

Application by Highways England for an Order Granting Development Consent for the M42 J6 Improvement Project.

The Examining Authority's draft Development Consent Order (dDCO) commentary schedule of changes

Issued 8 November 2019

Irrespective of its recommendation to the Secretary of State (SoS) on the planning merits of the Application, the Examining Authority (ExA) is under an obligation to preserve the SoS' decision-making discretion. It must provide the best obtainable draft Development Consent Order (dDCO) to inform the SoS' decision about whether or not to grant development consent. A dDCO is appended to the recommendation reports of all ExAs appointed under PA2008.

The purpose of this commentary is to enable the Applicant to have regard to it prior to submitting the final dDCO at Deadline 9 (15 November 2019) and to allow Interested Parties (IPs) to make final submissions on the dDCO and to enable the ExA to form any recommendations for changes to the drafting that it considers necessary and appropriate, as part of its preparation to report to the SoS.

The ExA's commentary on the dDCO is set out below. The issues and propositions are directed to the Applicant and to IP's, identified by name in the right-hand column. However, comments from any IPs and Affected Persons (APs) involved in the Examination are welcome.

Readers are requested to refer to the Applicant's most recent submitted 3rd dDCO [REP5-002], submitted at Deadline 5, in order to link the issues and questions raised to the draft provisions to which they relate. All provision numbering follows the 3rd dDCO and the ExA requests all respondents to reference their responses citing the provision number from that draft and the comment number in the table below.

Responses to this commentary are sought by Deadline 9 (15 November 2019).

Abbreviations and other references used

PA2008	<i>The Planning Act 2008 (as amended)</i>	PRoW	<i>Public Right of Way</i>
Art	<i>Article</i>	R	<i>Requirement</i>
CEMP	<i>Construction environmental management plan</i>	SoS	<i>Secretary of State</i>
dDCO	<i>Draft Development Consent Order</i>	SMBC	<i>Solihull Metropolitan Borough Council</i>
OEMP/	<i>Outline environmental management plan /</i>	WCC	<i>Warwickshire County Council</i>
REAC	<i>Register of Environmental Actions and Commitments</i>		

No.	Part of DCO	Relevant extract from DCO (for ease of reference)	Commentary	Response sought from:
Articles				
1	Art 15 - Classification of roads etc	15(7) Unless otherwise agreed by the relevant planning authority, the public rights of way set out in Part 6 (public rights of way) of Schedule 3 and identified on the rights of way and access plans are to be constructed by the undertaker in the specified locations and open for use from the date on which the authorised development is open for traffic.	Obstruction or severing of existing PROWs is likely to occur well before the authorised development is brought into use, so that if replacement footpaths were to be available before the authorised development was open to traffic, their use would help to restore connectivity and accessibility for pedestrians, cyclists and other non-motorised users. The Applicant should employ a form of words for Art 15(7) to promote that possibility. We propose that the following amendments to Art 15(7): Delete: Unless otherwise agreed by the relevant planning authority Add to the end of Art 15(7): ' , unless the earlier opening of a public right of way might be achievable and warranted, as may be agreed with the relevant local planning authority.'	The Applicant, SMBC, WCC, Open Space Society and The Ramblers, Warwickshire Area



No.	Part of DCO	Relevant extract from DCO (for ease of reference)	Commentary	Response sought from:
2	Art 20 - Traffic regulation	20(1) This article applies to roads in respect of which the undertaker is not the traffic authority. (2) Subject to the provisions of this article, and the consent of the traffic authority in whose area the road concerned is situated, which consent must not be unreasonably withheld, the undertaker may, for the purposes of the authorised development- (b) permit, prohibit or restrict the stopping, waiting, loading or unloading of vehicles on any road;	<p>Art 20(2)(b) provides wide powers to introduce parking restrictions for the purposes of this scheme, subject to the consent of the traffic authority. The Applicant is willing to use these powers to deter anti-social parking (including taxis) in the areas identified by local residents and parish councils, particularly in REP6-028 and REP6-040. It is agreed that details are to be devised, in consultation with SMBC, indicating how appropriate restrictions might be imposed while preventing, as far as possible, anti-social parking towards the centre of the village. The ExA welcome this approach and considers that the anti-social parking should be deterred.</p> <p>The Applicant should, as appropriate, either make changes to this article so that the traffic regulation powers are focussed enough to allow the imposition of restrictions to prevent anti-social parking, or amend R10 (traffic management) to achieve the same.</p>	The Applicant, SMBC, Bickenhill and Marston Green Parish Council and Mr Philip O'Reilly



