of State decides whether or not to approve those details.

21. The key controls for flood risk are set out in the OEMP, compliance with which is secured by requirement 4. The key measure is MW-WAT13 which sets out the general provisions relating to flood risk. These include managing flood risk safely throughout construction and implementation and to ensure that all designs do not cause increased risk levels from those assessed in the FRA. Additionally, MW-WAT12 requires the preparation of a Flood Risk Management Plan developed in consultation with the Environment Agency and Wiltshire Council. Other measures in the OEMP to manage flood risk include MW-WAT3 which addresses site drainage and includes a commitment to not exceed existing run-off rates, MW-WAT8 addresses dewatering and abstraction and MW-WAT10 which sets out the requirements for the Groundwater Management Plan.

22. In view of the low level of flood risk, together with the measures set out in the OEMP, compliance with which is secured through requirement 4. The Applicant considers the addition of the proposed requirement is unnecessary, as its subject matter is adequately addressed elsewhere.

ii. **Please also explain why it is regarded as being appropriate for Highways England to approve the CEMP, rather than the Secretary of State or the Wiltshire Council in consultation with other key stakeholders.**

23. Please see the Applicant's responses to DCO2.44 and DCO.2.47.

iii. **Whilst MW-G5 of the OEMP requires the main works contractor to prepare a CEMP in accordance with the OEMP, given the critical nature of the obligation should this not be a matter that is specifically secured within the DCO?**

24. The Applicant considers it is appropriate, *because* of the important nature of the obligation in MW-G5, for it to be secured in the OEMP rather than in the requirements to the Order. MW-G5 is embedded within the document in its overarching general principles. Any person, particularly the contractors and the key stakeholders named in the document, that needs to refer to it during the construction and implementation of the Scheme can readily read all of the terms in one place set out in plain English. The Applicant considers this to be a more practical approach when compared with the alternative of persons interested in its terms having to also cross refer to legal drafting in a schedule to statutory instrument.

25. In addition to the important practical benefit outlined above there can be no more question that this approach in any way undermines the enforceability

of requirement 4, which is very clear that the authorised development must be carried out in accordance with the OEMP. To further clarify this point the Applicant has expanded the definition of “OEMP” in revision 4 of the draft DCO to more clearly explain its role and expressly acknowledge that it requires the Applicant to prepare, among other things, CEMPS and HEMPS.

iv. Likewise, should specific reference of the conversion of the CEMP to the HEMP not also be included within a DCO Requirement as proposed by Wiltshire Council?

26. Likewise, please see (iii) above. The same rationale applies to the HEMP (MW-G11) as it does to MW-G5.

Question DCO.2.67

Additional Requirements

The Applicant, in rejecting any provision within the dDCO to secure improvements and/ or enhancement to waterbodies, points to the net biodiversity gain secured by the scheme, principally through the creation of new connected chalk habitats.

Please explain further and with reference to relevant local and national policies on this topic why it is considered to be unnecessary and unreasonable to impose a Requirement securing further biodiversity gain which could potentially be achieved as a result of the scheme?

Highways England response

1. The Applicant notes that net biodiversity gain is an emerging area of policy at both national and local measures. This is reflected in paragraph 5.20 of the National Policy Statement for National Networks ('**NNNPS**):
2. *"The NEWP [Natural Environment White Paper] sets out a vision of moving progressively from net biodiversity loss to net gain, by supporting healthy, well-functioning ecosystems and establishing more coherent ecological networks that are more resilient to current and future pressures."*
3. As an organisation Highways England has acknowledged the role that it can play in contributing to biodiversity net gain and has published its plan for doing so: 'Our plan to protect and increase biodiversity' . Highways England publishes annual reports of its progress towards achieving the objectives of this plan.
4. National Policy Statement for National Networks
Paragraph 5.23 of the NNNPS requires applicants to show *"how the project has taken advantage of opportunities to conserve and enhance biodiversity and geological conservation interests"* (there are no relevant geological sites within the Scheme study area).
5. Paragraph 5.33 of the NNNPS which relates to decision making, goes on to state:
"Development proposals potentially provide many opportunities for building in beneficial biodiversity or geological features as part of good design⁸⁰. When considering proposals, the Secretary of State should consider whether the applicant has maximised such opportunities in and around developments. The Secretary of State may use requirements or planning obligations where appropriate in order to ensure that such beneficial features are delivered."
6. Footnote 80 of the NNNPS relates to the opportunities identified in the Natural Environment White Paper 2011 for transport to contribute to the

creation of coherent and resilient ecological networks. The NNNPS itself does not require national network schemes to secure a net gain of biodiversity. It requires applicants only to take advantage of, and maximise, opportunities to "conserve and enhance".

