

M25 junction 10/A3 Wisley interchange TR010030

9.8 Written submission of Applicant's case put orally at the Issue Specific Hearing on the draft development consent order (dDCO) held on 12 November

Planning Act 2008
Rule 8(1)(k)

The Infrastructure Planning (Examination Procedure) Rules 2010



Infrastructure Planning

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M25 junction 10 / A3 Wisley interchange Development Consent Order 202[]

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1. Introduction

- 1.1.1 This document summarises the case put forward by Highways England (**the Applicant**), at the Issue Specific Hearing (**ISH 1**) on the draft Development Consent Order (dDCO) which took place at the Mandolay Hotel, 36-40 London Road, Guildford, Surrey GU1 2AE on 12 November 2019.
- 1.1.2 Mark Challis (MC) and Oliver Spencer (OS) of BDB Pitmans represented the Applicant and were assisted by Jacqueline Watson (JAW), the DCO lead at Atkins, (lead consultants for the Applicant) and Jonathan Wade (JOW), the Project Manager for the Applicant.
- 1.1.3 The summary of the submissions below broadly follows the Examining Authority's (ExA) agenda.

2. ISH 1 on the draft Development Consent Order

2.1 The structure of the dDCO

- 2.1.1 **The ExA asked the Applicant to explain the authorised development as set out in the Works described in Schedule 1 and any proposed minor amendments to these.**
- 2.1.2 To put matters in context, not least for the benefit of those present not familiar with Development Consent Orders (DCOs), MC explained that a Development Consent Order is a statutory instrument the primary purpose of which is to authorise a nationally significant infrastructure project (**NSIP**) pursuant to the Planning Act 2008 (**PA2008**). MC explained that as a matter of law, any NSIP needs to be authorised by a DCO.
- 2.1.3 MC drew comparisons between a DCO and planning permission noting that DCOs are more complicated and detailed, containing various powers allowing the project to be built, operated and maintained, including powers to acquire land and rights in land.
- 2.1.4 MC explained that one of the main features of a DCO is that it brings together most of the powers and consents needed to build and operate an NSIP and that they invariably contain a wide range of controls to ensure the NSIP is built and operated in an appropriate and satisfactory way.
- 2.1.5 JOW provided a high level overview of the scheme, drawing the attendees' attention to a plan of the scheme, being a composite version of the scheme layout plans.
- 2.1.6 JOW explained that the five principal drivers for the scheme are:
- to improve journey times and journey reliability, as the A3 and M25 are currently very congested in this locality
 - to improve the safety of the junction and surrounding area, as it currently does not have a positive safety record
 - to support the projected population and economic growth of the area

- to minimise the impact of the scheme on the local road network
- to improve the facilities around the junction currently available to non-motorised users (“NMUs”), including pedestrians, cyclists and horse riders.

2.1.7 **The ExA asked whether any consents outside of the DCO are required.**

2.1.8 MC drew the ExA's attention to the Consents and Agreements Position Statement [APP-020] and noted in particular the following consents:

- a consent from the Secretary of State, via the Planning Inspectorate to carry out works on common land pursuant to section 38(6) of the Commons Act 2006. An application under this sub-section is due to be submitted by the Applicant shortly.
- a water impoundment licence from the Environment Agency, the need for which the Applicant is still discussing with them.
- licences from Natural England relating to badgers and bats.
- other miscellaneous consents needed during the construction phase. MC noted that it is usual practice for the appointed contractor to obtain such consents in due course rather than for the Applicant to do so at this stage of the process.

2.1.9 MC was optimistic that the Commons Act consent would be obtained before the end of the examination period.

2.1.10 **The ExA asked the Applicant to explain any significant deviations from the “standard” DCO drafting and the reasoning behind such deviations.**

2.1.11 MC explained that there is no entirely “standard” DCO wording as practice is constantly evolving and each project has its own characteristics. MC explained that the dDCO had been drafted using a number of DCOs the Applicant has or is promoting to deliver upon its Road Investment Strategy (RIS). These include the following made DCOs:

- A19 / A184 Testos Junction improvement, made by the Secretary of State (**SOS**) in 2018.
- M20 Junction 10A, made by the SOS in 2017.
- A14 Cambridge to Huntingdon Improvement Scheme, made by the SOS in 2016.

