

Planning Act 2008 – section 91

TR010027 - Application by Highways England for an Order Granting Development Consent for the M42 Junction 6 Improvement**Agenda for Issue Specific Hearing 1: draft Development Consent Order (DCO)**

The Panel notified Interested Parties in its letter dated 23 April 2019 of the decision to hold an Issue Specific Hearing on the following date:

Hearing	Date and time	Location
Issue Specific Hearing 1 (DCO)	Wednesday 22 May 2019 seating available from 1.30pm, the hearing will start at 2.00pm	Ramada Hotel, The Square, Solihull, West Midlands, B91 3RF

Access and Parking: Full disabled access. Free parking at venue
Attendees

The Panel would find it helpful if the following parties could attend this hearing. However, this does not indicate that other parties will not be able to contribute. All interested parties are invited to attend and make oral representations on the matters set out in the agenda, subject to Panel's ability to control the hearing.

- Highways England (the Applicant)
- Solihull Metropolitan Borough Council
- North Warwickshire Borough Council
- National Grid Electricity Transmission PLC and National Grid Gas
- Cadent Gas Limited
- Western Power Distribution (West Midlands) PLC
- Esso Petroleum Company Limited
- Severn Trent Water Limited
- Network Rail Infrastructure Limited
- High Speed Two (HS2) Ltd
- Birmingham Airport
- Any other IPs with an interest in the drafting of the DCO; implementation or discharge of proposed articles, requirements or other provisions; seeking protective provisions or any related side agreements

The Panel have sought to provide sufficient detail to assist the parties to prepare for the hearing. However, the details set out below are indicative and the Panel may find it necessary to include additional agenda items or to amend the order in which the items are dealt with.

Please note: Interested parties who have registered to speak in advance may be provided with a table and microphone. Individuals who have not registered in advance may participate at the discretion of the Panel. Any lack of discussion of a particular issue at a hearing does not preclude further examination of this issue, including further written questions.

Agenda for Issue Specific Hearing 1 (ISH DCO 1)

1. Welcome, introductions and arrangements for the Hearing

2. Purpose of the ISH

An early hearing on the draft DCO is being held to address matters, issues and questions initially identified by the Panel during their assessment of preliminary issues, before its consideration of written representations. The Panel considers that it is necessary to examine these matters, issues and questions orally at the outset of the Examination, providing the maximum time for interested parties to respond to them in their own subsequent written representations and for the applicant, where necessary, to programme actions to address issues raised. The possibility of further hearings for the examination of the draft DCO are programmed in our draft timetable enclosed with our letter of 23 April 2019.

The Panel will examine the draft DCO within the framework of the matters set out below to consider:

- how the draft responds to the project definition;
- the Applicant's response to guidance in PINS' Advice Notes, particularly AN15;
- whether the draft secures delivery of the proposed project within the parameters assessed for environmental impact assessment (EIA), habitat regulations assessment (HRA) and other purposes – the 'Rochdale envelope';
- the need for changes to other legislative provisions, ensuring that these are clear and are not unduly reductive of other persons' rights;
- whether the policy tests for planning conditions set out at paragraph 55 of the National Planning Policy Framework (NPPF) and which are relevant to requirements are met;
- the need for protective provisions and the scope for changes to the current draft to respond to negotiations in progress;
- the need for any commercial agreements or planning obligations and progress towards these; and
- the need for statutory undertaker and any other consents.

In addition to the matters identified in this agenda, the Panel will review detailed issues and questions about individual DCO provisions that they have identified in the attached schedule. Additional issues and questions arising from interested parties that have not been identified in the schedule will not be discussed at this time. These should be set out in written representations and will be considered as the Examination progresses, in writing or orally as required. This hearing will not examine the detailed content of provisions relating to the compulsory acquisition of land or rights, or temporary possession of land, although the attached schedule does contain some comments and questions on these issues. Responses to these should also be set out in written representations. The draft Examination Timetable proposes that separate compulsory acquisition hearings will be held.

