

M25 junction 10/A3 Wisley interchange TR010030

9.90 Applicant's comments on Examining Authority's schedule of changes to the draft Development Consent Order (dDCO)

Rule 8(1)(k)

Planning Act 2008

Infrastructure Planning (Examination Procedure) Rules 2010



Infrastructure Planning

Planning Act 2008

The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (as amended)

M25 junction 10/A3 Wisley interchange

Development Consent Order 202[x]

9.90 APPLICANT'S COMMENTS ON EXAMINING AUTHORITY'S SCHEDULE OF CHANGES TO THE DRAFT DEVELOPMENT CONSENT ORDER (dDCO)

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Ref	ExA's Suggested Changes	ExA's Comments	Highways England Comments
Articles			
Interpretation Article 2(1)	"the book of reference" means the book of reference certified by the Secretary of State under article 45 (Certification of documents, etc.) as the book of reference for the purposes of this Order;	Additional text inserted for the purposes of clarity to take account of the content of what would be the final version of the Book of Reference.	Highways England confirms that the next iteration of the draft development consent order (dDCO) will incorporate this amendment.
Interpretation Article 2(1)	"environmental statement" means the document of that description certified under article 45 (Certification of documents, etc.) as the environmental statement by the Secretary of State for the purposes of this Order;	Additional text inserted for the purposes of clarity to take account of the content of what would be the final version of the Environment Statement.	Highways England confirms that the next iteration of the dDCO will incorporate this amendment.
Interpretation Article 2(1)	"maintain" in relation to any part of the authorised development includes to inspect, repair, adjust, alter, improve landscape, preserve, remove, reconstruct, refurbish or replace, in perpetuity provided such works do not give rise to any materially new or materially different environmental effects to those identified in the environmental statement, and any derivative of "maintain" is to be construed accordingly,	The ExA considers that the words 'alter' and 'improve' should be deleted as these would appear to go beyond a reasonable definition of 'maintain' in terms of measures that they could allow for, with the use of improve implying that the initial design would not have the principles of 'good design' imbedded within the Proposed Development's design from the outset. Addition of 'in perpetuity' to indicate that this would be an ongoing commitment.	<p>Highways England does not agree with the proposed removal of "alter" and "improve" from the definition of "maintain". This is an appropriate and precedented approach as explained at paragraph 5.5 of the Explanatory Memorandum [REP6-004]. The inclusion of "improve" in the definition of "maintain" ensures consistency with Highways England's statutory power of improvement in relation to highways for which it is the highway authority, i.e. the strategic road network and should not be regarded as an indication that the Scheme design has not embedded the principles of good design.</p> <p>In relation to the proposed inclusion of the expression "in perpetuity", this is not necessary because article 5 of the dDCO makes plain that the power for Highways England to maintain the authorised development may be exercised "at any time".</p>
Development granted by the Order Article 4(2)	<p>4.—(1) Subject to the provisions of this Order including the requirements in Schedule 2 (requirements), the undertaker is granted development consent for the authorised development to be carried out within the Order limits.</p> <p>(2) Any enactment applying to land within or adjacent to the Order limits has effect subject to the provisions of this Order.</p> <p>(3) Nothing in this Order prevents the carrying out of operations consisting of non-intrusive investigations for the purpose of assessing ground conditions, erection of any temporary means of enclosure, and the temporary display of site notices or advertisements immediately upon this Order coming into force.</p>	<p>Deletion of the second sub paragraph of Article 4, as the ExA considers there appears to be no particular justification for its inclusion within a made Order.</p> <p>To ensure consistency with the definition of 'commence' in Schedule 2 Part 1. Also, there appears to be no particular justification for the third sub paragraph if the wording of Requirement 3 (the CEMP) is worded so as to clearly state what works would be permissible under a made DCO prior to the CEMP being approved by the SoS.</p>	<p>In relation to the proposed deletion of article 4(2), Highways England does not accept that there is no justification for its inclusion in a made development consent order. This is a precedented provision as explained at paragraph 5.15 of the Explanatory Memorandum [REP6-004]. The provision has very recently been included in two Highways England development consent orders, c.f. article 3(2) The A585 Windy Harbour to Skippool Highway Development Consent Order 2020 and article 5(2) The A30 Chiverton to Carland Cross Development Consent Order 2020.</p> <p>In relation to the proposed deletion of article 4(3), Highways England confirms that the next iteration of the dDCO will incorporate this amendment.</p>