2.1.12 MC explained that both Highways England DCOs and non-Highways England DCOs were used by the Applicant as precedents to determine best practice when drafting the current dDCO. He explained that although repealed, the Model Provisions found within The Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 – SI 2009/2265 (**the 2009 Order**) are still commonly used in practice and served as a useful guide. MC explained that the Planning Inspectorate's (**PINS's**) Advice Notes 13 (Preparation of a draft Development

Consent Order and Explanatory Memorandum) and 15 (Drafting Development Consent Orders) were also considered in preparing the dDCO.

- 2.1.13 MC explained that as the scheme is in an environmentally sensitive area, affecting a special protection area (**SPA**), a site of special scientific interest, common land and open space, there are a number of non-standard provisions in the dDCO in order to:
- provide replacement land for common land and/or open space subject to compulsory acquisition powers in the dDCO.
 - ensure that the SPA is properly provided for by way of compensation and enhancement measures such that the integrity of the SPA is maintained.
- 2.1.14 MC explained that these provisions are not commonly found in other DCOs but reflect a thread that runs through this application: the protection and maintenance of environmentally sensitive areas affected by the scheme. MC noted that other environmentally sensitive areas affected by the scheme including Bolder Mere, a lake to the south of the A3 and southwest of junction 10, and Stratford Brook, both of which are subject to non-standard provisions and requirements within the dDCO.
- 2.1.15 MC explained that a further aspect of the dDCO which is non-standard is the procedure for approvals under the requirements in part 2 of schedule 2. MC explained that under this provision, the Secretary of State would have jurisdiction to approve submissions under the requirements and he explained that a unit has been set up in the Department for Transport to handle such applications in respect of Highways England DCO schemes.
- 2.1.16 MC explained that whilst this wording is atypical in other DCOs, it is common to other Highways England DCOs and is included in the Highways England DCOs already made and those currently coming through the system.
- 2.1.17 Nancy El-Shatoury, principal solicitor at Surrey County Council (**SCC**), expressed the Council's concern that no specific provisions regarding agreements with street authorities had been included in the dDCO, following article 13 of the 2009 Order. MC explained that article 13 of the 2009 Order contains a permissive power only (and is not required by Highways England) and that this provision has not been included in other Highways England DCOs, MC pointed out that the Applicant has been in constructive discussions with SCC in order to reach an agreement which would cover a variety of highway matters. As such, MC explained that in the light of these constructive discussions, not including this provision in the dDCO was not a significant omission.
- 2.1.18 The ExA asked the Applicant to explain why Highways England had chosen not to distinguish between the NSIPs and associated development in the dDCO and how the concurrent implementation of the NSIPs would be secured under a single DCO.
- 2.1.19 MC explained that there is no legal requirement to distinguish between the project itself (i.e. the NSIP) and associated development in a DCO and that in practice it can be difficult to do so. Nor would it provide any particular assistance to anyone. MC noted that as the works on the A3 and the M25 meet at a junction, they are inextricably linked.

- 2.1.20 MC pointed out that not separately identifying the NSIP itself and its associated development has been the Promoter's adopted approach as regards all its schemes consented (or applied for) under the DCO process.
- 2.1.21 MC referred to section 22 of the PA2008, which sets the threshold for works to highways to fall within the NSIP regime. MC noted that a different threshold is used depending on whether the road is a trunk road, such as the A3, or a motorway, like the M25. MC explained that both the works to the A3 and the M25 exceed their respective thresholds and therefore, as a matter of fact and law, there are two NSIPs comprised in this scheme. MC suggested that it would be a recipe for confusion and not a good use of resources to have two parallel DCO applications which would serve the same purpose as one and would bring no advantage to anyone concerned.
- 2.1.22 MC added that there are precedents where more than one NSIP is included within a DCO and he noted the East Midlands Gateway Rail Freight Interchange DCO made in 2016 which includes three NSIPs.
- 2.1.23 In response to a query raised by an attendee relating to the increased traffic flow through Cobham and Byfleet as a result of the scheme, MC noted requirement 4 in schedule 2 which requires the Applicant to prepare a traffic management plan prior to the commencement of the authorised development.
- 2.1.24 The ExA asked the Applicant to explain the proposed articles as included in the dDCO.
- 2.1.25 MC explained that the articles are found at the front end of the dDCO. There are 47 articles in total in this dDCO which are split into seven parts. MC noted that the schedules are at the back end of the dDCO and these contain the finer details of the scheme such as details about the works, requirements, and matters regarding stopping up and speed limits, for example.
- 2.1.26 MC highlighted the following articles:
- Article 4 – grants the development consent for the scheme according to the works which are listed in schedule 1. MC noted that schedule 1 in this dDCO contains 65 separate works, reflecting that the scheme has been designed to quite a high level of detail at this stage of the process.
 - Article 8 – allows the Applicant to transfer the powers under the DCO to others with the consent of the Secretary of State. MC noted that this is mostly relevant in the case of utilities.
 - Article 11 – powers relating to streets including the construction of new streets. MC explained that this is a power included in almost all DCOs.
 - Articles 13 and 14 – allows the Applicant to stop up and divert streets either permanently or temporarily and relates to the list provided in schedule 4 to the dDCO. MC noted that article 13 also allows for the stopping up of private means of access, which is relevant in this scheme in relation to various private accesses directly to and from the A3.
 - Article 20 – gives power to the Applicant to enter onto land for the purpose of construction.

