

A303 Amesbury to Berwick Down

TR010025

Deadline 9

**8.57 Explanation of Amendments to Rev 7 of Draft DCO &
Comments on the Examining Authorities' draft
Development Consent Order**

APFP Regulation 5(2)(q)

Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

September 2019



Infrastructure Planning

Planning Act 2008

The Infrastructure Planning (Examination Procedure)**Rules 2010****A303 Amesbury to Berwick Down**

Development Consent Order 20[**]

**Explanation of Amendments to Rev 7 of Draft DCO & Comments on
the Examining Authorities' draft Development Consent Order**

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| Regulation Number: | Regulation 5(2)(q) |
| Planning Inspectorate Scheme Reference | TR010025 |
| Application Document Reference | 8.57 |
| Author: | A303 Amesbury to Berwick Down Project Team, Highways England |

| Version | Date | Status of Version |
|----------------|-------------|--------------------------|
| Rev 0 | 26.09.2019 | Deadline 9 Issue |

THE A303 (AMESBURY TO BERWICK DOWN) DEVELOPMENT CONSENT ORDER

EXPLANATION OF CHANGES MADE TO THE DRAFT DCO (REV 7)

AND

THE APPLICANT'S RESPONSE TO THE EXAMINING AUTHORITY'S DRAFT DCO

1. INTRODUCTION

- 1.1 This document provides a commentary on changes made to the draft Development Consent Order in the version submitted on 25 September 2019 (DCO Revision 7), compared with Revision 6 of the draft DCO submitted on 6 September 2019 (DCO Revision 6). An electronic .pdf comparison between the two versions has also been submitted.
- 1.2 In broad terms the changes made in the latest draft DCO have been made for the following reasons:
 - 1.2.1 changes arising from the Applicant's consideration of the Examining Authority's draft DCO [PD-018];
 - 1.2.2 changes arising from the Applicant's consideration of deadline 8 submissions;
 - 1.2.3 changes to reflect further comments received from, and ongoing discussions with, interested parties; and
 - 1.2.4 changes to correct typographical errors and reflect statutory instrument drafting practice
- 1.3 The table in section 2 below includes a summary of the changes to revision 7 of the DCO.
- 1.4 Section 3 of this document sets out the Applicant's response to the Examining Authority's draft DCO.

2. TABLE OF CHANGES TO THE DRAFT DCO REVISION 7

| Provision in revised draft DCO and/or issue | Brief description and explanation |
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| Preamble | <p>The Applicant has added a new paragraph to the preamble which acknowledges at the outset of the Order that the application concerns development which traverses the World Heritage Site and its setting, and which acknowledges the Convention. This is in response to discussions with Historic England regarding their request for 'protective provisions' in the Order.</p> |
| Article 2 Interpretation | <p><u>“commence”</u> The Applicant has considered the Examining Authority's draft DCO, which would move “the erection of construction plant and equipment” from the works excluded from the definition of commence to fall within the definition of “preliminary works”. The Examining Authority's reason for the change is that it agrees with Wiltshire Council and that the receipt and erection of construction of plant should be regulated under preliminary works OEMP. The Applicant notes from Wiltshire Council's summary of its oral submissions at the second DCO ISH [REP8-028] that, at paragraph 4.1.3, it confirms that its concerns relate to the erection of plant and equipment and this it is not unduly concerned by the bringing of materials to the site.</p> <p>The Applicant has considered the issue further and, following discussion with Wiltshire Council, has amended the definition of “commence” to address that underlying concern. The effect of the amendments is to exclude the “<i>receipt of construction plant and equipment</i>” and “<i>the erection of construction plant and equipment for the preliminary works</i>” from the definition of “commence”. This ensures that the mere receipt of construction plant and equipment (for the main or preliminary works), which Wiltshire Council have submitted does not cause concern, would not trigger “commencement”. However, the erection of construction plant and equipment for the preliminary works, while not triggering commencement, would be regulated pursuant to the preliminary works OEMP and the subsequently approved CEMPs. This is appropriate given the relative scale of the preliminary works. Erection of construction plant and equipment for the much more significant main works would trigger</p> |

| Provision in revised draft DCO and/or issue | Brief description and explanation |
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| | <p>“commencement” to the extent it comprises development and could not therefore occur until the pre-commencement requirements had been discharged in respect of that part. To give effect to this amendment, the definition of “preliminary works” has been moved without amendment from Paragraph 1 of Schedule 2 to Article 2(1).</p> <p>The Applicant understands these amendments to be agreed with Wiltshire Council.</p> <p><u>“Convention”</u> The Applicant has defined the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972, which is used in the new definition of “Historic England”, at the request of Historic England.</p> <p><u>“Esso”</u> The Applicant has defined Esso in article 2(1) to give effect to changes to articles 22 (compulsory acquisition of rights) and 50 (consent to transfer benefit of Order) (please see the corresponding entries below).</p> <p><u>“Historic England”</u> The Applicant has defined Historic England, at its request, in terms that acknowledge its role as the government’s adviser on the historic environment and on the Convention. In particular, Historic England requested that the definition refer to their role as a statutory consultee and to the Department for Digital, Culture, Media and Sport.</p> <p><u>“Maintain”</u> The Applicant has amended the proviso on environmental effects to “materially worse adverse” rather than “materially different” for consistency with the phrases’ use elsewhere in the Order.</p> <p><u>“Preliminary works”</u> The definition of “preliminary works” has been moved without amendment from Paragraph 1 of Schedule 2 to Article 2(1).</p> |