3. The function and structure of the draft DCO

The Panel will ask the applicant about:

- the proposed articles;
- the proposed project description (Sch 1);
- the proposed requirements (Sch 2);
- the need for and progress on protective provisions (Sch 10);
- the need for and progress on any planning obligations;
- the need for and progress on any related consents; and
- ongoing negotiations and statements of common ground.

4. Specific issues and questions bearing on the DCO, raised by the Examining authority

Questions will be put to the applicant and views will be sought from interested parties present. Where they are relevant to the discussions under matter 3 above, the questions may be drawn out within those matters.

5. Discharge of requirements and conditions, appeals and disputes

The Panel will ask the bodies and local authorities whether they have any significant concerns in principle with the proposed approaches taken to the discharge of requirements, or for managing appeals or disputes arising from these.

6. Review of issues and actions arising

7. Next steps

8. Closure of the hearing

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Schedule of the Panel's issues and questions relating to the draft Development Consent Order (DCO1)

The issues and questions set out below are based on the Applicant's draft Development Consent Order (dDCO) as submitted as a matter for examination. The questions will be referred to in the first issue-specific hearing (ISH1) into the dDCO on Wednesday 22 May 2019. They are principally addressed to the Applicant, but responses and observations from the relevant planning authorities, who have a leading role in enforcing the DCO, if made, are invited. Other Interested Parties attending the hearing may also wish to respond. Questions may be expanded in the Panel's First Written Questions.

Abbreviations Used:			
Art	Article	LA	Local Authority
BoR	Book of Reference	LPA	Local Planning Authority
DfT	Department for Transport	R	Requirement
DCO	Development Consent Order	Sch	Schedule
dDCO	Draft DCO	SoCG	Statement of Common Ground
EM	Explanatory Memorandum	SoS	Secretary of State
ES	Environmental Statement		

Citation of questions in the table below should be cited as follows:

- Hearing reference: question number, eg ISH1-DCO1:Q1 – refers to question 1 in the table.