3	Art 39 - Felling or lopping of trees and removal of hedgerows	39(1) The undertaker may fell or lop any tree or shrub within or overhanging land within the Order limits, or cut back its roots, if it reasonably believes it to be necessary to do so to prevent the tree or shrub- (a) from obstructing or interfering with the construction, maintenance or operation of the authorised development or any apparatus used in connection with the authorised development; or (b) from constituting a danger to persons using the authorised development. (2) In carrying out any activity authorised by paragraph (1), the undertaker must do no unnecessary damage to any tree or shrub and must pay compensation to any person for any loss or damage arising from such activity (3) ...	<p>The <i>Ancient Woodland Clarifications and Proposed Additional Measures Technical Note</i> [AS-035] includes several measures to reduce the impact on, and to enhance the management of, ancient woodland. Subject to undertaking reasonable endeavours, those measures are to be incorporated in an updated REAC and made binding through the OEMP. Moreover, it is stated that such measures should bind the Applicant over and above the provisions set out in Art 39 [REP7-009].</p> <p>The ExA's preferred dDCO requires this to be explicitly stated in Art 39 for the avoidance of any doubt.</p> <p>Also, it is proposed that Art 39 includes schedules and plans showing the trees and hedgerows likely to be affected by the scheme to comply with good practice point 6 of Advice Note 15. (It is understood that Schedule 9A is to be completed.)</p> <p>The following amendments are suggested: Amend Art 39(1) as follows: 'The undertaker may fell or lop any tree or shrub identified in Schedule 9B...' New Schedule 9B should bring together the information at Appendix 1, Table 1 of APP-128, Table 1-1 of REP6-019 and the plans in Appendix 1 of REP7-089.</p> <p>Amend Art 39(2) as follows: 'The undertaker may, for the purposes of carrying out the authorised development but subject to paragraph (3), remove any hedgerow within the Order limits and specified in Schedule 9A (hedgerows to be removed or managed) that is required to be removed.'</p>	The Applicant, Natural England, Warwickshire Wildlife Trust, the Gooch Estate and SMBC
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No.	Part of DCO	Relevant extract from DCO (for ease of reference)	Commentary	Response sought from:
		<p>(4) The undertaker may, for the purposes of carrying out the authorised development but subject to paragraph (2), remove any hedgerow within the Order limits and specified in Schedule 9A (hedgerows to be removed or managed) that is required to be removed.</p> <p>(5)...</p>	<p>Amend Art 39(3) to: 'In carrying out any activity authorised by paragraphs (1) and (2), the undertaker must do no unnecessary damage to any hedgerow, tree or shrub and must pay compensation to any person for any loss or damage arising from such activity.'</p> <p>Amend Art 39(4) as follows: 'Any dispute as to a person's entitlement to compensation under paragraph (3), or as to the amount of compensation, is to be determined under Part 1 of the 1961 Act.'</p> <p>Schedule 9A should reflect Table B-5-3 of APP-131 and the plans in Figure 1 of REP6-020.</p>	