| Provision in revised draft DCO and/or issue | Brief description and explanation |
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| | <p><u>“Shared use cycle track”</u> The Applicant has defined “shared use cycle track” in terms that closely follow the definition of “cycle track” in section 329 Highways Act 1980. The Applicant’s definition differs in that a shared use cycle track will always convey a public right of way on foot, whereas a “cycle track” is expressed to be “with or without a right of way on foot”. The definition is necessary to support clarificatory amendments made to Work No. 3A. The reasons for this amendment are described in further detail in the Applicant’s additional submission ‘Shared Use Cycle Route Clarification Note’ [AS-107].</p> <p><u>“World Heritage Site”</u> The Applicant has amended the definition to make it clear that it does not relate to the Avebury part of the Stonehenge, Avebury and Associated Site World Heritage Site. This is particularly important given the disapplication of permitted development rights in the World Heritage Site under article 6(3).</p> |
| Article 3 Disapplication of legislative provisions | <p>The Applicant has introduced a new article 3(1)(h), following discussions with Historic England, that would disapply section 33(1)(f) Planning Act 2008, in so far as it relates to any work or operation authorised by the Order to be carried out beyond the Order limits under articles 14 or 15.</p> <p>Section 33(1)(f) Planning Act 2008 removes the requirement for consent for works to scheduled ancient monuments that would otherwise be required under section 2(3) or 3 of the Ancient Monuments and Archaeological Areas Act 1979 (the “1979 Act”). Articles 14 (protective works to buildings) and 15 (authority to survey and investigate land) include a limited power to protect buildings affected by the authorised development, or survey and investigate land adjacent to the Order limits.</p> <p>The intention is that the exercise of those powers beyond the Order limits would be subject to the requirement to obtain scheduled ancient monument consent, where the requirement for that consent is engaged. This is appropriate in the unique circumstances of the Scheme,</p> |

| Provision in revised draft DCO and/or issue | Brief description and explanation |
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| | <p>where the land adjacent to the Order limits contains scheduled monuments, because it provides simple certainty that outside the Order limits, the 1979 Act would continue to apply. Within the Order limits, section 33(1)(f) Planning Act 2008 would continue to disapply the requirement for scheduled ancient monument consent.</p> |
| <p>Article 7 Limits of deviation</p> | <p>The Applicant has amended article 7(1) to ensure that it is consistent with articles 14 (protective works to buildings) and 15 (authority to survey and investigate land), which would authorise limited operations on land outside of the Order limits.</p> <p>The Applicant has also amended article 7(6) to acknowledge the Secretary of State's consideration, when deciding who ought to be consulted prior to a certification under article 7(6), of those person's statutory roles and responsibilities. This has arisen from Applicant's further consideration of the submissions of the Environment Agency and Historic England. The wording used is substantially the same as that included in the Examining Authority's draft DCO, in respect of requirement 3. The Applicant considers it is desirable to employ consistent wording for the Secretary of State's consideration of the appropriate persons to consult when considering a change under article 7(6) and requirement 3.</p> |
| <p>Article 15 Authority to survey and investigate land</p> | <p>The Applicant has deleted the second instance of "may" in sub-paragraph (1), which was a typographical error.</p> |
| <p>Article 16 Removal of human remains</p> | <p>The Applicant has introduced a paragraph (13) to provide certainty on the procedure that applies where remains to which paragraph (12) applies are encountered. It provides that in such circumstances the Applicant (i) may remove those remains but (ii) must apply to the Secretary of State for a direction as to how those remains will subsequently be treated and (iii) thereafter deal with the remains according to the Secretary of State's direction.</p> |