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Limits of Deviation Article 7	<p>7. In carrying out the authorised development the undertaker may—</p> <p>(a) deviate laterally from the lines or situations of the authorised development shown on the works plans to the extent of the limits of deviation shown on those plans; and</p> <p>(b) deviate vertically from the levels of the authorised development shown on the engineering drawings and sections to a maximum of 0.50 metres upwards or 0.50 metres downwards,</p> <p>Except that these maximum limits of vertical 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 and the local highway authority, certifies accordingly that a deviation in excess of these limits would not give rise to any materially new or materially different environmental effects in comparison with those reported in the environmental statement.</p>	<p>The text following sub paragraph (b) would allow for deviations in excess of the limits where effects “would not give rise to any materially new or materially worse adverse environmental effects from those reported in the environmental statement.” There appears to be no justification for the inclusion of this text because if a proposed change to the Approved Development exceeded what had been assessed in the Environmental Statement then any such change would be so material as to fall outside the principles of the ‘Rochdale Envelope’ or the scale of change would be such that it could be considered by the Secretary State under the procedures available for the determination of changes to the consent development under Section 153 and Schedule 6 of the PA2008.</p>	<p>Highways England does not agree with the proposed removal of the tailpiece to article 7 as explained in its response to ExAQ 3.15.3.</p>
Consent to transfer benefit of Order Article 9	<p>9.—(1) Subject to paragraph (4), t The undertaker may—</p> <p>(4) The written consent of the Secretary of State is required for a transfer or grant under this article., except where the transfer or grant is made to—</p> <p>(a) Southern Gas Networks PLC (company number 5167021, whose registered office is at St Lawrence House, Station Approach, Horley, Surrey, RH6 9HJ);</p> <p>(b) (b) UK Power Networks (Operations) Limited (company number 3870728, whose registered office is at Newington House, 237 Southwark Bridge Road, London, SE1 6NP);</p> <p>(c) (c) Affinity Water Limited (company number 2546950, whose registered office is at Tamblin Way, Hatfield, Hertfordshire, AL10 9EZ);</p> <p>(d) (d) British Telecommunications PLC (company number 1800000, whose registered office is at 81 Newgate Street, London, EC1A 7AJ);</p> <p>(e) (e) Sky Telecommunications Services Limited (company number 2883980, whose registered office is at Grant Way, Isleworth, Middlesex, TW7 5QD);</p> <p>(f) (f) Virgin Media Limited (company number 2591237, whose registered office is at Media House, Bartley Wood Business Park, Hook, Hampshire, RG27 9UP); and</p> <p>(g) (g) National Grid Electricity Transmission PLC (company number 2366977, whose registered office is at 1-3 Strand, London, WC2N 5EH), for the purposes of undertaking works to their apparatus or replacement apparatus.</p>	<p>Sub-paragraph (4) should be deleted and replaced with a requirement for the Secretary of State giving his written consent to any transfer that would allow some Compulsory Acquisition (CA) and Temporary Possession (TP) benefits of the Order to be transferred to companies and the Secretary of State would need to be satisfied that any company that might benefit from CA and/or TP powers would have sufficient funds to meet these costs</p>	<p>Highways England does not agree with the proposed amendments to article 9. The drafting in the dDCO is well-precedented as explained at paragraphs 5.28 and 5.29 of the Explanatory Memorandum [REP6-004].</p> <p>Highways England notes that the equivalent power in the recent A585 Windy Harbour to Skippool Highway Development Consent Order 2020 is more reflective of the amendments proposed by the examining authority but submits that that order should be distinguished from the long line of made development consent orders which enable the benefit of the order (including powers of compulsory acquisition and temporary possession of land) to be transferred to named statutory undertakers or code operators. The Secretary of State can have confidence that such parties are appropriate parties to whom such powers may be transferred without needing a formal approval process.</p>