No.	Part of DCO	Relevant extract from DCO (for ease of reference)	Commentary	Response sought from:
Schedule 1 – authorised development				
4	Work No.76	<p>Work No.76 as shown on Sheet No. 3 of the works plans and being the installation of a pumped system to mitigate for the loss of surface water catchment area to the Bickenhill Meadows SSSI – Shadowbrook Meadows unit. Works to feature collection drains and chambers, a pump station and a pressured pipeline to feed replacement water to an appropriate water feature in the vicinity of the SSSI.</p>	<p>Careful work and consultation between the Applicant, Natural England, Warwickshire Wildlife Trust and SMBC have resulted in an agreed <i>Bickenhill Meadows SSSI Hydrological Investigation Technical Note (v9.1)</i> [REP3-004]. This promotes a 'passive' solution to provide sufficient water to maintain the Shadowbrook Lane (SE) unit of the SSSI rather than the 'pumped' solution currently referred to in Work No.76, unless the required monitoring, together with the commitments given in the REAC, demonstrates the necessity to implement a 'pumped' solution. The required monitoring of the proposed solution is to be contained in the <i>Outline Bickenhill Meadows SSSI Monitoring and Management Plan</i> [REP7-015].</p> <p>The Applicant is asked to amend Work No.76 to reflect the proposed solution set out in the <i>Bickenhill Meadows SSSI Hydrological Investigation Technical Note (v9.1)</i> [REP3-004]. The following amendment is suggested: Insert after 'as shown on Sheet No.3 of the works plans and being the installation of' '(a) a passive system to mitigate for the loss of surface water catchment area to the Bickenhill Meadows SSSI – Shadowbrook Meadows unit. Works to feature collection drains, ditches and conveyance swales to deliver water to the northern ditch in accordance with the details and the monitoring protocol set out in the <i>Outline Bickenhill Meadows SSSI Monitoring and Management Plan</i> or (b) in the event that the monitoring protocol indicates the provision of insufficient water to maintain the SSSI, the installation of a pumped system...'</p>	<p>The Applicant. Natural England, Warwickshire Wildlife Trust and SMBC</p>



No.	Part of DCO	Relevant extract from DCO (for ease of reference)	Commentary	Response sought from:
5	Lettered works Further development within the Order limits Works (a)-(o)	For the purposes of or in connection with the construction of any of those [numbered] works, further development within the Order limits which does not give rise to any materially new or materially different environmental effects to those assessed in the environmental statement, consisting of (a)-(o)	<p>A Detailed Schedule 1 Matrix provided in Appendix C to REP2-008 sets out how the lettered works (a)-(o) relate to the numbered works 1-76. The ExA consider that there would be some value in terms of clarity and certainty to refer to this here and to append the Schedule to the DCO.</p> <p>The following amendment is proposed: Insert after 'the construction of any of those works' 'as listed in the Schedule 1 Matrix provided in Appendix C to REP2-008 and appended to this DCO...'</p>	The Applicant
Schedule 2 Part 1 Requirements				
6	R1, R3, R4, R5 and R8		<p>Discussions are continuing between the Applicant and Birmingham Airport in relation to the Airport safeguarding zone and other matters. The outcome of that discussion is to be provided at D9 and any consequent amendments made to the DCO.</p> <p>The ExA look forward to receiving those amendments to the DCO at D9.</p>	The Applicant and Birmingham Airport Limited



No.	Part of DCO	Relevant extract from DCO (for ease of reference)	Commentary	Response sought from:
7	R4	(3) The CEMP must be written in accordance with ISO14001 and must ... (c) require adherence to working hours of 07:00–18:00 on Mondays to Fridays and 08:00–13:00 on Saturday	<p>In agreeing to the working hours proposed, SMBC seek to prevent annoying or disturbing noisy activities taking place between the hours of 07:00 and 08:00, following the approach that they have adopted for the construction works for HS2. Although BS 5228 provides objective thresholds for construction noise in various situations, such noises may well be annoying or disturbing when heard between 07.00 and 08.00 hours. Discussions are underway between the Applicants and SMBC to devise a protocol for addressing such issues.</p> <p>In those circumstances, the ExA consider that R4(3)(c) should refer to the intended limitations on construction noise levels between 07.00 and 08.00 hours.</p> <p>The following amendment is proposed: Insert after 'working hours of 07:00–18:00 on Mondays to Fridays and 08:00–13:00 on Saturday' , subject to no annoying or disturbing noise activities [referencing the identified protocol] taking place between the hours of 07:00 and 08:00 on those days except for-... (i)-(xiv) etc.'</p>	The Applicant, SMBC, Bickenhill and Marston Green Parish Council, Mr Philip O'Reilly, Heath Cotterill, Camila Burton and David Cuthbert
8	R4	R4(3)d(xvi) Management Plan for Main Site Compound	<p>Save for the indicative details of Appendix 1, the ExA welcome the comprehensive approach to the Compound Management Plan [REP8-009].</p> <p>We expect R4(3)d(xvi) to be amended accordingly and we propose that this Management Plan should form part of the updated OEMP/ REAC or be a Certified Document in its own right.</p>	The Applicant