| Provision in revised draft DCO and/or issue | Brief description and explanation |
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| Article 22 Compulsory acquisition of rights | The Applicant has introduced a new paragraph (8) that is required to give effect to the acquisition of rights required for the benefit of Esso and its undertaking in relation to the diversion of its apparatus. |
| Article 25 Modification of Part 1 of the 1965 Act | The Applicant has amended paragraph (5)(b) in order that the text to be inserted into Schedule 2A of the Compulsory Purchase Act 1965 also includes reference to article 15 (authority to survey and investigate land). This is to ensure that the entry on to land for the purposes authorised under article 15 does not trigger the counter-notice procedures in that schedule. This is appropriate in view of the temporary and limited nature of any occupation of land authorised by article 15. |
| Article 38 Crown rights | As reported in the Applicant's 'Crown Authority Consent Report' [REP8-067], the Applicant is now in receipt of all the necessary Crown consents for Crown land within the Order limits. Article 38, is therefore no longer required and has been deleted. The remaining article numbering and cross references have been amended accordingly. |
| Article 39 Closing the tunnel | The Applicant has amended this article, following discussions with Wiltshire Council, to avoid the potential for conflict between this article and the tunnel closure management plan required under OEMP measure MW-TRA12. |
| Article 50 Consent to transfer benefit of Order | The Applicant has introduced an new paragraph (8) that is required to ensure that rights acquired under article 22 for the benefit of Esso and its undertaking, to facilitate the diversion of its pipeline, can be transferred to it without requiring the specific consent of the Secretary of State. |
| Schedule 1 Work Nos. 3A and 3C | <p>The Applicant has included the "construction of a shared use cycle track" within the description of the works supporting the reclassification of the existing A303 described in Work No. 3A(iii). A shared use cycle track would permit use by pedal cyclists and pedestrians, but not equestrians, carriages or motorised vehicles. Equestrians would be entitled to use the de-trunked A303.</p> <p>The Applicant has also amended Work No. 3C(i) to include a cycleway within the description of the construction of a new link to the southern roundabout of</p> |

| Provision in revised draft DCO and/or issue | Brief description and explanation |
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| | <p>the new Longbarrow Junction. The cycleway would be open to use by pedestrians, pedal cyclists and equestrians, but not motorised vehicles or carriages.</p> <p>Users of mobility scooters would be able to use both cycleways and shared use cycle tracks.</p> <p>For consistency, the Applicant has also added “shared use cycle track” to the list of ancillary works.</p> <p>Please see the Applicant’s additional submission ‘Shared Use Cycle Route Clarification Note’ [AS-107] for further details.</p> |
| Schedule 2 Interpretation | <p><u>“British Standards”</u> A definition has been added for clarity.</p> <p><u>“detailed archaeological mitigation strategy”</u> The Applicant has amended the definition of detailed archaeological mitigation strategy (“DAMS”) to provide further detail as to its contents and to expressly acknowledge that it contains measures for the protection of the World Heritage Site during the construction, operation and maintenance of the authorised development. This, and a similar amendment to the definition of the “OEMP”, discussed further below, has been made following discussions with Historic England.</p> <p><u>“National Trust”</u> The Applicant has defined the National Trust to support an amendment to requirement 4(1) (discussed further below).</p> <p><u>“OEMP”</u> Similarly, the definition of “OEMP” has been expanded to reflect its contents by (i) acknowledging that it contains the “scheme objectives” and (ii) protections for the World Heritage Site and its setting during the construction, operation and maintenance of the authorised development.</p> <p><u>“preliminary works CEMP”</u> The Applicant has amended the definition to clarify that the preliminary works CEMP relates to the preliminary works.</p> |

| Provision in revised draft DCO and/or issue | Brief description and explanation |
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| | <p><u>“scheme objectives”</u></p> <p>Following discussions with Historic England, the Applicant has included a definition for the “scheme objectives” which acknowledges the four objectives, transport, economic growth, cultural heritage and environment and community, on the face of the Order. The term is used in the definition of OEMP and in paragraph 15 (further information) of Schedule 2, discussed below.</p> |
| <p>Schedule 2 Requirement 3 Preparation of detailed design, etc.</p> | <p>As noted above in respect of article 7(6), the Applicant has adopted, with minor modifications, the Examining Authority’s addition to requirement 3 of reference to the “statutory roles and responsibilities” of persons with whom the Secretary of State is considering consulting in respect of an application made under this requirement.</p> |
| <p>Schedule 2 Requirement 4</p> | <p>The Applicant has made amendments to this requirement to clarify its relationship to the DAMS (see sub paragraphs (5) and (9)). Typographical amendments have been made to the list of plans in sub-paragraph (11) for the purposes of conforming to SI drafting conventions (the use of lower case).</p> <p>The Applicant has also made amendments to sub-paragraph (11) and introduced new sub-paragraphs (12) and (13). These amendments are necessary to carry through the requirement already contained in requirement 4 for a main works CEMPs to be approved before the relevant <i>part</i> of the main works commences. Sub-paragraph (11) previously required that a main works CEMP must include all of the plans etc listed in the sub-paragraph. However not all of the plans, strategies and policies listed in sub-paragraph (11) will be relevant to all parts of the authorised development.</p> <p>For example, a Ground Movement Monitoring Strategy, described in measure MW-CH8 is designed to address the potential effects of ground vibration from the tunnel, or ground surface movement caused by settlement, on heritage assets. It would not be relevant to a CEMP that covers, for example Work No.1A (the Winterbourne Stoke Bypass and associated works) which is over a kilometre away from, and does not include, any tunnelling</p> |