- Part 5 of the dDCO (“powers of acquisition and possession of land”) – grants compulsory powers of acquisition to Highways England to acquire land permanently or acquire rights over land or take temporary possession of land. MC also noted the amendments to the underlying compulsory acquisition legislation within part 5 of the dDCO (articles 27 and 28) The different land categories are shaded differently on the land plans.
- Article 37 – MC noted that one of the features of this dDCO is the amount of special category land, (i.e. common land and open space) involved with the scheme. He explained that article 37 deals with the situation in which special category land is subject to compulsory purchase powers, and that it provides for the Applicant to provide appropriate replacement land. MC noted that the Applicant is proposing to provide substantially more replacement land than the special category land it is taking compulsory acquisition powers over.
- Articles 38 and 39 – MC explained that these articles relate to the management of trees and hedgerows.
- Article 46 – MC explained that this article amends local legislation which may overlap with the powers within the dDCO.
- Article 47 – provides for any differences under the DCO to be resolved by way of arbitration.

2.1.27 MC explained that many of the articles previously mentioned are standard and those that depart from the standard wording are adaptations of articles which are generally found in DCOs, including those found in made DCOs for Highways England schemes and dDCOs being applied for by Highways England.

2.1.28 In response to the ExA’s question as to whether article 47 would apply to differences in the discharge of requirements under the DCO, MC explained that Article 47 is drafted to cover any difference under the DCO and would therefore cover differences relating to the discharge of requirements. MC mentioned that he was not aware of an instance when the arbitration clause in a DCO has served this purpose, but is aware that this provision is included within other DCOs made as regards schemes promoted by the Applicant and those coming through the system.

2.1.29 In response to SCC’s question relating to the inconsistency in wording between the sub-sections in article 11 of the dDCO, MC responded that the intent of these provisions is that streets, other than trunk roads and special roads, are maintainable by the local highway authority (**LHA**) unless otherwise agreed between the undertaker and the LHA.

2.1.30 **The ExA asked the Applicant to give an overview of the proposed requirements as set out in schedule 2 of the dDCO.** MC invited JAW to respond.

2.1.31 JAW gave a short overview of the term “requirement” before proceeding to outline the guiding principles the Applicant followed when drafting the requirements in Schedule 2. JAW noted the following key principles:

- to ensure the requirements are suitably comprehensive in their scope and precise in their wording to give sufficient assurance for the detail of mitigation and other control measures set out in the dDCO.
- to provide the Applicant with a reasonable and proportionate degree of flexibility to fix certain detailed aspects of the design at a later stage, provided that the scheme remains within the scope of the development as authorised, within the limits of deviation and provided no materially new or different significant environmental effects occur as a result.
- to ensure sufficient clarity with regard to who is responsible for discharging the Requirements and how this would work in practice.

2.1.32 JAW explained that appropriate regard was given to the relevant PINS advice notes (13 and 15) and the government's guidance on pre-application process when drafting the requirements.