9	R4	R4(3)d(xvi) Outline Compound Management Plan Appendix 1: Indicative Proposal for Main Compound and Office for the Scheme [REP8-009]	<p>The 'Indicative Proposal for Main Compound and Office for the Scheme' replicates the initial arrangement set out at D3A [REP3A-003] rather than the alternative configurations put forward at D6 (REP6-015 – page 13) and D7 (REP7-011 – Appendix 1, Page 2 of 2). It was agreed that an alternative configuration was possible with an entrance and exit onto Catherine-de-Barnes Lane at the northern end of the compound (Figure 1 at Action No.4 of REP6-015). Moreover, a plan at page 13 in the same section of the same document details how the compound could be reconfigured to the north and east to increase the buffer significantly between the compound perimeter and the adjacent properties on Church Lane. Although the laydown areas would then be closer to residents at the north east of Church Lane, they would be screened by existing trees and hedgerows and the proposed stockpile bunds as shown in the cross sections on page 2 of Appendix 1 of REP7-011. The ExA recognise that this configuration might require a right turn from the northern exit to be prohibited and the installation of traffic lights there and additional phases in constructing the main line link road. However, the scale of the embankments and earth moving required for the scheme suggested in EV-040 could be prohibitive.</p> <p>The following amendment is therefore proposed (see also new R14 below): Substitute the existing Plan at Appendix 1 of the Outline Compound Management Plan [REP8-009] with the plan shown at Action No.4 of REP6-015 (page 13) detailing how the compound could be pushed further to the north and east to increase the buffer and as also shown in the cross sections on page 2 of Appendix 1 of REP7-011.</p>	The Applicant, SMBC, Bickenhill and Marston Green Parish Council, Mr Philip O'Reilly, Heath Cotterill, Camila Burton and David Cuthbert
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No.	Part of DCO	Relevant extract from DCO (for ease of reference)	Commentary	Response sought from:
10	R9	Archaeological remains 9(1) No part of the authorised development is to commence until for that part a written scheme for the investigation of areas of archaeological interest has been submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority on matters related to its function.	Discussions are underway with SMBC on the wording that could be added to R9. It is agreed that the Written Scheme of Investigation is the best document to include such detail. The ExA welcome this agreement. We look forward to receiving the final Written Scheme of Investigation and any consequent changes to the DCO at D9.	The Applicant and SMBC



No.	Part of DCO	Relevant extract from DCO (for ease of reference)	Commentary	Response sought from:
11	R13	<p>13(1) No part of the authorised development that affects Bickenhill Meadows SSSI is to commence until a detailed Bickenhill Meadows SSSI monitoring management plan has been submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority on matters related to its function.</p> <p>(2) The detailed Bickenhill Meadows SSSI monitoring management plan must set out— (b) details of trigger points and action measures...</p>	<p>The ExA welcome the preparation of the Bickenhill Meadows SSSI Monitoring and Management Plan.</p> <p>Suggested amendments to R13, discussed and agreed at ISH 7 (DCO 4), entails amending the text to R13(1) after relevant local planning authority as follows: 'and Natural England on matters related to their function.' And, inserting at the end of R13(2)(b): ' , which must be taken in the event that the trigger points are met or exceeded.'</p>	<p>The Applicant, Natural England, Warwickshire Wildlife Trust and SMBC</p>



No.	Part of DCO	Relevant extract from DCO (for ease of reference)	Commentary	Response sought from:
Schedule 2 Part 1 New Requirements				
12	New R14 Configuration of the main site compound		<p>The ExA propose the insertion of a new R14 as follows:</p> <p>14(1) Notwithstanding the details shown on any Certified Plan and Document listed in Schedule 11 of this Order, work to construct the main site compound shall not commence until a scheme for its configuration has been submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority on matters related to its function.</p> <p>(2) Unless otherwise agreed by the relevant planning authority, the scheme must show how the compound could be configured to the north and east and an entrance and exit onto Catherine-de-Barnes Lane achieved at the northern end of the compound. Those access arrangements may entail prohibiting a right turn at the northern exit, or the provision of traffic lights and the possible re-programming of additional phases in constructing the main line link road.</p>	The Applicant, SMBC, Bickenhill and Marston Green Parish Council, Heath Cotterill, Camila Burton and David Cuthbert