| Provision in revised draft DCO and/or issue | Brief description and explanation |
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| | <p>operations.</p> <p>Equally, it would not be appropriate to require the preparation of an arboricultural strategy for a part of the main works, the site and surroundings of which contain no trees.</p> <p>This is consistent with the existing approach to the terms of the main works CEMPs generally, set out at measure MW-G5 of the OEMP, which makes states that the contractor must prepare a CEMP for the relevant part of their works, <i>as applicable to the scope of their contract</i> (emphasis added).</p> <p>The selection of the appropriate plans will be regulated by the wide consultation on the CEMP required under the terms of the OEMP, and ultimately by the supervision of the Secretary of State or Wiltshire Council as approver.</p> <p>The new sub-paragraphs (12) and (13) are intended to act as protections around this process. Sub-paragraph (12) will ensure that, taken together, the main works CEMPs must be substantially in accordance with all of the requirements of the OEMP, must include all of the plans etc and must be consistent. Sub-paragraph (13) serves to emphasise that the requirements of the DAMS continue to apply to all parts of the authorised development and if, for example, the DAMS requires that a site specific written scheme of investigation is required for part of the works, that document will be required to form part of the relevant main works CEMP pursuant to requirement 5..</p> |
| <p>Schedule 2 Requirement 5 Archaeology</p> | <p>The Applicant has amended requirement 5(1) to reflect that the DAMS includes, and the undertaker must comply with, measures for the construction, operation and maintenance of the authorised development. In keeping with the close relationship between the OEMP and the DAMS, this application is achieved chiefly via the HEMP mechanism under the OEMP: please see paragraph 5.1.25 of the DAMS.</p> <p>Other amendments are to reflect the procedures for approvals by Wiltshire Council of the HMP, SSWSIs and</p> |

| Provision in revised draft DCO and/or issue | Brief description and explanation |
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| | <p>AMS, which are set out in the DAMS. Sub-paragraph (2) has been added to both signpost the existence of those procedures and to clarify on the face of the Order that the Secretary of State is to determine any appeals in accordance with the procedures in the DAMS. Those procedures reflect the need to maintain progress on a wide-ranging mitigation strategy. They are based on the appeals procedure in article 44 of the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and incorporate elements of the procedure in Schedule 12 paragraph 3 of the Milbrook Gas Fired Generating Station Order 2019.</p> <p>Paragraph (3) ensures there is no conflict with the appeals procedures set out in the DAMS and the procedures for the Secretary of State's determination of applications for approvals under the requirements by making it clear that Part 2 of Schedule 2 does not apply to such appeals.</p> |
| <p>Schedule 2 Requirement 8 Implementation and maintenance of landscaping</p> | <p>Following further discussions with the National Trust, the Applicant has included a requirement to consult it on any application for approval under sub-paragraph (1). Sub-paragraph (1) relates to the landscaping scheme applicable for all of the authorised development within the WHS, and Work No. 4. In the unique circumstances of this Scheme, the Applicant considers it to be appropriate to consult the National Trust, who hold inalienably land comprised in the World Heritage Site for the benefit of the nation, on that Scheme.</p> |
| <p>Schedule 2 Requirement 11 Details of consultation</p> | <p>The Applicant has amended requirement 11 to require the summary consultation report to include the written responses received. This amendment has been made following consideration of Historic England's deadline 8 submission, and on balance, in the particular circumstances of this Scheme, the Applicant considers it to be appropriate to include all written responses.</p> |
| <p>Schedule 2 Requirement 12 Replacement stone curlew</p> | <p>As set out in the Applicant's response to the Examining Authority's Rule 17 request for further information dated 3 September 2019 (submitted at Deadline 9), the Applicant has included a new requirement in the DCO in respect of stone curlew. The full explanation and rationale for this approach is included in that response, but in summary in</p> |

| Provision in revised draft DCO and/or issue | Brief description and explanation |
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| breeding plot | <p>the absence of binding legal agreements, the Applicant recognises in the context of the Secretary of State's duties under the Habitats Regulation Assessment regime, a robust, enforceable legal mechanism is required to ensure the four proposed stone curlew breeding plots (one to replace a plot lost as a result of construction, together with three additional plots) to be provided are put in place and maintained.</p> <p>Details must be provided to the Secretary of State demonstrating that the Applicant has secured land and a maintenance regime in respect of each of the plots. The Secretary of State must then certify their satisfaction with those details and the Applicant must then implement and maintain the plots in line with them.</p> <p>The details provided to the Secretary of State under the requirement in respect of both the provision of the plots and their maintenance must be substantially in accordance with the 'stone curlew breeding plot specification', which is to be a certified document and has been submitted at Deadline 9. The specification reflects the details provided in Appendix 1 of Appendix A to the Statement of Common Ground with Natural England [AS-106], and the provision and maintenance of the plots in accordance with it ensures that there would be no adverse effects on the integrity of the Salisbury Plain SPA as a result of the Scheme.</p> <p>The Applicant has provided the wording of the requirement and the specification to Natural England and RSPB and both bodies have confirmed they are content with the approach the Applicant is proposing.</p> |
| Schedule 2 Requirement 14 Determination of applications by the planning | <p>Related to the amendments to requirements 4 and 5, the Applicant has included a new paragraph 14 which confirms that the planning authority has to determine applications for the approval of a HMP, SSWSI or AMS, in accordance with the procedure set out in the DAMS. There is no conflict with requirement 5(3), as that provision disapplies Part 2 in so far as it relates to</p> |