2.1.33 JAW noted that the Applicant has developed a fairly established approach when drafting requirements, and those contained within the dDCO demonstrate a great deal of consistency with those found in previous DCOs promoted by the Applicant. JAW explained that this consistency is important for the Applicant as a promoter of a large number of DCOs. Particular reference was made to the arrangements proposed for the discharging of the requirements, which follow what is now a well established system, with a special unit having been created within the Department for Transport specifically tasked with this role.

2.1.34 JAW explained that the Applicant has shared drafts of the DCO with Guildford Borough Council, Elmbridge Borough Council and SCC and a number of statutory environmental bodies including Natural England, Historic England and the Environment Agency. JAW continued that the requirements as presented in schedule 2 incorporate a number of amendments that have been made in response to feedback from the bodies mentioned above prior to submitting the application, and the Applicant wishes to continue such dialogue so that issues on the requirements can be more fully set out in the respective statements of common ground.

2.1.35 JAW added that a number of the requirements as presented in schedule 2 have been tailored to the circumstances of the scheme to address the specific issues it raises and the nature and environment in which the scheme is located. JAW referred to these as "bespoke requirements" and reassured attendees that appropriate mitigation measures will be designed in accordance with these bespoke requirements.

2.1.36 JAW outlined the following key seven bespoke requirements:

- first, a requirement for the design and layout of land to be used as replacement land. JAW explained that the land to be provided will offset losses of common land and open space, and the requirement provides further clarification as to what detail must be approved as part of any scheme referred to in article 37 of the dDCO.

- second, a requirement on the detailed design of the compensation measures that are included within the scheme to offset the scheme's effect on the Thames Basin Heaths Special Protection Area (SPA). JAW explained that the scheme makes provision for a combination of additional habitat creation outside of the designated SPA and an extensive area of enhancement work within the boundary of the SPA. JAW added that whilst the locations, extents and general design and management proposals are already set out in the DCO application documents, this requirement will allow for the details on planting species etc to be finalised later and will ensure that no works in the SPA can commence until these details are approved and the environmental works to secure the SPA compensation land are begun.
- third, a requirement on the detailed design of the mitigation measures for Bolder Mere, a water body protected under the European Water Framework Directive. JAW explained that this requirement provides that the retaining wall works along the edge of Bolder Mere which are necessary for widening the A3 cannot be started until these details of the mitigation are agreed.
- fourth, a requirement on the detailed design of the proposed wood pasture planting on land adjacent to Buxton Wood, an area proposed as mitigation for the loss of trees as a result of the scheme more generally. JAW explained that this land is initially identified in the DCO application documents as being required for topsoil storage and partly for a construction compound and thereafter to be planted as mitigation. JAW added that this requirement will enable the details of that planting in terms of species type and mixes to be approved before the relevant environmental works are undertaken.
- fifth, a requirement on the detailed design for the Stratford Brook environmental mitigation measures, which have been proposed within the scheme to improve the condition of the watercourse as mitigation for the construction of the new overbridge. JAW explained that the Applicant is currently in discussions with the Environment Agency about incorporating words to link this requirement to Work 33b to provide greater assurance.
- sixth, a requirement on the design of Green Bridge. JAW explained that the DCO makes provision, subject to designated funds being made available by Highways England, to provide a green wildlife verge as part of replacing the existing Cockcrow Bridge. JAW explained that this is an opportunity for the scheme to help address historic habitat severance issues caused by the original construction of the A3 rather than as mitigation for the scheme itself. JAW added that this requirement provides a mechanism for the details of that green verge to be approved prior to the relevant bridge works being started.
- last, a requirement for the restoration of land used temporarily during construction. JAW pointed out that very few DCOs include such a requirement on this as this matter tends to be sufficiently covered within the DCO articles. JAW explained, however, that in this case some of the land to be used temporarily is designated as SPA, Site of Special Scientific Interest (SSSI) or comprises common land and therefore making provision for the details of the

restoration measures to be subject to an appropriate approval process gives greater assurance.