M42 Junction 6

Questions on submission draft Development Consent Order

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
1	General		<p>Even where an article has precedence in other DCOs it will need to be justified in the context of this particular DCO and project.</p> <p>The preamble on page 6 can now be amended in the knowledge that the application is to be examined by a panel.</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
1.1	General: Order Format and Tracking of Changes		<p>The Applicant is asked to confirm that subsequent versions of the draft Development Consent Order (dDCO) submitted after the application version will be:</p> <ul style="list-style-type: none"> • supplied in both .pdf and Word formats and in two versions, the first forming the latest consolidated draft and the second showing changes from the previous version in tracked changes, with comments outlining the reason for the change; and • the consolidated draft version in Word is to be supported by a report validating that version of the dDCO as being in the SI template, obtained from the publishing section of the legislation.gov.uk website; and • endorsed with updated revision numbers consecutively from the application version.
1.2	General: List of Plans or Documents to be Certified		<p>The Applicant is asked to confirm that Schedule 11 (Documents to be Certified) will be updated in each subsequent version of the dDCO provided during the examination. This should accompany a table recording the latest version of each plan and documents required to support the examination and the dDCO (the 'plan of plans').</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
1.3	General: Plan or Document Changes and Revision Numbers		<p>The Applicant is asked to ensure that all application or subsequent plans and documents referred to in the dDCO are identified by Drawing or Document and Revision Numbers in subsequent versions of the dDCO. Revisions to plans and documents, should be reflected in the latest version of the dDCO. The Applicant should undertake a final audit of plans and documents referred to in the dDCO prior to submitting its final preferred dDCO to the Examination. It should ensure that the results of this audit are reflected in all references, in Schedule 11 and in the final 'plan of plans' (see Q1.2). It should take all reasonable steps thereafter to ensure that changes to plans and documents are not required.</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
1.4	General: 'guillotine' provisions		<p>Several individual articles (eg Art 16, Art 20, Art 21, Art 23) make provision for deemed consent to be granted if a consultee does not respond within a certain period – a 'guillotine' provision. There are precedents, however, they have tended to be justified with reference to the characteristics of particular dDCOs. This type of provision is not automatically appropriate to all NSIP development and has to be justified on a project-specific basis.</p> <p>The Applicant is therefore asked to justify why the proposed 'guillotine' provisions are necessary and appropriate for this dDCO.</p> <p>If 'guillotine' provisions are to be recommended, should any notice provided associated with an application for consent under the relevant article draw attention to the existence and effect of the 'guillotine' period? Could any other provisions than 'guillotine' provisions suffice?</p> <p>How would the operation of the 'guillotine provisions' interact with the arbitration provision under Art 47?</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
1.5	General: determinations and discharge of requirements		<p>In contrast with many made Orders for non-highways NSIPs (and Orders for the A14 or the A19/A1058 Coast Road) this dDCO appears to lack provision in terms for 'appeals' or associated dispute resolutions arising from the determinations under provisions and the discharge of requirements.</p> <p>The Applicant is asked to confirm whether this is the case.</p> <p>If there are provisions intended to provide what amounts to an appeal function, the Applicant is asked to identify and explain these.</p> <p>Similarly, instead of obligations placed on the 'relevant planning authority', this dDCO places obligations for the discharge of requirements on the SoS, in consultation with the LA eg R9 - archaeology. Are the Applicant and LPAs clear that the SoS is the appropriate body for such determinations in this dDCO?</p>
1.6	Preamble		<p>The Applicant is asked to draft the Preamble to the next version of the dDCO to confirm that the Examination is being carried out by a panel, by removing the square brackets from the second paragraph.</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
2.1	2 - Interpretation	<p>Commencement -</p> <p>other than operations consisting of archaeological investigations, ecological surveys and pre-construction ecological mitigation, investigations for the purpose of assessing and monitoring ground conditions and levels, remedial work in respect of any contamination or other adverse ground conditions, erection of any temporary means of enclosure, receipt and erection of construction plant and equipment, diversion and laying of underground apparatus and site clearance, and the temporary display of site notices or advertisements</p>	<p>The Applicant and LPAs are asked whether all these works are 'de minimis' and whether some might need to be subject to mitigation measures secured through the requirements?</p> <p>For example, "diversion and laying of underground apparatus and site clearance" has the potential to conflict with a requirement relating to archaeology and biodiversity and possibly statutory undertakers too.</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
2.2		<p>Maintain -</p> <p>to inspect, repair, adjust, alter, improve, landscape, preserve, remove, reconstruct, refurbish or replace, provided such works do not give rise to any materially new or materially different environmental effects to those identified in the environmental statement</p>	<p>The Applicant and LA is asked whether the scope of this power is justified (together with article 4) within the context of this particular dDCO?</p> <p>'Adjust' and 'alter' are vague and potentially wide reaching. Should they fall within the definition of 'maintain'? The caveat relating to materially new or materially different environmental effects is also vague and could exclude other reasons for requiring control not specifically addressed in the ES.</p> <p>The Applicant is asked to confirm that the determination of whether 'maintenance' might entail materially new or materially different environmental effects may be LPAs or other public bodies.</p>
2.3		Secretary of State for Transport	<p>The Applicant is asked to confirm why it is necessary to identify the Secretary of State given common practice that a DCO should assume a general Secretary of State to allow for any future changes to government machinery or responsibilities beyond the DfT? Is this a DfT preference?</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
3	3(2) – development consent etc., granted by the Order	<u>Any enactment</u> applying to land within or adjacent to the Order limits has effect subject to the provisions of this Order	<p>With reference to Schedule 1</p> <p>The Applicant is asked to:</p> <ul style="list-style-type: none"> • provide further explanation as to why this general, vague and extensive provision is necessary and justified for this particular project; • provide examples of particular enactments that the Applicant considers may otherwise interfere with the operation of the dDCO; • explain in particular why it should apply to land outside the Order limits; and • explain how far outside the Order limits it would apply, noting that the term 'adjacent' is undefined? <p>Is there an argument that for certainty, this provision should only apply to land within the Order limits?</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
4	6 – Limits of deviation	<p>(a) deviate laterally ... to the extent of the limits of deviation shown on those plans; (b) deviate vertically ... for a new Solihull Road Overbridge Work No. 3, to a max of 1.5m up or down; and for other work to a max of 0.5m up or down</p> <p>limits of deviation do not apply where it is demonstrated by the undertaker to the Secretary of State's satisfaction and the Secretary of State, following consultation with the relevant planning authority, certifies accordingly that a deviation in excess of these limits would not give rise to any materially new or materially worse adverse environmental effects from those reported in the environmental statement.</p>	<p>The Applicant is asked to justify this level of flexibility in the context of this dDCO.</p> <p>The vertical limits of deviation of Solihull Road Overbridge might necessitate greater banking and engineering operations to the bridge itself and approaches with consequential effects to the ancient woodland and the results of the LVIA.</p> <p>The reference to materially new or materially worse adverse environmental effects within the ES must be demonstrated here. Could the Applicant please explain why 'maintain' references different environmental effects.</p> <p>The Applicant is also asked to justify and clarify (see Q 29) the implications, in terms of the flexibility allowed, of the different formulations.</p>
5	8 – Consent to transfer benefit of the order	SMBC, Cadent Gas Ltd, Severn Trent Water Ltd, Wester Power Distribution PLC, Esso Petroleum Co Ltd	The Applicant is asked whether it is appropriate for the Secretary of State's consent not to be required for the transfer of benefit to the companies specified in paragraph 4 (a) to (e)?

