

# M25 junction 28 improvement scheme

TR010029

## 9.113 Applicant's comments on Cadent Gas's Deadline 7 submission

Rule 8(1)(k)

Planning Act 2008

Infrastructure Planning (Examination Procedure) Rules 2010

Volume 9

June 2021

# Infrastructure Planning

## Planning Act 2008

### The Infrastructure Planning (Examination Procedure) Rules 2010

### M25 junction 28 scheme Development Consent Order 202[x ]

---

#### 9.113 Applicant's comments on Cadent Gas's Deadline 7 submission

---

<b>Rule Number:</b>	Rule 8(1)(k)
<b>Planning Inspectorate Scheme Reference</b>	TR010029
<b>Application Document Reference</b>	TR010029/APP/9.113
<b>Author:</b>	M25 junction 28 scheme, Project Team, Highways England

<b>Version</b>	<b>Date</b>	<b>Status of Version</b>
0	9 June 2021	Deadline 8

# Table of contents

<b>Chapter</b>	<b>Pages</b>
1. <b>Purpose and structure of this response</b>	<b>4</b>
2. <b>REP7-037 Cadent Gas's Deadline 7 submission</b>	<b>5</b>

## 1. Purpose and structure of this response

- 1.1.1 This document provides the comments of the applicant, Highways England, in response to CMS Cameron McKenna Nabarro Olswang LLP on behalf of Cadent Gas's submission to the Examining Authority (ExA) on or before Deadline 7 (20 May 2021).
- 1.1.2 Highways England has sought to provide comments where it is helpful to the Examination to do so, for instance where a representation includes a request for further information or clarification from Highways England or where Highways England considers that it would be appropriate for the Examining Authority (ExA) to have Highways England's views in response to a matter raised by an Interested Party in its representations. Where issues raised within a representation have been dealt with previously by Highways England, for instance in response to a question posed by the ExA in its first round of written questions or within one of the application documents submitted to the Examination, a cross reference to that response or document is provided to avoid unnecessary duplication. The information provided in this document should, therefore, be read in conjunction with the material to which cross references are provided.
- 1.1.3 Highways England has not provided comments on every point made within the representation (for instance, Highways England has not responded to comments made about the adequacy of its pre-application consultation given that Highways England has already provided a full report of the consultation it has undertaken as part of its application for the Development Consent Order (DCO)) and the Planning Inspectorate has already confirmed the adequacy of the pre-application consultation undertaken when the application was accepted for Examination. In some cases, no comments have been provided, for instance, because the written representation was very short, or because it expressed objections in principle to the Scheme or expressions of opinion without supporting evidence.
- 1.1.4 For the avoidance of doubt, where Highways England has chosen not to comment on matters raised by Interested Parties, this is not an indication Highways England agrees with the point or comment raised or opinion expressed.

## 2. REP7-037 Cadent Gas's Deadline 7 submission

Response reference:	Question	Highways England Response
REP7-037-01	2.3 Cadent welcomes the submission of protective provisions by the Applicant at Deadline 6 ...	Highways England submitted at Deadline 6 (REP6-017) the current form of protective provisions it is proposing for inclusion in the DCO for Cadent's benefit, as well as a comparison showing the differences between the protective provisions proposed by Highways England and those proposed by Cadent at Deadline 5 (REP5-064), making clear the few substantive points of difference between the parties.
REP7-037-02	2.4 Cadent has sought to engage with the Applicant to reach an agreed position on protective provisions across all schemes that it is promoting (subject to any scheme specific requirements), and negotiations are ongoing. Cadent remains committed to reaching an agreed position if possible and will continue to engage with the Applicant. It is hoped that this form of protective provisions can serve as the template between the two parties for future projects.	Highways England agrees that both parties have sought to reach an agreed position on protective provisions across all schemes that it is promoting (subject to any scheme specific requirements), and negotiations are ongoing. Highways England remains committed to reaching an agreed position if possible and will continue to engage with Cadent accordingly It is hoped that this form of protective provisions can serve as the template between the two parties for future projects.
REP7-037-03	3.3 Cadent agrees that the substantive matters to be agreed between the parties are those summarised by the Applicant. These are the:  3.3.1 exclusion of consequential loss from the indemnity, and in particular the requirement for	Highways England agrees that those are the substantive matters to be agreed.