- 2.1.37 In response to a question asked by Richard Max, representing the Royal Horticultural Society relating to tree root mitigation measures, MC referred to requirement 6 (3)(c) which relates to landscaping and deals specifically with mitigation measures relating to trees during the construction period.
- 2.1.38 JAW summarised by stating that the intent of the bespoke requirements is to give a greater degree of assurance about how the final detail design will be approved and that the design must be carried out in accordance with those approved details.
- 2.1.39 **The ExA asked the Applicant to explain the protective provisions as set out at Schedule 9 of the dDCO, including progress on any others that may be required in light of the comments made by SCC in paragraph 2.8.2 of [RR-004].**
- 2.1.40 OS explained that the protective provisions as provided at schedule 9 to the dDCO are for the benefit of various undertakers and were taken from standard protective provisions approved by the SoS in other Highways England DCOs and other DCOs made. OS noted the following examples of where these standard protective provisions have been used: A14 Cambridge to Huntingdon Improvement Scheme, M4 Junctions 3 to 12 Smart Motorway and A19 / A184 Testo's Junction Improvement.
- 2.1.41 OS noted that two statutory undertakers have made relevant representations: Affinity Water and National Grid. OS explained that discussions remain ongoing with both parties however Affinity Water is content with the protective provisions as at schedule 9 and wish simply to discuss matters relating only to access to apparatus. With regard to National Grid, OS explained that negotiations remain ongoing and it is anticipated that bespoke protective provisions will be included in a side agreement. OS explained that a further update would be provided to the ExA in due course.
- 2.1.42 OS explained that part 3 of schedule 9 of the dDCO comprises protective provisions for the benefit of the Environment Agency to be given in exchange for the dis-application of the requirement to obtain an environmental permit for a flood risk activity under article 3(1)(a) of the dDCO. OS explained that since the application for development consent for the Scheme was submitted in June 2019, the Applicant and the Environment Agency have agreed the terms of the protective provisions and intend those provisions to be inserted into the relevant part of the next submission of the dDCO.
- 2.1.43 OS explained that part 4 of schedule 9 of the dDCO is a series of protective provisions in favour of SCC in respect of ordinary watercourses which may be affected by the works carried out for the scheme. These protective provisions were to be given in exchange for the dis-application of the requirement to obtain land drainage consent from SCC under article 3(1)(c) of the dDCO. OS reported that negotiations are ongoing with SCC and it is anticipated that a set of agreed protective provisions will be presented as part of the revised dDCO by Deadline 2 (Wednesday 18 December 2019).

- 2.1.44 In response to the ExA's question relating to whether there are any additional statutory undertakers who may seek to make representations about the dDCO, OS explained that this was not anticipated.
- 2.1.45 In reference to the point raised by SCC at paragraph 2.8.2 of [RR-004], OS explained that the Applicant is currently in discussions with SCC with regard to reaching an agreement relating to local highway matters. OS clarified that the Applicant's position here is that protective provisions for LHAs should not be included on the face of the DCO but are more appropriately dealt with by way of a side agreement made under various powers.
- 2.1.46 **The ExA asked the Applicant to explain the need for and progress on any planning obligations and/or commercial side agreements, with regard to SCC's point raised in [RR-004].**
- 2.1.47 OS confirmed that the Applicant had not proposed a unilateral undertaking or section 106 agreement with either SCC as the LHA or GBC or EBC as local planning authorities. This was on the basis that the Applicant does not accept SCC's case that it is necessary to provide highway mitigation measures in Ripley. OS noted that the Applicant recognised that the ExA may wish to explore this issue further as part of its examination into the Scheme.
- 2.1.48 OS referred to the discussions with statutory undertakers which were ongoing regarding possible side agreements.
- 2.1.49 OS noted that it was the Applicant's intention to have all side agreements completed within the examination period.
- 2.1.50 The ExA asked the Applicant to explain the documents to be certified in schedule 10 of the dDCO.
- 2.1.51 OS explained that schedule 10 of the dDCO identifies the application documents which are referred to in the dDCO. OS explained that the purpose of certifying them is to ensure clarity as to the precise document which is referred to. OS added that the Applicant notes various revisions to these documents may be made and Schedule 10 of the dDCO would be updated accordingly.
- 2.1.52 In response to the ExA's query relating to why subsidiary documents contemplated by the requirements at schedule 2 to the dDCO were not presently listed in Schedule 10, OS explained that the documents currently listed in schedule 10 are in existence and a number of subsidiary documents contemplated by the requirements do not yet exist and may not come into existence until the dDCO has been made, having regard to the terms of the requirements.
- 2.1.53 OS confirmed that there are no current proposals to extend the list of documents currently in schedule 10, but the Applicant will reflect on the need to adjust the list as appropriate throughout the examination period.