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
6	9 – Application of the 1990 Act		<p>Section 57 (2) provides that:</p> <p>(2) Where planning permission to develop land has been granted for a limited period, planning permission is not required for the resumption, at the end of that period, of its use for the purpose for which it was normally used before the permission was granted.</p> <p>The Applicant is asked to justify (having regard to the views of the LPAs) whether or not it is appropriate, at the end of potentially a long period, for land to revert to the purpose for which it was used before the development consent was granted.</p>
7	10 - Application of CIL Regulations		<p>The Applicant is asked to justify (having regard to the views of the LPAs) whether or not it is appropriate, given the length of time during which the temporary works may be in place, to modify the CIL Regulations in this way in order to exclude CIL liability.</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
8	11 – Planning permission	If planning permission is issued pursuant to the 1990 Act ...	<p>The Applicant is asked to justify (having regard to the views of the LPAs) whether or not this power might be necessary and in what circumstances it might be applied.</p> <p>Why would the Applicant need planning permission in relation to the project to enable it to “facilitate its completion, construction, use or operation” when such matters would be governed by the DCO and its requirements and any changes to which may need to be authorised under section 153 of PA2008?</p>
9	12 - Street Works		<p>This is a wide power – authorising interference with any street within the Order limits. The Applicant is asked whether this is necessary? If not, should it be limited to identified streets, as in article 8 in the Model Provisions?</p>
10	13 – Application of the 1991 Act	section 58 (restrictions on works following substantial road works) (e); section 58A (restriction on works following substantial street works) (f); section 73A (power to require undertaker to re-surface street) (g);	<p>The Applicant is asked to justify (having regard to the views of the LPAs) why this power might be necessary.</p> <p>Is it reasonable or necessary to remove the powers (available to the street works authority) listed in paragraph (3)?</p>