| Provision in revised draft DCO and/or issue | Brief description and explanation |
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| authority under paragraph 4 | appeals to the Secretary of State, where the procedure in the DAMS would apply instead. |
| Schedule 2 Requirement 16 Register of requirements | The Applicant has amended requirement 16 to extend the duty to maintain a register of requirements to approvals by the planning authority. This is appropriate since Wiltshire Council will be the approver of HMPs, SSWSIs and AMSs. |
| Schedule 3 Part 3 Private means of access to be stopped up for which a substitute is to be provided and new private means of access which are otherwise to be provided Reference 10 | The Applicant has corrected a typographical error in the description of reference 10. |
| Schedule 4 Land in which only new rights etc., may be acquired Plots 03-13, 03-14 and 12-02 | The Applicant has amended the purposes for which rights may be acquired over these plots to expressly refer to the acquisition of rights for the benefit Esso Petroleum Company, Limited. |
| Schedule 12 Documents to be certified | The Applicant has updated Schedule 12 to reflect the addition of the stone curlew breeding plot specification and made minor amendments to update and more clearly describe the documents to be certified. |

3. THE APPLICANT'S RESPONSES TO THE EXAMINING AUTHORITY'S DRAFT DCO

| Article, Requirement or Schedule | ExA's Proposed Wording | Reason | Applicant's Response |
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| Article 7(2), (3), (4), (5) and (7) | Delete: <i>"or convenient"</i> | <p>The Examining Authority (ExA) agrees with Historic England that whilst there may be grounds for a deviation that is "necessary" it is not considered that the provision of infrastructure with scope for deviation on the basis of "convenience" would be appropriate in a World Heritage Site (WHS) and its setting.</p> <p>In addition, it is considered that this change reflects the justification provided by the Applicant for the extent of the Limits of Deviation (LoD) sought in this location.</p> | <p>The Applicant remains firmly of the view that it is appropriate for it to exercise the limits of deviation when it is either necessary or convenient to do so, subject as it is to compliance with the detailed restrictions and controls contained in the draft DCO, the DAMS and the OEMP.</p> <p>The Applicant is unaware of any precedent where the exercise of limits of deviation has to be demonstrated to be "necessary" alone; the usual practice is for their exercise to be the sole preserve of the undertaker without qualification. Striking out "convenient" would have a chilling effect on the ability of the contractor to develop the detailed design in such a way as to deliver better environmental outcomes and to deliver better value for money, such outcomes being clearly convenient, but may not be "necessary".</p> <p>The Applicant further notes that it has throughout the examination (and before) stressed that flexibility is necessary to deliver the Scheme. This is a very different proposition than flexibility that may only be exercised where it is "necessary" to do so. The deletion of "convenience" effectively creates a presumption that the centrelines, levels and commencement/termination points shown on Works Plans, Engineering Section Drawings (Plan and Profiles) and (Cross sections) ("the Plans") are the default that must be</p> |

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| | | | <p>followed unless it is necessary to depart from them.</p> <p>The plans were never intended to operate in this fashion. They have always been used as the reference points from which the limits of deviation are defined and within which the detailed design would be developed. It is unreasonable to require the Plans to undertake a task for which they are not designed by showing a presumed design, from which any deviation must be justified as being <i>necessary</i>.</p> <p>As has been noted throughout the Applicant's submissions to the examination, the limits of deviation have been thoroughly assessed, with full account of the World Heritage Site, and their exercise would not alter the outcomes of the environmental assessment or the heritage impact assessment. It follows then that the deletion of "convenient" merely imposes an additional unnecessary constraint on the flexibility required to develop a complex nationally significant infrastructure project with no benefit in terms of the outcome.</p> |
| Article 13(5) | <p>Amend wording by inserting the words in bold below so as to read:</p> <p><i>"(5) The undertaker must take such steps as are reasonably</i></p> | <p>The ExA agrees with the Environment Agency that this amendment is necessary due to the sensitivity of the groundwater in this area.</p> | <p>The Applicant maintains its position that the Environment Agency's proposed amendments to this article misconstrue its purpose and effect as was outlined at the second DCO ISH (see REP8-019 under agenda item 3.4(i)). The groundwater in the area is already protected by the full suite of environmental protection legislation applying to it including the Environmental Permitting (England and Wales) Regulations 2016 explicitly referenced within the article.</p> <p>The purpose and effect of article 13 is to provide a right for the undertaker to discharge water into existing drainage systems,</p> |