7. The Applicant has demonstrated compliance with this requirement in its Case for the Scheme and NPS Accordance [APP-294] (see pages A-62 and A-63). In summary the enhancement and conservation measures within the design of the Scheme include:
 - Four green bridges to establish and improve connectivity of habitat.
 - The Scheme is in a cutting for most of its length, where necessary these include false cuttings to reduce risk of mortality for bats and birds.
 - The River Till Viaduct has been designed to minimise shading impact on sensitive marginal habitat.
 - Replacement and improvement of habitats, including reconnecting existing semi natural habitats, the planting of new woodland and the implementation of species rich chalk grassland habitat, as shown illustratively on the Environmental Masterplan [APP-059] and detailed in Chapter 8 of the Environmental Statement [APP-046], Sections 8, 8.8.14 – 8.8.21, 8.9.65 – 8.9.66, and Table 8.14 (item MW-BIO2 of the OEMP secures the creation of new habitats shown within Environmental Masterplan).
 - Improved east-west connectivity of habitat through creation of new habitats and soft estate.
 - Two bat hibernation features.
 - Lighting only included where necessary to minimise impacts on bats.
 - Enhancement of chalk grassland between Parsonage Down SSSI and the Scheme to the south.
8. Each of these measures is secured as part of the design of the Scheme for which the Applicant seeks development consent, or is controlled through means of a requirement, including via the OEMP. The Applicant's response to the Environment Agency's written representation [REP3-013] (paragraphs 23.4.42 to 23.4.47) sets out in more detail the biodiversity enhancements provided by the Scheme together with the means through which they are secured.

9. National Planning Policy Framework

The Secretary of State may consider the National Planning Policy Framework (2019) to be relevant and important when deciding the application. Paragraph 175 sets out the policy on habitats and biodiversity. These are clearly focussed on the avoidance, mitigation or compensation for, adverse effects on biodiversity. They do not require proposals to

demonstrate biodiversity net gain, although developments that do so may be supported:

"(d) development whose primary objective is to conserve or enhance biodiversity should be supported; while opportunities to incorporate improvements in and around developments should be encouraged, especially where this can secure measurable net gains for biodiversity."

10. Net Gain consultation proposals– DEFRA December 2018

In December 2018 DEFRA consulted² on its proposals for biodiversity net gain. Among the measures envisaged in the consultation, DEFRA sought views on strengthening the relevant measures in the NPPF to support its proposals.

11. Following the close of the consultation, the Chancellor confirmed in the Spring Statement that the government will use the forthcoming Environment Bill to mandate biodiversity net gain. However, it is important to acknowledge that the DEFRA consultation expressly excluded from its scope the application of biodiversity net gain to nationally significant infrastructure projects (see page first paragraph page 26). It is therefore unlikely, within the timescales for a decision to be made on the Applicant's application, that biodiversity net gain will be mandated.

12. Local policy

Wiltshire Council's Core Strategy, adopted in January 2015, includes Core Policy 50 which is in line with the general thrust of paragraph 175 of NPPF, among other matters states:

"Biodiversity enhancement

All development should seek opportunities to enhance biodiversity. Major development in particular must include measures to deliver biodiversity gains through opportunities to restore, enhance and create valuable habitats, ecological networks and ecosystem services. Such enhancement measures will contribute to the objectives and targets of the Biodiversity Action Plan (BAP) or River Basin/Catchment Management Plan, particularly through landscape scale projects, and be relevant to the local landscape character."