11	15 – Classification of roads etc	<p>(8) The application of paragraphs (1) to (7) may be varied or revoked by any instrument made under any enactment which provides for the variation or revocation of such matters, including by an instrument made under the 1984 Act where the matter in question could have been included in an order made under that Act</p> <p>((5) An order granting development consent may —</p> <p>(a) apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order;</p> <p>(b) make such amendments, repeals or revocations of statutory provisions of local application as appear to the [Secretary of State] to be necessary or expedient in consequence of a provision of the order or in connection with the order;</p> <p>(c) include any provision that appears to the [Secretary of State] to be necessary or expedient for giving full effect to any other provision of the order;</p> <p>(d) include incidental, consequential, supplementary, transitional or transitory provisions and savings)</p>	<p>Paragraph 7 provides for construction of public rights of way. Is the highway authority content that “unless otherwise agreed” is sufficiently clear to enable the authority to prevent the right of way opening for use in the event that it has not been created to a specified standard? Does this article (read with Schedule 3) have the effect of giving the rights of way the status of public rights of way? Is it acceptable for rights of way only to be open for use from the date on which the authorised development is open for traffic? Could it be earlier?</p> <p>Also, in terms of good drafting practice, is it appropriate for paragraph 7 (which authorises construction of public rights of way) to be included within article 7 which is principally dealing with the classification of roads?</p> <p>Does paragraph 8 have the effect of disapplying section 153 of the PA 2008, which provides a procedure for changing a DCO?</p> <p>Under which part of section 120 of the PA2008 is this article made?</p> <p>Please could the Applicant provide further justification as to why it is necessary or expedient to give full effect to any other provision of the DCO.</p>
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Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
12	16 – Temporary stopping up and restriction of use of streets	<p>may temporarily stop up, alter, divert or restrict the use of any street and may for any reasonable time ...</p> <p>may use any street temporarily stopped up, ... and which is within the Order limits, as a temporary working site</p>	<p>This article authorises the Applicant to use temporarily stopped up streets as temporary working sites. The Applicant is asked whether this article is appropriate on the facts of this particular DCO (including the impacts of authorising temporary working sites in such circumstances) and taking account of any views expressed by the highway authority?</p> <p>Although other DCOs are cited as precedents, this DCO applies to a rather more densely developed area than many.</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
13	17 – Permanent stopping up and restriction of use of streets, public rights of way and private means of access		<p>This article authorises the stopping up of certain streets and public rights of way with no substitute means of access being provided, subject to the condition in paragraph (4) which includes the requirement that there “is reasonably convenient access to the land”.</p> <p>The Applicant is asked to confirm, where relevant, that the Secretary of State can be satisfied that the requirements of section 136 of PA2008 will be met in relation to any stopping up, as set out in Schedule 5 parts 4, 5 and 6.</p> <p>136 Public rights of way</p> <p>(1) An order granting development consent may extinguish a public right of way over land only if the [Secretary of State] is satisfied that—</p> <p>(a) an alternative right of way has been or will be provided, or</p> <p>(b) the provision of an alternative right of way is not required.</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
14	19 – Clearways, prohibitions and restrictions	<p>(5) An order granting development consent may—</p> <p>(a) apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order;</p> <p>(b) make such amendments, repeals or revocations of statutory provisions of local application as appear to the [Secretary of State] to be necessary or expedient in consequence of a provision of the order or in connection with the order;</p> <p>(c) include any provision that appears to the [Secretary of State] to be necessary or expedient for giving full effect to any other provision of the order;</p> <p>(d) include incidental, consequential, supplementary, transitional or transitory provisions and savings</p>	Does paragraph (5) have the effect of disapplying section 153 which provides a procedure for changing a DCO? Please could the Applicant clarify under which section 120 power of the PA2008 this article is made and if necessary, provide further justification as to why it is necessary or expedient to give full effect to any other provision of the DCO?
15	21 – Discharge of water		Please could the Applicant alter the references to the Homes and Communities Agency by referring to Homes England?
16	22 – Protective work to buildings		The Applicant is questioned whether these provisions are necessary or expedient for this particular dDCO and to give some examples.