Response reference:	Question	Highways England Response
	<p>the indemnity to extend to third party contractual liability Cadent has in respect of the indirect or consequential loss of a landowner in whose land apparatus is contained;</p> <p>3.3.2 exclusion of deductions and reductions for betterment and deferral of renewal; and</p> <p>3.3.3 extent of the expenses clauses.</p>	
REP7-037-04	<p>3.4 The first and second of these points were the subject of Cadent's submissions at Deadline 5 and these are expanded upon below. The third of these points was a new point that was introduced late in the examination process by the Applicant at Deadline 6.</p>	<p>Highways England responds to Cadent's further submissions below.</p> <p>Highways England does not accept that the third point (re expenses) was introduced by it late in the examination process at Deadline 6. As Cadent is aware, this point has been discussed between the parties for some months. As Highways England explained in its response at Deadline 6 (REP5-064-06 of REP6-017), the change to the protective provisions in this regard (i.e. para. 3(3)) is proposed to clarify that the cost-sharing provisions in the New Roads and Streets Works Act 1991, s.85 continue to apply to on-street diversion works (i.e. major highway works, major bridge works or major transport works) and are not displaced, as Cadent contends they would be, by para. 3(1) and para. 10 (expenses) which refers to Highways England bearing "all costs". It is therefore Cadent's contention (with which Highways England does not agree, for the reasons given in its response at D6) which prompted the inclusion of this clause.</p>

Response reference:	Question	Highways England Response
REP7-037-05	<p><b>Issue 1: Exclusion of consequential loss from the indemnity (para. 11(3)(c))</b></p> <p>Cadent seeks the deletion of sub-paragraph 11(3)(c) or, as an alternative, the following amendment:</p> <p>“any indirect or consequential loss of any third party arising from any such damage or interruption, which is not reasonably foreseeable at the commencement of the relevant works referred to in sub-paragraph (1) <u>SAVE THAT the undertaker’s indemnity under para. (1)(b) shall extend to any contractual liability Cadent has in respect of the indirect or consequential loss of a landowner in whose land apparatus is or, pursuant to the works will be, located</u>”</p> <p>Cadent set out its position at Deadline 5, and Cadent welcomes the inclusion of this wording (in square brackets) in the Applicant’s submission at Deadline 6.</p> <p>Cadent notes that the Applicant’s justification for its position relies heavily on the A38 DCO. Cadent understands from press reports that the Secretary of State may have consented to a</p>	<p>Highways England responded to the substance of Cadent’s submission on this issue in its response at Deadline 6 (REP5-064-04 of REP6-017). Highways England considers the directly relevant and express consideration given by the Secretary of State to consequential loss in relation to Cadent’s undertaking on the M42 J6 and A38 schemes (which consideration was no less relevant or express because it referred to the ExA’s conclusions) should be given greater weight than a decision (i.e. the A1 Birtley to Coal House Development Consent Order 2021) for a different undertaker (Network Rail) and on different wording. As regards the A38 scheme, no official announcement has yet been made, pending the outcome of ongoing litigation.</p> <p>Negotiations continue as regards the underlined words, the effect of which would be to require Highways England to cover a contractual commitment given by Cadent to a landowner. Highways England refers to its response at Deadline 6 in this regard.</p>

Response reference:	Question	Highways England Response
	<p>judgment in respect of a legal challenge to the making of the A38 DCO. The effect of this would be that the A38 DCO decision would be quashed and of no effect. If the A38 DCO decision is quashed, then no weight can be placed on this decision in determining the Application. The effect of this is that there would be one Secretary of State decision that supports the Applicant's position (without any detailed reasoning or discussion of the point in dispute), with two Secretary of State decisions that support Cadent's position (with detailed reasoning and discussion on the point, including the most recent A1 DCO decision, the A1 Birtley to Coal House Improvement Scheme). The references for these decisions were provided in Cadent's Deadline 5 submission.</p> <p>In the M42 DCO, the Secretary of State did not address this in the decision letter. The Secretary of State simply cross referred to the ExA report, which did not address the consequential loss point.</p>	