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Article 24(2)	<p>24.—(1) After the end of the period of 5 years beginning on the day on which this Order is made—</p> <p>(a) no notice to treat is to be served under Part 1 of the 1965 Act as modified by article 28 (modification of Part 1 of the 1965 Act); and</p> <p>(b) no declaration is to be executed under section 4 (execution of declaration) of the 1981 Act as applied by article 29 (application of the 1981 Act).</p> <p>(2) The authority conferred by article 32 (temporary use of land for carrying out the authorised development) 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>	<p>Sub-paragraph (2) as drafted in its totality would have the potential to allow for an indefinite period of TP and this eventuality is a matter that the ExA considers has not been fully justified in the Statement of Reasons and that without a fuller justification the second half of this sub-paragraph should be deleted.</p>	<p>Highways England notes the examining authority's concerns (which is not the intention of the drafting) and proposes to update the drafting of the dDCO as may be appropriate at deadline 8.</p>
Felling or lopping of trees and removal of hedgerows Article 39(4) and (5)	<p>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—</p> <p>(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</p> <p>(b) from constituting a danger to persons using the authorised development.</p> <p>(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.</p> <p>(3) Any dispute as to a person's entitlement to compensation under paragraph (2), or as to the amount of compensation, is to be determined under Part 1 of the 1961 Act.</p> <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 that is required to be removed.</p> <p>(5) In this article "hedgerow" has the same meaning as in the Hedgerow Regulations 1997(a) and includes important hedgerows.</p>	<p>With respect to the removal of hedgerows the ExA considers that sub-paragraphs 4 and 5 can be deleted from Article 39 because the Hedgerow Regulations grant the Applicant the same powers as sought in this part of the dDCO.</p>	<p>Highways England does not agree with the examining authority's proposed amendment on the basis that the Hedgerow Regulations do not confer power on it to remove hedgerows as part of the Scheme as the dDCO does not constitute a "planning permission" under regulation 6 and so the removal of hedgerows as part of the Scheme will not amount to a permitted activity under the Hedgerow Regulations.</p> <p>More generally the power in article 39 of the dDCO is well-precedented as explained at paragraphs 5.143-5.144 of the Explanatory Memorandum [REP6-004].</p>