2.2 Issues and questions in relation to the dDCO raised by the ExA

2.2.1 The ExA asked the Applicant to explain the definition of “commence” article 2.

2.2.2 MC explained that the wording here is intended to remove from the approvals process activities that have or are likely to have minor effects and so do not need to go through an approval process before they can be done. It follows wording in other Highways England DCOs. However, MC noted that reference to “creation and establishment of replacement land” in the definition ought to be expunged that activity is subject to requirement 7 (“design, layout and implementation of Replacement Land”).

2.2.3 With regard to the definition of ‘maintain’ (which contains a caveat to the effect that works do not fall within the definition of that term if they would have materially new or different effects to those assessed in the ES), MC noted that this definition has been used in various DCOs including recently made Highways England DCOs.

2.2.4 With regard to who would make the decision as to whether any works would breach that caveat or not, MC explained that that this is a parameter and it would be up to someone to challenge Highways England if they believed the “environmental envelope” had been breached in carrying out works in pursuance of the power. MC added that a number of Highways England scheme DCOs do not contain an environmental caveat, therefore the definition here is tighter than those included in other DCOs.

2.2.5 In response to the ExA’s query relating to the location of the definitions outside the interpretation article, MC explained that there was no strong feeling on the Applicant’s part as to whether the definitions were found in one spot or another in the DCO. MC noted that the Applicant would consider putting all of the definitions in one place in the dDCO. MC explained that as regards the examples of definitions set out in the agenda (i.e. articles 18(6), 19(12) and 32(11)), in all three cases including the definition within the article follows the 2009 Order.

2.2.6 The ExA asked the Applicant to explain the need for the second part of article 7 (“Limits of deviation”), given that section 153 of the PA2008 provides a statutory procedure for making amendments to a DCO.

2.2.7 MC explained that the second part of article 7 has been included in other recently made Highways England DCOs and is intended to give the Applicant appropriate flexibility to construct the development subject to vertical limits of deviation which are greater than the those specified (i.e. in article 7(b)) where there would be no materially new or different environmental effects. MC explained that the second part of article 7 can itself be seen as a limit of deviation albeit not in numerical form.

2.2.8 In response to the ExA’s query relating to the definition of “relevant planning authority”, which is defined in article 2(1), MC agreed that the definition would be further considered by the Applicant to ensure it was clear which authority or authorities would be the relevant authority in any given case.

2.2.9 The ExA asked the Applicant to explain the need for the disapplication of other legislative provisions and the progress that is being made to obtain the relevant regulators’ consent to them.

- 2.2.10 MC noted that article 3 of the dDCO (“Disapplication of legislative provisions”) will be familiar to those familiar with previous DCOs as it is a standard provision. MC explained that protective provisions have been substantially agreed with the Environment Agency and there are ongoing discussions with SCC with regard to land drainage consents. MC explained that the Applicant hopes to reach agreement with both organisations shortly such that the relevant consents under section 150 PA2008 are given shortly.
- 2.2.11 SCC queried whether the disapplication of the Wildlife and Countryside Act 1981 in the dDCO (article 3(1)(f)) should in fact refer to the Countryside and Rights of Way Act 2000. MC agreed the Applicant would look into this and make any required changes accordingly.
- 2.2.12 **The ExA asked the Applicant to explain whether it is appropriate for the dDCO to include temporary possession provisions relating to common land, having regard to section 139(3) (Common land and rights of Common) of the PA2008.**
- 2.2.13 OS explained that the Applicant’s position was that section 139(3) is not engaged in respect of the Scheme as there are no registered rights of common affecting the relevant commons. OS further explained that the Applicant has requested the common land register from the Common Land Registration Officer at SCC but has not yet received the document.
- 2.2.14 **The ExA asked the Applicant to explain, with regard to requirements 8, 9, 10, 11 and 12, the need for wording specifying when the required details would be submitted that relate to the authorised development, not just to that specific element.**
- 2.2.15 OS explained that, as had been noted by JAW, the general principle behind the drafting of the requirements is that the requirements provide certainty as to the mitigation whilst granting the Applicant a proportionate degree of flexibility over how the authorised development is implemented. OS added that those requirements in the ISH 1 agenda at item 4(v), save for requirement 11, identify the specific elements of the principal highway works which would have an impact on a particular environmental site.
- 2.2.16 OS explained that these requirements operate so that the relevant highway works cannot be commenced until the provisions of the requirements have been satisfied, and obliges the Applicant to ensure relevant plans are approved before those parts of the scheme can be started.
- 2.2.17 The ExA noted that some of the requirements (particularly requirement 11) do not relate to the highway works and therefore wished to understand how the SoS can be satisfied that the environmental mitigation works will be delivered. OS explained that in most cases, the requirements are drafted so that particular highway works cannot be commenced until the relevant plans or schemes are approved under the requirements. OS explained that the Applicant would review the drafting of the requirements in this regard.
- 2.2.18 The ExA noted a number of minor omissions and typographical errors. MC confirmed these would be reviewed and corrected, as needed.