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| | <p><i>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.</i></p> | | <p>including public sewers and watercourses. This right to connect is subject to the approval of the system’s owner and a duty on the undertaker to ensure that the water discharged does not interfere with the operation of the drainage system (i.e. it is free from gravel, soil or other solid substance, oil or matter in suspension).</p> <p>The purpose and effect of the article is to authorise the connection to the drainage system as against the owner of that system. The article is not concerned with pollution control generally, which is regulated by the Environment Agency under the Environmental Permitting (England and Wales) Regulations 2016 (“EPR 2016”). Nothing in this article overrides that, nor could it, as such a disapplication would require the Environment Agency’s consent under section 150 Planning Act 2008 and the Environment Agency has been clear that such consent would not be granted. The amendments would unnecessarily duplicate those controls.</p> <p>In respect of discharges to ground, the Applicant notes that the article does not authorise discharges to ground and, as noted above, it does not override the requirement for an environmental permit, should one be required.</p> <p>The Applicant has considered the MoU with its predecessor, the Highways Agency, referred to by the Environment Agency in its submissions at the second DCO issue specific hearing, and this does not alter its view. The Environment Agency has not identified any shortcomings in the EPR 2016 which would necessitate the proposed amendment to article 13. As noted above, as a matter of law, the DCO cannot override the EPR 2016 without the Environment Agency’s consent.</p> |
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| | | | <p>It should further be noted that article 13 is a very well precedented article, which has been included in substantially the same form in the vast majority of development consent orders that have been made to date.</p> |
| Article 29(2) | <p>Amend as follows:</p> <p>Delete the figures “14” and substitute therefor the figures “28”.</p> | <p>The ExA agrees with the National Farmers Union (NFU) that the notice period set out in Article 29(2) is unreasonably short and that it is necessary and reasonable for the Applicant to give a longer period of notice to landowners before exercising the powers of temporary possession. The ExA considers that a reasonable notice period would be not less than 28 days.</p> | <p>The Applicant has throughout the examination maintained its view that 14 days is the appropriate period of notice to be given under this article, see the Applicant’s responses to DCO.1.18 and DCO.1.19 [REP2-030], agenda item 3.1(i) of the Applicant’s summary of representations made at the first DCO ISH [REP4-029], 8.2.3 of [REP7-021], and the Applicant’s summary of the second DCO ISH (see agenda items 3.2 (ii) and [REP8-019]</p> <p>The Applicant has given clear and enforceable commitments to liaise with affected landowners. These are set out in the OEMP in the duties of the Agricultural Liaison Officer, which include an obligation to liaise with affected landowners/occupiers about activities which may affect their land/business prior to public release of information about those activities, arrange quarterly meetings with agent representatives of owners/occupiers. Other measures in the OEMP include a requirement to give notification of works adjacent to their landholdings (MW-COM1). Taking these measures together, the affected persons will be kept informed regarding the progress of the works.</p> <p>The Applicant’s position remains, particularly in view of the additional commitments referred to above, that 14 days is a reasonable period of notice to give before taking temporary possession of land under article 29. In this regard the Applicant notes that it is supported by the precedent of the vast majority of</p> |

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| | | | development consent orders made to date. The Applicant further notes that three development consent orders have been made following the enactment of the Neighbourhood Planning Act 2017 (Silvertown Tunnel Order 2018, the A19/A184 Testo's Junction Alteration Development Consent Order 2018 and the M20 Junction 10a Development Consent Order 2017). The 14 days is required to ensure that this nationally significant infrastructure project can proceed without delay. The consequence of imposing a longer period of notice is that it is likely to lead to the Applicant taking possession of more land, earlier, than might otherwise be the case. |
| Requirement 1(1) | <p>Insert new category (k) in sub-paragraph (1) as follows:</p> <p><i>“(k) the erection of construction plant and equipment”.</i></p> | The ExA agrees with Wiltshire Council that it is necessary for such activities to be incorporated within the definition of <i>“preliminary works”</i> so that they can be satisfactorily controlled. | The Applicant has considered the Examining Authority's drafting and the desire “the erection of construction plant and equipment” to be subject to regulation. Revision 7 of the DCO has achieved this objective in a slightly different way, which the Applicant understands to be agreed with Wiltshire Council; please see the explanation of the changes to the definition of “commence” in the first table in this document. |
| Requirement 3(1) | <p>Amend as follows:</p> <p>By the deletion of the words <i>“it is compatible”</i> and the substitution therefor of the following words:</p> <p><i>“subject to the</i></p> | The ExA agrees with Wiltshire Council that this change is necessary to ensure that all essential elements of the Proposed Development, particularly ecological and enhancement measures, are delivered. | Revision 6 of the Applicant's DCO adopted wording in requirement 3 that achieves the same outcome as that proposed. |