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Arbitration Article 48	<p>48.—(1) Subject to paragraph (2), any dispute arising under any provision of this Order may not be referred to the courts of England and Wales and shall instead be referred to and settled by a single arbitrator to be agreed between the parties, or failing agreement, 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 the Secretary of State.</p> <p>(2) Paragraph (1) does not apply to any dispute which falls to be determined by the Upper Tribunal or where the parties to the dispute otherwise agree in writing.</p>	<p>Wording at the end of sub paragraph amended to reflect the Secretary State's current preference for addressing the appointment of arbitrators.</p>	<p>Highways England notes the Secretary of State's stated preference as to the power of appointment of an arbitrator although wishes to make the examining authority aware that the two most recent Highways England DCOs (for the A30 Chiverton to Carland Cross and A585 Windy Harbour to Skippool schemes) continue the practice which has been followed in highways DCOs of referring to the President of the Institution of Civil Engineers rather than the Secretary of State as the person with the power to appoint an arbitrator under the relevant arbitration article.</p> <p>This approach differs from non-highways DCOs and reflects the position that, unlike in non-highways DCOs, the Secretary of State has responsibility for discharging requirements in highways DCOs and it may not therefore be appropriate for him to have the power to appoint an arbitrator.</p>
Requirements			
Schedule 2 Part 1 'Interpretation'	<p>"commence" means beginning to carry out any material operation (as defined in section 56(4) of the 1990 Act) forming part of the authorised development other than operations consisting of non intrusive investigations and surveys, ecological surveys and pre construction ecological mitigation, investigations for the purpose of assessing and monitoring ground conditions and levels, erection of any temporary means of enclosure, receipt and erection of construction plant and equipment, site clearance, and the temporary display of site notices or advertisements, and "commencement" is to be construed accordingly;</p>	<p>The ExA is minded to concur with views expressed by some Interested Parties (IPs) on this matter having regard to biodiversity considerations and the potential effects on the use of Special Category Land and therefore considers that 'erection of any temporary means of enclosure' 'receipt and erection of construction plant and equipment' and 'site clearance' be removed from the list of excepted activities, and should instead fall within the definition of commence. This is due to the potential impacts that could occur should appropriate assessment and mitigation not be in place prior to these aforementioned activities being undertaken.</p>	<p>The examining authority's attention is referred to the dDCO as submitted at deadline 6 [REP6-003] which includes an amended definition of "commence" that omits "receipt and erection of construction plant and equipment" and "site clearance". The examining authority's attention is also referred to Highways England's comments on the responses to ExAQ 2.15.5 submitted by interested parties [REP6-013 at pages 17-20].</p>
5(1)	<p>5.—(1) 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, the Scheme Layout Plans and the engineering drawings and sections, certified under article 45 (certification of documents, etc.) of this Order, unless otherwise agreed in writing by the Secretary of State, following consultation with the relevant planning authority and the local highway authority on matters related to their functions and provided that the Secretary of State is satisfied that any amendments would not give rise to any materially new or materially different significant environmental effects in comparison with those described in the environmental statement.</p> <p>(2) Where amended details are approved by the Secretary of State under sub-paragraph (1), those details are deemed to supersede the</p>	<p>The ExA considers that the second half of sub-paragraph (1) would be unnecessary because it would amount to a duplication of the provisions of Section 153 and Schedule 6 of the PA2008, which provide a mechanism for changes to be made to a development that benefits from a made DCO. The ExA therefore considers that the unnecessary text should be deleted.</p>	<p>Highways England disagrees with the proposed amendments. The examining authority's attention is referred to Highways England's response to ExAQ 3.15.10 and to its previous comments on this point as referenced in that response.</p>

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	<p>corresponding drawings and plans certified under article 45 of this order and the undertaker must make those amended details available in electronic form for inspection by members of the public and undertake the works in accordance with the approved amended details.</p>		
6(1)	<p>The authorised development must be landscaped in accordance with a landscaping scheme which sets out details of all proposed hard and soft landscaping works, including all proposed permanent fencing or other means of enclosure, and which has been submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority.</p>	<p>The addition of 'proposed permanent fencing or other means of enclosure' is necessary in order to ensure that these works also fall within the ambit of the authorisation process.</p>	<p>Highways England does not agree with the proposed amendment. The examining authority's attention is referred to Highways England's response to ExAQ 3.15.11.</p>
6(4)	<p>All landscaping works must be carried out to a reasonable standard in accordance with the relevant recommendations of appropriate British Standards or other recognise codes of good practice.</p>	<p>Deletion of 'to a reasonable standard' as this wording is not considered to be sufficiently precise.</p>	<p>Highways England confirms that the next iteration of the dDCO will incorporate this amendment.</p>
6(5)	<p>Any tree or shrub planted as part of the authorised development that, within a period of 5 10 years after planting, is removed, dies or becomes in the opinion of the relevant planning authority, seriously damaged or diseased, must be replaced in the first available planting season with a specimen of the same species and size as that originally planted, unless the Secretary of State, following consultation with the relevant planning authority on matters related to its function, gives consent to a variation.</p>	<p>The ExA is concerned that 5 years would not be a sufficient length of time in order for all the proposed soft landscaping to become sufficiently established.</p>	<p>Highways England does not agree with the proposed amendment. The examining authority's attention is referred to Highways England's response to ExAQ 3.15.13.</p>
7(1) and (2)	<p>7.—(1) No part of the authorised development that involves the loss of an existing area of registered common land or open space shall be commenced until the layout and design details comprising associated with the creation of an the corresponding area of replacement land common land or open space identified in (Work No.59) is to commence until for that part details of the layout and design of the land have been submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority and with the prospective owner of the replacement land identified in Part 4 of Schedule 10. The details must include—</p> <p>(a) a landscaping scheme for the replacement land in accordance with requirement 6 of this Order;</p> <p>(b) the extent, methods and timing of any tree felling or other vegetation clearance required within the boundary of the replacement land to render the land suitable for public recreational access;</p> <p>(c) measures for the management and protection of any ancient woodland, veteran trees or trees which are the subject of a tree</p>	<p>Requirement 7, as currently drafted, does not link the timing of the approval process for the layout and design details for the areas of replacement special category land to the timing for the loss of the existing special category land that would be authorised under the terms of the DCO. The ExA considers that the revised drafting it has identified would address this matter.</p>	<p>Highways England does not agree that the proposed amendments are necessary. This is primarily because, as is explained in the Common Land and Open Space Report [AS-005], the replacement land provision for the Scheme has been assembled on a global basis, I.e. there is not a specific corresponding area of replacement land identified for particular parcels of special category land which will be subject to compulsory acquisition as a result of the Scheme.</p> <p>The ExA's attention is drawn to article 38 (Special category land) of the dDCO [REP6-003] which provides an appropriate degree of certainty as to the provision of replacement land in accordance with a scheme approved by the Secretary of State under requirement 7. Article 38(1) provides that Highways England may not acquire the special category land, or to acquire permanent rights compulsorily over such land, until it has acquired the replacement land and the Secretary of State has approved a scheme for its implementation in accordance with requirement 7. Accordingly Highways England does not propose to amend the drafting of requirement 7.</p>