Response reference:	Question	Highways England Response
REP7-037-06	<p>The Applicant's position on the consequential loss point for this Project, particularly in light of the recent A1 DCO decision, is unknown given the lack of any submissions to the examination.</p> <p>It is for the Applicant to justify the wording of its own DCO and in this respect it has not done that.</p>	<p>Highways England responded to the substance of Cadent's submission on this issue in its response at Deadline 6 (REP6-017) and negotiations between the parties are continuing. Highways England therefore does not accept that its "<i>position on the consequential loss point for this Project ... is unknown given the lack of any submissions to the examination.</i>"</p>
REP7-037-07	<p><b>Issue 2: Betterment and deferral of benefit discount</b></p> <p>Betterment or deferral of renewal for works that are fully outside of the highway are not discounts that Cadent applies in the operation of its business or is required by legislation to apply in the operation of its business, and Cadent set out its position at Deadline 5. The justification for Cadent's position is set out below and is clearly made out.</p> <p>The Town and Country Planning Act 1990 (the TCPA) sets out, in some detail, the compensation provisions that apply where a statutory undertaker is required to relocate apparatus as a consequence of development. This is the correct basis against which to</p>	<p>Cadent submits that discounts for betterment (provided in sub-paras. (2) to (4)) or deferral of renewal for works (provided in sub-para. (5)) should not be applied for works outside the highway. It seeks to support its position by reference to the compensation provisions under the Town and Country Planning Act 1990 (TCPA) which apply where a statutory undertaker is required to relocate apparatus as a consequence of development, and which provisions do not expressly include discounts for betterment or deferral of renewal. (Note Cadent's submissions at Deadline 5 and Deadline 7 erroneously refer to the deletion of sub-paras. (2) to (4) only. Cadent has confirmed to Highways England that it seeks the deletion of sub-paras. (2) to (5) as shown in Highways England's comparison protective provisions submitted at D6).</p> <p>First, Highways England would clarify, for the benefit of the ExA, that Cadent is not seeking to rely on, or apply, the TCPA provisions themselves in this context, rather Cadent submits that the TCPA provisions should be used to inform the content of the bespoke protective provisions being negotiated and to apply for its benefit. But,</p>

Response reference:	Question	Highways England Response
	<p>consider Paragraph 10 and the Expenses clause.</p> <p>Section 279 of the TCPA provides a statutory right to compensation in a number of circumstances, including where apparatus needs to be removed/re-sited to facilitate development. This applies to diversions outside of the highway and includes the following rights of compensation:</p> <p>Section 279(2): Where by virtue of section 271 of the TCPA:</p> <ul style="list-style-type: none"> <li>• any right vested in or belonging to statutory undertakers is extinguished; or</li> <li>• any requirement is imposed on statutory undertakers,</li> </ul> <p>those undertakers shall be entitled to compensation from the acquiring or appropriating authority at whose instance the right was extinguished or the requirement imposed.</p> <p>Section 279(4): Where:</p>	<p>as Highways England has previously submitted at D6 (REP5-064-05 of REP6-017), standard practice in statutory undertaker's protective provisions (which apply off-street, i.e. outside the highway) is for betterment to be taken into account, and provisions equivalent to those contested by Cadent have appeared in dozens of Acts, Harbour Revision Orders, Transport and Works Act Orders and DCOs, all passed since the TCPA. Those include the following Orders with protective provisions for Cadent (all of which are therefore legislation requiring it to apply the betterment and deferral of renewal discounts):</p> <ul style="list-style-type: none"> <li>• Immingham Open Cycle Gas Turbine Order 2020</li> <li>• M42 Junction 6 DCO 2020</li> <li>• A38 Derby Junctions DCO 2021</li> <li>• A585 Windy Harbour to Skippool Highway DCO 2020</li> <li>• Southampton to London Pipeline DCO 2020</li> <li>• Lake Lothing (Lowestoft) Third Crossing Order 2020</li> <li>• West Midlands RFI Order 2020</li> <li>• Northampton Gateway RFI Order 2019</li> <li>• Hornsea Three Offshore Wind Farm Order 2020</li> <li>• Norfolk Vanguard Offshore Wind Farm Order 2020</li> </ul> <p>Highways England respectfully requests that the ExA and the Secretary of State uphold this position.</p> <p>It is therefore <u>not</u> the case, as Cadent contend, that Highways England's justification for the inclusion of the betterment and deferral of renewal discounts is based solely on legislation that applies to work</p>