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
17	23 – Authority to survey and investigate the land	including, where reasonably necessary, any land which is adjacent to, but outside the Order limits	<p>The Applicant is questioned whether these provisions are necessary or expedient for this particular dDCO?</p> <p>Please could the Applicant illustrate the circumstances where the power to carry out surveys on land outside but adjacent to the Order limits would be required.</p> <p>When might this be ‘reasonably necessary’?</p>
18	26 - Time limit for authority to acquire land compulsorily	ceases at the end of the period referred to in paragraph (1), except that nothing in this paragraph prevents the undertaker remaining in possession of land after the end of that period, if the land was entered and possession was taken before the end of that period	<p>The Applicant is asked whether the 5-year time limit for remaining in temporary possession of land appropriate for this particular dDCO?</p> <p>Please could the Applicant illustrate on what basis possession might be retained?</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
19	27 - Compulsory acquisition of rights and restrictive covenants	27.—(1) Subject to paragraphs (2) to (4), the undertaker may acquire such rights over the Order land, or impose restrictive covenants affecting the Order land, as may be required for any purpose for which that land may be acquired under article 24 (compulsory acquisition of land) by creating them as well as acquiring rights already in existence	<p>The Applicant is asked whether this power is justified for this particular dDCO?</p> <p>The Applicant’s attention is drawn to the Secretary of State DfT’s decision (paragraph 62 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) DCO) “to remove the power to impose restrictive covenants and related provisions as he does not consider that it is appropriate to give such a general power over any of the Order land as defined in article 2(1) in the absence of a specific and clear justification for conferring such a wide-ranging power in the circumstances of the proposed development and without an indication of how the power would be used”.</p> <p>The EM indicates that a public benefit would be a limitation on the compulsory acquisition of Order lands by using restrictive covenants instead. Please could the Applicant give examples.</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
20	<p>35 - statutory undertakers, &</p> <p>36 – apparatus and rights of statutory undertakers in stopped up streets</p>	<p>127 3(b) if purchased it can be replaced by other land belonging to, or available for acquisition by, the undertakers without serious detriment to the carrying on of the undertaking</p> <p>138 4(b) only if SoS is satisfied that the extinguishment or removal is necessary for the purpose of carrying out the development to which the order relates</p>	<p>The Applicant will be aware that where a representation is made by a statutory undertaker under s127 of the PA2008 and has not been withdrawn, the Secretary of State will be unable to authorise Article 35 unless satisfied of specified matters set out in s127.</p> <p>If there are objections (eg from Network Rail) would a section 106 Agreement provide an appropriate solution or should there be continued negotiation over protective provisions to be made in the dDCO?</p> <p>The Secretary of State will also be unable to authorise removal or repositioning of apparatus unless satisfied that the extinguishment or removal is necessary for the purpose of carrying out the development to which the order relates in accordance with s138 of the PA2008.</p> <p>Hence, before making a recommendation to the SoS in relation to these particular articles the Panel will need to be satisfied that the statutory tests are met.</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
21	37 – Crown rights	the transfer of land formerly owned by the SoS for Transport to Highways England, Part 4 of the BoR lists 22 plots where the SoS is still registered as the freehold owner at the Land Registry; plots also shown on the Crown Land Plans. Plots considered within the ownership of the Applicant pursuant to the Transfer Scheme, they have been included as Crown Land as a precautionary measure, pending completion of the formal registration process for the transfer	<p>It isn't clear from the Statement of Reasons whether or not there are plots of land owned by the Department for Transport the title of which will not actually transfer to the Applicant in due course. If that is the case, then consent must be granted by the appropriate Crown authority in respect of compulsory acquisition of land in which an interest is held other than by or on behalf of the Crown before an article authorising CA can be included in the DCO.</p> <p>The Applicant is asked to confirm and update the progress relating to the transfer of ownership from the Department for Transport to the Applicant under the transfer scheme as it will not be appropriate to retain this article 'on a precautionary basis'. The Applicant should also obtain and submit to the Panel the Department's views as Crown authority.</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