2.3 Discharge of Requirements and amended details

- 2.3.1 MC explained that the Applicant's letter to the Planning Inspectorate dated 4 November 2019 [AS-023] outlines seven proposed changes to the scheme. MC commented that six of these changes are non-material. The only material change proposed is the adjustment to the A245. MC explained that the Applicant intends to consult on all of the proposed changes and this will take some preparation as supplementary documents regarding environmental matters and so on will need to be prepared. MC noted that the Applicant intends to provide this package of supplementary documents to the Inspectorate by the beginning of February 2020. MC suggested that this should give the ExA sufficient time to incorporate the changes within the examination period given that the changes are fairly modest.
- 2.3.2 **The ExA asked the Applicant to explain the mechanisms for determining the preparation, discharge and monitoring of future plans, for example, the Environmental Control Plans that are listed in section 4.4. of the Outline CEMP [APP-134].**
- 2.3.3 In response MC agreed to provide a road map of which documents are expected, when they are expected, and arrangements for assessment, discharge and monitoring in due course. MC accepted that section 4(4) of the Outline CEMP [APP-134] did not tie in precisely with the plans which must be provided under requirement 3(2)(c) as part of the detailed CEMP, but the list in requirement 3(2)(c) is not exhaustive.
- 2.3.4 **The ExA, having regard to the PINS advice note 15 and the provisions of section 153 and schedule 56 of the PA2008, asked the Applicant to justify the use of tailpiece in requirement 5(1) and also sought clarification from the Applicant regarding the wording of requirement 18.**
- 2.3.5 MC explained that the use of the tailpiece in requirement 5 ("detailed design") is about providing an appropriate amount of flexibility to Highways England in arriving at a final design to build. If any variation to the current preliminary design has a materially new or different environmental effect then it would not be consentable by the SoS under that requirement. MC added that there is transparency provided for in requirement 5(2) which requires details of decisions under requirement 5(1) to be made public and made following consultation with the relevant planning authority. MC agreed with the ExA that "relevant planning authority" is a term (defined in article 2(1)) that may need to be defined more precisely in the next iteration of the dDCO, given that there are various local authorities involved with the scheme.
- 2.3.6 With regard to the ExA's query relating to requirement 18 ("Approvals and amendments to approved details") MC explained that this wording is taken from the 2009 Order and that the Applicant believes that it is intended to provide clarity as to which version of any approved details should prevail.
- 2.3.7 **The ExA asked the Applicant to explain the wording of requirement 19(3) and queried whether it would be appropriate for requirement 19(2) to apply to the matter subject to requirement 8 and requirement 17(3). Requirement 19 is concerned with the approvals process under the requirements. Requirement 8 concerns compensation and enhancement measures in the SPA. Requirement 17 (3) is concerned with the restoration of land used temporarily in the SPA.**

2.3.8 Requirement 19 contains provisions under which if an application for approval under a requirement is not determined within a given period, the approval is deemed to have been given (19(2)), except that where the application is accompanied by an environmental report, on the basis that the matter in question would not give rise to any materially new or different environmental effects, the application is deemed to have been refused. MC explained that, as a responsible promoter, the Applicant would not omit to submit a report in reliance on requirement 19(2) where one should have been submitted as envisaged by requirement 19(3). MC added that there is more elaboration on the process in requirement 19 in requirement 20 which requires certain pre-application consultation. MC added that despite this requirement following previous Highways England DCOs as made, the Applicant would review the drafting of these requirements further in light of the ExA's comments.

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