Response reference:	Question	Highways England Response
	<ul style="list-style-type: none"> <li>works are carried out for the removal or re-siting of statutory undertakers' apparatus; and</li> <li>the undertakers have the right to carry out those works by virtue of section 273 or an order of Ministers under that section,</li> </ul> <p>the undertakers shall be entitled to compensation from the acquiring or appropriating authority.</p> <p>Section 271 of the TCPA applies where any land has been acquired compulsorily, including “compulsorily under any other enactment” and there is a land right in favour of Cadent. Section 273 of the TCPA applies where Cadent is required to remove or re-site apparatus affected by development. This legislation is directly applicable to the issue at stake.</p> <p>Section 280 of the TCPA then sets out how compensation is to be calculated. This is:</p> <p>“a) the amount of any expenditure reasonably incurred in acquiring land, providing apparatus, erecting buildings or doing work for the purpose of any adjustment of the carrying on of the</p>	<p>inside, and not outside, the highway and relates to specific circumstances (street works in respect of NRSWA and stopping up of highways in respect of the Highways Act 1980).</p> <p>Under those protective provisions, a utility forced to replace any of its apparatus because of the exercise of statutory powers is entitled to the recovery of its expenses, subject to deductions for (a) the value of any removed apparatus (b) the increased costs of any improved apparatus that has not been agreed by the promoter, awarded by an arbitrator or required by current standards, and (c) the deferral of renewal costs. This deduction ensures that utilities are repaid their net expenses and do not derive a windfall benefit at the expense of the promoters. This approach, of repaying their net costs, is analogous to the approach taken by CPO practice, hence Highways England’s referral to that in its response at D6.</p> <p>The specific right of compensation provided by TCPA, s.279(2) and (4), referred to by Cadent, is also not directly applicable in this context.</p> <p>First, in general terms, because the DCO and TCPA regimes are separate. Section 33 of the Planning Act 2008 provides that, in respect of projects for which development consent is required for development, “<i>none of the following is required to be obtained for the development or given in relation to it— (a) planning permission ...</i>” i.e. permission for development under the TCPA. The “development” which is authorised under the DCO (i.e. NSIP development) is not therefore “development” to which the TCPA applies.</p>

Response reference:	Question	Highways England Response
	<p>undertaking rendered necessary (a “business adjustment”);</p> <p>b) the appropriate amount for loss of profits; and</p> <p>c) where the compensation is in respect of the imposition of a requirement to remove apparatus, the amount of any expenditure reasonably incurred by the statutory undertakers or, as the case may be, the operator in complying with the requirement, reduced by the value after removal of the apparatus removed.”</p> <p>Section 280(2)(c) sets out the only deduction that is applied in such circumstances: This provides that compensation is to be: “reduced by the value after removal of the apparatus removed”. The provisions in respect of NRSWA and the Highways Act 1980 are not replicated, and there is no provision for a deduction or reduction for betterment or deferral of renewal. If there is a dispute as to compensation, this is referable to the Upper Tribunal. In this context, Section 281 of the TCPA provides that a statutory undertaker can elect for compensation to be determined in accordance with the CPO</p>	<p>Second, more specifically, because s.279(2) provides a right of compensation where, <i>by virtue of s.271</i>, a right vested in a statutory undertaker is extinguished or a requirement is imposed on a statutory undertaker. Section 271 only applies where “<i>any land has been acquired by a Minister, a local authority or statutory undertakers</i>” (s.271(1)). That does not include Highways England which, as a strategic highways company, is included within the definition of “local highway authority” for TCPA purposes (TCPA, s.336). Similarly, s.279(4) provides a right of compensation consequent on s.273 which again applies “<i>where land has been acquired or appropriated as mentioned in section 271(1).</i>”</p>

Response reference:	Question	Highways England Response
	<p>compensation rules instead of pursuant to Section 280.</p> <p>This demonstrates that Section 280 is a different method of compensation than “standard” CPO compensation, which demonstrates a fundamental error in the Applicant’s reference to betterment in CPO compensation to support their position. The Government has provided an alternative form of compensation to be paid to statutory undertakers such as Cadent in respect of works outside of the highway where their apparatus needs to be removed or re-sited.</p> <p>The Applicant’s justification for the inclusion of this wording is based solely on legislation that applies to work inside, and not outside, the highway and relates to specific circumstances (street works in respect of NRSWA and stopping up of highways in respect of the Highways Act 1980). This reflects and supports Cadent’s position: the Government has applied a specific expenses regime in respect of certain works within the highway, and that does not form part of the specific expenses regime that the Government has applied to the diversion of</p>	