22	39 - Felling or lopping of trees and removal of hedgerows		<p>This is a general power (which effectively disapplies the provision of the Hedgerow Regulations because it allows any hedgerow to be removed whether or not it is 'important').</p> <p>Advice Note 15 suggests that that articles such as these should include a Schedule and a plan to specifically identify the hedgerows to be removed (whether in whole or in part). This will allow the question of their removal to be examined in detail. The same applies to protected trees either subject to a TPO or within a Conservation Area. Alternatively, the Article within the DCO could be drafted to include powers for general removal of hedgerows or trees (if they cannot be specifically identified) but this must be subject to the later consent of the local authority.</p> <p>The Applicant is asked to justify the form of Article 39 in the light of the guidance in Advice Note 15, with regard to the views of LPAs.</p> <p>The Applicant is also asked to cross-reference any Schedule or plan prepared in accordance with that guidance with information to be prepared for Requirement 5 – Landscaping, which entails the preparation of a schedule of trees to remain and trees to be removed.</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
23	40 – application of landlord and tenant law		This article requires the Applicant’s justification in the circumstances of this particular dDCO and NSIP.
24	41 - Operational land for the purposes of the Town and Country Planning Act 1990		This article requires the Applicant’s justification in the circumstances of this particular dDCO and NSIP.
25	47 - Arbitration	...to be appointed on the application of either party (after giving notice in writing to the other) by the President of the Institution of Civil Engineers.	<p>No process in terms of ‘appeals’ relating to the discharge or determinations on requirements is apparent. It has now become well established practice in dDCOs for the appointment of arbitrators to be by the SoS and not by the President of a professional body. This is because arbitration under a DCO is a public law and public interest function that falls within the remit of and accountability to the SoS responsible for the DCO, rather than within the sectoral interest of a professional body.</p> <p>Hence, should reference to the appointing function of the President of the Institution of Civil Engineers be substituted for reference to the SoS?</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
26	48 – Removal of human remains		<p>This article requires the Applicant's justification in the circumstances of this particular dDCO and NSIP.</p> <p>Why is it that the Applicant considers human remains may be found?</p> <p>Although the scheme includes significant cutting, it is not necessarily comparable to Crossrail, cited as a precedent.</p>
27	50 – Amendment of local legislation	<p>Eg, Birmingham and Gloucester Railway Act 1836 (c. xiv) section III; (b) Shrewsbury and Birmingham Railway Act 1846 (c. cccvii) sections XXV, XXXI, XLV, XLVI, XLVIII, L, LIV and LXIV; (c) London and Birmingham Railway Act 1846 (c. ccclix) sections xix, xx, xxi, xxii, xxiii and xxvi; (d) Birmingham and Oxford Junction Railway Act 1846 (c. cccxxxvii) sections XXIV and XXV; etc</p>	<p>The Applicant is asked to provide extracts from the relevant local legislation which is being disapplied, together with information about the purpose of the legislation and the persons or bodies vested with the relevant power. An explanation of the effects of that disapplication is asked for and whether any protective provisions or requirements would be necessary to prevent any adverse impact arising as a result of disapplying the local legislative control.</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
28	Schedule 1 authorised development – further development within the Order limits	<p>Works 1-76 and further development a-o</p> <p>(d) embankments, cuttings, viaducts, bridges, aprons, abutments, shafts, foundations, retaining walls, drainage works, drainage treatment areas, ponds, lagoons, outfalls, ditches, pollution control devices, pumping stations, wing walls, firefighting system water tanks and associated plant and equipment, highway lighting, fencing and culverts;</p> <p>(k) site preparation works, site clearance (including fencing and other boundary treatments, vegetation removal, demolition of existing structures and the creation of alternative highways or footpaths); earthworks (including soil stripping and storage and site levelling); (l) the felling of trees and hedgerows;</p>	<p>The works listed in paragraphs (a) to (o) are extensive and need to be justified by the Applicant in the context of this dDCO.</p> <p>The Applicant is asked to clarify whether any of the development listed in (a) to (o) is also identified as part of one of the works (please give some examples).</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