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| | <i>exercise of the limits of deviation under Article 7 of this Order, it is in accordance”.</i> | | |
| Requirement 3(1) | <p>Insert between the word “<i>question</i>” and the word “<i>and</i>” the words:</p> <p><i>“and the statutory roles and responsibilities of those persons”.</i></p> | The ExA agrees with the Environment Agency that the additional wording is necessary to appropriately reflect the status and role of statutory consultees. | The Applicant has adopted this amendment with minor modifications, please see the explanation of changes to requirement 3 in the first table in this document. |
| Requirement 4(11) | <p>Insert new category (p) in sub-paragraph (11) as follows:</p> <p><i>“(p) Invasive Non-native Species Management Plan”.</i></p> | The ExA agrees with Wiltshire Council that this should additionally be included in the main works CEMP and the Applicant acknowledges that it was inadvertently omitted from the latest revision. | The Applicant included the Invasive Non-native Species Management Plan in sub-paragraph (11) of requirement 4 in Revision 6 of the draft DCO [REP 8-005]. |
| Requirement 4(12) | <p>Insert new sub-paragraph 4(12) as follows:</p> <p><i>“The Groundwater Management Plan referred to in sub-paragraph (11)(m)</i></p> | The ExA considers that this addition is necessary and reasonable given the importance of the Blick Mead archaeological site. It is appropriate that any potential hydrological effects upon it should be specifically | The Applicant maintains its position as set out at the second DCO ISH set out in its summary [REP8-109] under agenda item 4.9(iv). In summary the Applicant remains of the firm view that the OEMP is the appropriate place to specify groundwater monitoring requirements and specifying it there would be consistent with the manner in which all other management and mitigation proposals have been addressed across the Scheme proposals. A measure secured in the OEMP has no less status or importance than |

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| | <i>above must include details of how any potential adverse hydrological effects on the archaeological site, known as Blick Mead, have been considered in the course of meeting all the requirements to be addressed by that Plan as set out in the OEMP.”</i> | considered as part of the Groundwater Management Plan and that recognition of this should be on the face of the Order itself. | measure set out in a requirement; both of which must be complied with. Additional wording was included in MW-WAT10 in the deadline 8 submission of the OEMP [REP8-007] that achieves the same effect. The Applicant notes that the proposed wording aligns with that offered by the Applicant, without prejudice to its clearly stated position that such an amendment is unnecessary, at the DCO ISH. |
| Requirement 4(13) | Amend as follows: Delete the word “OEMP” and substitute for the word “CEMP”. | The ExA agrees with Wiltshire Council that the correct reference is to the “CEMP” and not the “OEMP”. The Applicant acknowledges that this drafting error should be corrected. | The Applicant removed the reference to the OEMP in what was requirement 4(13) in revision 6 of the draft DCO [REP8-005]. |
| Requirement 4(12), (13) and (14) | Renumber sub-paragraphs (12), (13) and (14) as (13), (14) and (15). | This re-numbering is consequential upon the insertion of the new sub-paragraph 4(12) as explained above. | The Applicant has no substantive comment. |
| Requirement | Delete the following word: | The ExA agrees with Wiltshire Council that it is | The Applicant made this amendment in revision 6 of the draft DCO [REP8-005]. |

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| 8(3)(b) | “noise” | necessary and reasonable for ‘normal’ fences and walls to form part of the landscaping scheme submitted to the Secretary of State for approval. | |
| Requirement 10(1) | Delete the following words: “land drainage” | The ExA agrees with Wiltshire Council that it is necessary for this Requirement to apply to all its relevant functions. | The Applicant made this amendment in revision 6 of the draft DCO [REP8-005]. |
| Requirement 10(1) | Insert after the words “ <i>pollution control</i> ” the words: “ <i>and management of flood risk</i> ”. | The ExA agrees with the Environment Agency that it is necessary and reasonable for the scope of this Requirement to include the management of flood risk. | The Applicant agreed this at the second DCO issue specific hearing and made this amendment in revision 6 of the draft DCO [REP8-005]. |
| Requirement 12 | Insert a new Requirement 12 as follows: “ <i>Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) (England) Order 1995 (or any Order revoking</i> | The ExA considers that, in the light of the WHS status of part of the site and its consequential sensitivity that, exceptionally, relevant permitted development right under the GPDO should be restricted within this location. Furthermore, this would reflect the Applicant’s own | <u>The Principle of the removal of permitted development rights</u> The Applicant in revision 6 of the DCO amended article 6 (planning permission) to clarify that in the exceptional circumstances of this scheme, within the World Heritage Site, it may not rely on permitted development granted under Part 9 Class B of the Town and Country Planning (General Permitted Development) Order 2015 (“ GPDO ”) for any part of the authorised development. In all other cases outside the exceptional circumstances of this scheme, it is extremely important to note that the permitted |