Response reference:	Question	Highways England Response
	<p>apparatus as a consequence of development outside of the highway.</p> <p>The Applicant's justification also makes reference to betterment in the context of CPO compensation.</p> <p>As the ExA and Secretary of State will be aware, betterment is a complex principle of CPO compensation with a very specific meaning. As the very first paragraph of the link that the Applicant provided (in its Deadline 6 response) to the Valuation Office guidance makes clear, in CPO compensation: "The term 'betterment' in terms of compulsory purchase refers to any increase in the value of a claimant's retained land resulting from the implementation of a scheme of public works". Betterment in CPO compensation addresses a materially different set of circumstances relating to retained land, and does not provide any support for applying deductions or reductions in respect of the relocation of apparatus. Cadent does not hold retained land which will increase in value. The correct framework to look at is the relevant framework in the TCPA which</p>	

Response reference:	Question	Highways England Response
	<p>addresses the relocation of apparatus and which supports Cadent's position.</p> <p>In any event, the protective provisions prevent the Applicant from acquiring Cadent's interest or apparatus otherwise than by agreement, and so powers of compulsory acquisition (and subsequent compensation) are not relevant to this point.</p> <p>If the Government had intended that deductions or reductions in respect of betterment or the deferral of renewal were intended to apply then, as with NRSWA and the Highways Act 1980, the compensation provisions set out in the TCPA would include the same deductions and reductions. The Government did not do this, and there is no basis for interpreting the Government's intentions differently.</p> <p>The Applicant's request to include this wording boils down to its contention that "the benefit that a utility undertaker may receive from the installation of an improved apparatus or the replacement of ageing apparatus is self-evident". The Applicant provides no evidence of such a benefit in support of this statement, and</p>	

Response reference:	Question	Highways England Response
	<p>this assertion is insufficient to displace Cadent's position.</p> <p>It is for the Applicant to justify the terms of its own DCO. The reliance on previous DCOs is not sufficient justification, and through this submission (and throughout this examination) Cadent has demonstrated that its position is consistent with primary legislation and justified. Applying additional deductions and reductions could cause serious detriment to Cadent's undertaking by putting Cadent in a materially worse position than it would otherwise be in.</p>	
REP7-037-08	<p><b>Paragraph 3: Expenses</b></p> <p>The Applicant's position is inconsistent with all DCOs which contain protective provisions in favour of Cadent, and does not reflect the agreed position on those schemes.</p> <p>Please see for example the terms of: paragraph 45 of Part 5 of Schedule 12 to The M42 Junction 6 Development Consent Order 2020; paragraph 51 of Part 5 of Schedule 9 to The A38 Derby Junctions Development Consent Order 2021; and paragraph 20 of Part 3 of</p>	<p>As Highways England explained in its response at Deadline 6 (REP6-017), Cadent's submission refers to protective provisions para. 3(3) which Highways England has added to the protective provisions to clarify that the cost-sharing provisions in the New Roads and Streets Works Act 1991, s.85 <i>continue</i> to apply to on-street diversion works (i.e. major highway works, major bridge works or major transport works) and are not displaced, as Cadent contends they would be, by para. 3(1) and para. 10 (expenses) which refers to Highways England bearing "all costs".</p>



Response reference:	Question	Highways England Response
	<p>Schedule 10 to The A585 Windy Harbour to Skippool Highway Development Consent Order 2020. This is also consistent with the protective provisions afforded to other gas undertakers by the Applicant, such as National Grid Gas plc and Southern Gas Networks plc.</p> <p>The Applicant's position has been introduced late in the examination (at Deadline 6, following Deadline 5 when the ExA had requested that the parties set out their full and final position) and materially departs from precedent.</p> <p>Cadent requests that the Secretary of State includes its preferred wording in the DCO.</p>	<p>Cadent's further submission (REP7-037) refers only to the text of other DCOs and not to the interpretation which Cadent is seeking to put on that text.</p> <p>Highways England relies on the submissions made in its Response at D6.</p>

© Crown copyright (2021).

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence:

visit [www.nationalarchives.gov.uk/doc/open-government-licence/](http://www.nationalarchives.gov.uk/doc/open-government-licence/)  
write to the Information Policy Team, **The National Archives, Kew, London TW9 4DU**,  
or email [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk).

Printed on paper from well-managed forests and other controlled sources.

Registered office Bridge House, 1 Walnut Tree Close, Guildford GU1 4LZ  
Highways England Company Limited registered in England and Wales number 09346363