13. The Environment Agency's Representations

The Environment Agency has maintained the position throughout the examination that the Applicant has failed to take advantage of opportunities to achieve a net gain to wetland habitat. The Environment Agency's written representation [REP2-094] overstates, at paragraph 3.4.7 the extent by which the NPPF requires the enhancement of the natural environment. The

² https://consult.defra.gov.uk/land-use/net-gain/supporting_documents/netgainconsultationdocument.pdf

Environment Agency's relevant representation [RR-2060] at section 3.0, makes reference to an opportunity for "*river restoration which links to public open space. These enhancement opportunity [sic] offer the ability to provide a multi-function space that deliver multiple benefits to the environment and the community.*". The Applicant has set out a detailed response to this suggestion in its relevant representations report [AS-026] on pages 20-13 and 20-14.

14. In addition to the conservation and enhancement elements outlined above the Scheme will secure modest improvements to rivers and wetland habitats, as follows. The Scheme already makes a contribution to environmental net gain through habitat creation, which will benefit the River Till through improved connectivity. The Scheme will also provide an improvement of highway drainage compared to existing conditions, contributing to improving river conditions. Through the use of Sustainable Drainage Systems (SuDS), the Scheme will deliver a significant improvement in road drainage quality against the existing system, which is likely to result in a moderately beneficial residual effect for water quality in the River Avon, as summarised in ES Chapter 11, Road Drainage and the Water Environment [APP-049], Table 11.10. New wetland habitats included in the Scheme are small scale habitat diversification associated with drainage infiltration areas (ES Chapter 8 [APP-046] paragraph 8.9.106).
15. It is also important to note that the enhancements sought in the River Avon are not within the land required for the Scheme and so would not be within the Applicant's power to deliver.

16. Analysis

Read together, sections 104(2)(a) and (d) of the Planning Act 2008 require the Secretary of State to have regard to the NNNPS and to any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision. Section 104(3) goes further and requires the Secretary of State to determine the application in accordance with the NNNPS, except to the extent to do so would place the United Kingdom in breach of any international obligation, the decision would be unlawful or if the adverse impact of the proposed development would outweigh its benefits. In respect of net gain of biodiversity, none of those exceptions would apply.

17. The NNNPS is clear in its requirements at paragraphs 5.23 and at 5.33 which requires applicants to "*maximise opportunities*" for "*building in beneficial biodiversity... features as good design*". The Applicant has demonstrated that its Scheme does this, as follows.
18. The Applicant has taken every opportunity to build in features beneficial for biodiversity as part of the Scheme and securing these through the requirements of the OEMP and the DCO requirements, in line with the requirements of the NPS. It should be noted that necessarily the opportunities

for enhancement arose from the land that will be required for the Scheme. – Given that the land will be subject to powers and compulsory acquisition under the DCO it would clearly be unreasonable for that land to be drawn more widely than was necessary for the overall nature of the Scheme to include enhancement opportunities, given how this would impact on the rights of landowners. In light of the nature of the scheme and the habitat through which it passes, the Applicant therefore identified the greatest opportunities for enhancement, for example by creating significant areas of new chalk grassland habitat within the Order limits. As shown in ES Table 8.14 this strategy will provide substantial net gain of habitat that is appropriate to the local landscape and contributes to local objectives for biodiversity gain.

19. It should also be noted that it is not a requirement of the NNNPS (nor, indeed, of Natural England) that equal provision be made for enhancement of every type of habitat in the area. As such, the Applicant's view is that, in this context, not implementing the enhancements proposed by the Environment Agency in respect of waterbodies does not mean Highways England has not maximised opportunities for environmental enhancement – when looked at in the context of the nature of the Scheme, it clearly has done.
20. In addition, and in any event, the requirements of paragraph 5.33 of the NPS do not mandate that applicants *must* maximise opportunities for enhancements for the Scheme to be approved. Instead, the Secretary of State needs to 'consider' whether opportunities have been maximised and 'may' use requirements to secure enhancements *where appropriate*. Given, as described above, the overall enhancements the Applicant is delivering as part of the Scheme, the Applicant does not consider a requirement securing further enhancements would be necessary or reasonable and therefore would not be appropriate.
21. The Environment Agency's proposed requirement is framed in terms that would require it to be discharged prior to the commencement of the authorised development. Neither the proposed requirement nor the Environment Agency's submission articulate the elements of the Scheme's design that could be improved through such a measure. To be justified on those terms, it must go to the core of the policy shortcoming that it is intended to overcome. The development must be unacceptable unless its subject matter is addressed. As outlined above, the Environment Agency overstate the extent of the policy requirement.
22. In the Applicant's view the proposed requirement does not comply with the test for requirements in paragraph 4.9 of the NNNPS. The subject matter of the requirement is not necessary because the Applicant's application conforms to the relevant policy requirements.
23. As confirmed in Highways England's response to the Environment Agency's relevant representation [AS-026] (pages 20-13 to 2014), the Applicant is not opposed to supporting the Environment Agency's aims but these fall outside the scope of what can be considered in relation to this application and it is