29	Schedule 2 part 1 – requirements	<p>Detailed design</p> <p>R3 – The authorised development must be designed in detail and carried out so that it is compatible with the preliminary scheme design shown on the works plans and the engineering section drawings</p> <p>any amendments ... would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement</p>	<p>The Applicant is asked to justify whether it is appropriate to allow the flexibility inherent in a scheme that is to be only 'carried out so that it is compatible with the preliminary scheme design'.</p> <p>The Applicant is asked to confirm that the 'preliminary scheme design' can be clearly identified on the works plans and engineering section drawings.</p> <p>The Applicant is asked to indicate how the demonstration of no materially new or materially worse adverse environmental effects might be made. (See also Q 4)</p>
30		<p>Landscaping</p> <p>R5 - All landscaping works must be carried out to a reasonable standard in accordance with</p>	<p>What does reasonable mean here? Please could the Applicant give examples?</p> <p>Would it not be stronger and simpler just to 'accord with [relevant] British Standard'?</p>
31		<p>Contaminated land and groundwater</p> <p>R6 – unexpected contamination ... it must be reported as soon as reasonably practicable to the Secretary of State, the relevant planning authority and the Environment Agency</p> <p>Where the undertaker determines that remediation of the contaminated land is necessary</p>	<p>The Applicant and LPAs are asked whether there should be a requirement for work to stop if contamination is found?</p> <p>The Applicant is asked to explain why it might be reasonable or appropriate for the undertaker or the Applicant to be the sole body for the determination of whether or not remediation might be necessary, even though consultation has to take place?</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
32		<p>Protected species</p> <p>R7 - Where nesting birds are identified works should cease within 10 metres of the nest until birds have fledged and the nest is no longer in use.</p>	<p>The Applicant is asked to justify why a 'buffer' zone of 10m around a nest is likely to be sufficient in all circumstances and for all species. Have the views of Natural England been taken into account?</p>
33		<p>Surface and foul water drainage</p> <p>R8 - any amendments ... would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement</p>	<p>The Applicant is asked to indicate how the demonstration of no materially new or materially worse adverse environmental effects might be made. (See also Q 4)</p>
34		<p>Archaeological remains</p> <p>R9 (4)-(6) – Unidentified remains to remain in situ, no construction within 10m for 14 days</p>	<p>The usual approach would be to halt works in the area affected until provision has been made for the retention or recording in accordance with details that have been submitted and approved. Please could the Applicant explain why the process should be different here?</p> <p>It is doubtful whether 10m would always be a sufficient buffer and whether 14 days would be sufficient time for a LA to determine the importance of previously unidentified remains. Please could the Applicant explain why such provision is considered sufficient in this case.</p> <p>Should there be a right of appeal?</p>

Q No.	DCO Article – No. and title	Drafting example (where relevant)	Questions or comments
35	Schedule 2 part 2 – procedure for discharge of requirements	<p>application has been made to a discharging authority for any consent</p> <p>the Secretary of State must give notice to the undertaker of the decision on the application within a period of 8 weeks</p> <p>not determine an application within the period set out in sub-paragraph (1), the Secretary of State is taken to have granted all parts of the application (without any condition or qualification at the end of that period)</p>	<p>Why do these articles differ from those dealing with discharge of requirements in Advice Note 15. The Applicant is asked to explain why its wording should be preferred.</p> <p>The undertaker may appeal in the event that- (a) the discharging authority refuses an application for any consent, agreement or approval required or contemplated by any of the provisions of this Order or grants it subject to condition.</p> <p>Is this 'guillotine measure' imposed on the SoS appropriate?</p>
36	Schedule 10 - Protective Provisions		<p>The Relevant Representations indicate that National Grid, Cadent Gas, Esso, Network Rail, Western Power and HS2 all seek appropriate protective provisions within the dDCO and that this isn't achieved in the current draft.</p> <p>Please could the parties indicate what progress is being made.</p>