No.	Part of DCO	Relevant extract from DCO (for ease of reference)	Commentary	Response sought from:
13	New R15 Altering the Priority of the Catherine-de- Barnes Lane and St Peters Lane Junction		<p>The ExA note that the Applicant has previously considered the altered priority for this junction but discounted it due to the need for a departure from standards for the horizontal radius of the bend onto the northern overbridge, for the consequent visibility round the bend and for the visibility to the left at St Peter's Lane: and, the possibility that the 'straight' alignment might encourage vehicles leaving St Peter's Lane to do so without stopping. The ExA acknowledge that the road layout might need to be altered, but they do not agree that land beyond the Order limits would be required, or that necessary road signs and safety features would clutter the roadside scene (similar signs and features would be required by the current proposal) or that the departure from standards would lead to worse or unacceptable road hazards; the opposite would be the case.</p> <p>Hence, the ExA propose the insertion of a new R15 as follows:</p> <p>15(1) Notwithstanding the details shown on any Certified Plan listed in Schedule 11 of this Order, no part of the realignment of Catherine-de-Barnes Lane is to commence until a scheme for the northern junction of St Peter's Lane and Catherine-de-Barnes Lane has been submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority on matters related to its function.</p> <p>(2) Unless otherwise agreed by the relevant planning authority, the scheme must change the vehicular junction priority from St Peter's Lane to the realigned section of Catherine-de-Barnes Lane.</p>	The Applicant, SMBC, Bickenhill and Marston Green Parish Council, Heath Cotterill, Camila Burton and David Cuthbert



14	New R16 Relocation of the underground storage tank and access		<p>It is agreed that the relocation of the underground storage tank and its access on land to the south of St Peters Lane would not affect the drainage arrangements and that it would be within the Limits of Deviation for Work No.35 [REP6-015]. However, this option is discounted because the access and egress would require a departure from standard and those defects (the provision of a layby off the realigned Catherine-de-Barnes Lane) are deemed to entail an increased risk of fly tipping and unregulated taxi parking. The ExA consider that those impediments could be avoided with measures within the dDCO. Moreover, this option has the advantage of locating the drainage arrangements to a roadside rather than introducing them to an otherwise relatively secluded area; the access to the fields and the aqueduct on the northern side of St Peters Lane need thus only be to an agricultural standard.</p> <p>Hence, the ExA propose the insertion of a new R16 as follows:</p> <p>16(1) Notwithstanding the details shown on any Certified Plan listed in Schedule 11 of this Order, no part of the realignment of Catherine-de-Barnes Lane is to commence until an amended scheme for the underground storage tank and associated access (Work No.35) is submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority on matters related to its function.</p> <p>(2) Unless otherwise agreed by the relevant planning authority, the amended scheme must relocate the underground storage tank and access from the northern to the southern side of St Peter's Lane.</p>	
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No.	Part of DCO	Relevant extract from DCO (for ease of reference)	Commentary	Response sought from:
Schedule 9A – Hedgerows to be removed or managed				
16	Schedule 9A and Article 39		<p>It is understood that Schedule 9A is to be completed at D9.</p> <p>The ExA look forward to receiving that information and the updated DCO.</p>	The Applicants Natural England, Warwickshire Wildlife Trust and SMBC
Schedule 10 – Protective Provisions				
17			<p>It is understood that the Protective Provisions are to be updated to reflect those agreed with National Grid and Severn Trent Water, as well as those to be agreed with HS2 Ltd and Cadent Gas.</p> <p>The ExA look forward to receiving those updated provisions.</p> <p>Please would the Applicant also confirm whether those provisions are intended to deal with the concerns of the Royal Mail and Esso or whether separate agreements are proposed?</p>	The Applicant, National Grid, Severn Trent Water, HS2 Ltd Cadent Gas, Royal Mail and Esso
Schedule 11 – Certification of plans and documents, etc				
18			<p>It is understood that the Crown Land Plans are to be amended to include the land incorrectly registered to the SoS, as well as the land within the DCO and within the boundary of operations for HS2 Ltd and which HS2 Ltd could acquire.</p> <p>The ExA look forward to receiving those updated plans at D9 or D10.</p>	The Applicant and HS2 Ltd