certainly not the case that the Scheme ought not be commenced until those matters are addressed. Through national Designated Funds Highways England is supporting a range of environmental initiatives where these contribute to meeting the fund's objectives, nationally or regionally. However, that funding is independent of this Scheme. Opportunities are under discussion through the appropriate working groups, which includes representation from the Environment Agency and other biodiversity stakeholders.

Question DCO.2.69

Please provide an update as to the present state of negotiations with the Statutory Undertakers and revised Protective Provisions where appropriate?

Highways England response

1. Please see Highways England's response to CA.2.23 for an update on all negotiations relating to protective provisions.

Question DCO.2.70

Please indicate whether the terms of the Protective Provisions set out in Schedule 11 of the dDCO are agreed and, if not, what are the areas of disagreement?

Highways England response

1. Please see Highways' England response to CA.2.23 for an update on all negotiations relating to protective provisions.

Question DCO.2.72

Please confirm that the references in this schedule to the documents to be certified are accurate and complete or do any of these references require updating?

Highways England response

1. As set out in the response to SWQ DCO.2.4, the documents listed as those which comprise "the environmental statement" in Schedule 12 to the draft DCO have been updated in the revised version of the draft DCO submitted at Deadline 6 to reflect the submission of updates to the Road Drainage Strategy [REP2-007] and the Level 3 Flood Risk Assessment [REP3-008].
2. In respect of the other documents listed in Schedule 12 to the draft DCO, the reference to the Book of Reference has been updated to reflect the submission of the Book of Reference at deadline 6.. In addition, the revised versions of the Detailed Archaeological Mitigation Strategy and Outline Environmental Management Plan submitted at Deadline 6 have also been taken into account. Given the potential for further updates to these documents the Applicant has included square brackets to signal its intention for the Schedule to reflect the latest versions of those documents submitted. All amendments are reflected in the revised version of the draft DCO submitted at Deadline 6.
3. Highways England will keep the list of documents in Schedule 12 under review and would expect to update it shortly prior to the end of examination, to fill the square brackets.

Question DCO.2.73

The [AS-009] Pre-examination clarification document plays an important role in the interpretation of detailed design issues and/ or Requirements and the relationship between them.

Please consider whether specific reference to this document on the face of the dDCO would provide clarity and aid interpretation?

Highways England response

1. As outlined in the introduction to the DCO application 'signposting' document [AS-009], the document explains the relationships between the various DCO application documents as included in the submitted DCO application, which follow the established approach followed on many made highways development consent orders. None of those orders makes reference to similar documents, or even covers the same content in its Explanatory Memorandum.
2. The Applicant considers that it would not be appropriate to secure the document on the face of the Order, for the same reasons that explanatory memoranda are not secured documents. They are aids to interpretation but are not intended to have legal effect. Securing the document on the face of the DCO risks causing a conflict between the two, by saying the same thing twice in different ways. For that reason, it is not surprising that to do so would also be a significant departure from established statutory instrument drafting practices. In addition, the signposting document was not drafted with that purpose – or even the purpose of being equivalent to an explanatory memorandum – in mind.
3. The Applicant will consider, however, what guidance might be given on the key points contained in [AS-009] in the updated Explanatory Memorandum to be submitted towards the close of the examination.

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