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| | <p><i>and re-enacting that Order) no development under Schedule 2, PART 9 Development relating to roads Class B and PART 16 Communications Class D shall be undertaken on the Order Land within the World Heritage Site other than that expressly authorised by this Order”.</i></p> | <p>approach to the Proposed Development in seeking to mitigate the potential harm to the WHS from uncontrolled development.</p> | <p>development rights that the Applicant enjoys in respect of the exercise of its functions as the authority for the strategic road network in England form an essential part of its tool kit that enables it to discharge those functions. The removal of part of that tool kit risks putting Highways England in a position where it is unable to discharge those public functions with which it is entrusted efficiently which would be to the wider public detriment. The Applicant has outlined that the exercise of its permitted development rights operates in the wider statutory framework provided by the Highways Act 1980, which includes the duties Part VA to comply with the EIA Directive and its wider licence duties. These are not matters that are taken lightly and a breach of its licence conditions could ultimately lead to the loss of its licence. Full detail on this point, including the established position on highways permitted development rights applying in world heritage sites, was set out in the Applicant’s response to question DCO.2.31 [REP6-027].</p> <p>In respect of Part 16 Class D permitted development, the Applicant understands that the scope of application of the Road Traffic (Driver Licensing and Information Systems) Act 1989 was significantly reduced by The Driver Information Systems (Exemption) Order 1990. The Applicant understands from its enquiries with Government that only one licence has been granted, to TrafficMaster Ltd.</p> <p>Crucially, Highways England is not a driver information system operator under the GPDO, because it is not a licensee under the 1989 Act, nor does it act on behalf of one. There is therefore no permitted development right available to Highways England to disapply. The development consent order, if made, is for the</p> |
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| | | | <p>benefit of Highways England; it does not run with the land. So it is not legitimate to disapply permitted development rights of a third party that has nothing to do with the Scheme.</p> <p>The Applicant further notes that Part 9 Class D permitted development are exercisable, subject to the controls in the Road Traffic (Driver Licensing and Information Systems) Act 1989 today in the World Heritage Site, with or without the Applicant’s Scheme, and are not constrained to the strategic road network (or indeed highways generally). The development consent order for the Scheme is not the appropriate place to correct any perceived shortcomings in the permitted development regime. That ought to be considered on a general basis, as it applies to World Heritage Sites across the country.</p> <p>On this basis, the Applicant considers the removal of permission for Class D Part 16 is unnecessary and unjustified. Should it be an issue of concern the local planning authority is empowered to make a direction under article 4 of the GDPO to restrict such development, which, in the Applicant’s submission, would be the appropriate mechanism to address such concerns if they are warranted.</p> <p>To conclude, the Applicant considers that its amendment to article 6 in revision 6 of the DCO, strikes the appropriate balance between maintaining the Applicant’s ability to discharge its functions as highway authority for the strategic road network and the concerns expressed as to the use of its permitted development rights in the World Heritage Site. The Applicant considers it to be unnecessary and unjustified for the DCO to restrict Part 16 Class D permitted</p> |
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| | | | <p>development, as Highways England does not benefit from it, the development consent order is not the appropriate place to vary what are general permitted development rights that apply across the country (including in world heritage sites) for the benefit of parties with no connecton to the scheme, and, in any event, the planning authority is the appropriate body to take action, and is empowered to do so.</p> <p><u>Comments on the drafting approach</u></p> <p>Notwithstanding the principles outlined above the Applicant has significant concerns with the drafting of the proposed requirement. The drafting goes far beyond removing the ability to rely on permitted development under Class B Part 9 of the GDPO. It is important to recognise that Class B Part 9 is defined by reference to the Applicant’s functions under the Highways Act 1980. The term “function” recognises both the duties of the Applicant and its powers to discharges those duties.</p> <p>The proposed requirement effectively criminalises any development that is (i) not expressly authorised by the DCO and (ii) is otherwise within the Applicant’s statutory functions under the Highways Act 1980, <i>even when it would be being undertaken outside of the permitted development regime</i>. The Applicant could therefore be required by statute to make an intervention yet be prevented by the proposed requirement from taking such action, even if it had planning permission to do so. Breach of the requirement would be a criminal offence. In such a situation, the Applicant’s only lawful recourse would be to apply to vary the Development Consent Order. Clearly, this would not be conducive</p> |
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| | | | <p>to the safe and efficient operation of the strategic road network.</p> <p>In respect of Class D of Part 16 the imposition of a requirement on the undertaker would not operate so as to prevent a driver information system operator from installing apparatus. As noted above, the appropriate intervention, if one is considered appropriate would be for the planning authority to make an article 4 direction on the GDPO.</p> |
| Requirements 12 to 15 | Re-number Requirements 12 to 15 as 13 to 16 | The re-numbering is consequential upon the insertion of a new Requirement 12 as explained above. | No comment. |

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