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	<p>preservation order, if present within the boundary of the relevant part of the replacement land;</p> <p>(d) the location and extent of any translocation of ancient woodland soils if proposed within the relevant part of the replacement land;</p> <p>(e) the detailed alignment and surface treatment of any proposed new paths or public rights of way to be created through the replacement land;</p> <p>(f) any measures, including street furniture and signage to be provided for the purposes of supporting, promoting and managing non-motorised public access to the land;</p> <p>(g) boundary treatment measures, including details of any new fencing, gates and barriers necessary to manage public access both within the replacement land and to restrict access to other adjoining land;</p> <p>(h) timetable for the implementation, completion and opening of the replacement land for public access; and</p> <p>(i) a scheme for the maintenance and management of the replacement land, including details of any environmental monitoring measures.</p> <p>(2) Following the approval of the layout and design details for an area of replacement common land or open space that area of land shall be laid out in accordance with the details approved under sub-paragraph (1). Thereafter the the authorised development must be carried out, maintained, managed and monitored in accordance with the details approved under sub paragraph (1).</p>		
8(1)(g)	<p>A scheme for the maintenance, management and monitoring of the SPA compensatory habitat creation and enhancement measures in respect of the Thames Basin Heaths SPA, that reflects the measures set out in the SPA Management and Monitoring Plan.</p>	<p>In order to maintain consistency with the wording of R8(1) and to ensure that such measures accord with the SPA MMP.</p>	<p>Highways England confirms that the next iteration of the dDCO will incorporate this amendment.</p>
9(3)	<p>Notwithstanding sub-paragraph (1) and (2), the Secretary of State may approve under this requirement a bridge design excluding any soft verge wildlife crossing, or a wider soft verge up to a width of that which has been assessed in the submitted application documentation.</p>	<p>The wording has been amended to increase the precision of this requirement to reflect the fact that the width of the wider soft verge element cannot be greater than what has been consulted upon and assessed in the application documentation, ie a 10 metre width but with the possibility of this being extended to 25 metres width should Proposed Change 1 be accepted into the Examination.</p>	<p>Highways England confirms that the next iteration of the dDCO will incorporate this amendment.</p>
11 (1)	<p>No part of the authorised development comprising Work No.25 (improvement, realignment and widening of the M25 eastbound off-slip at junction 10) is to open to traffic until details of the mitigation measure to be undertaken for Work No.60 have been</p>	<p>Amended to include in the text a specific reference to the Buxton Wood Environmental Mitigation Area</p>	<p>Highways England confirms that the next iteration of the dDCO will incorporate this amendment.</p>

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	submitted to and approved in writing by the Secretary of State, following consultation with the relevant planning authority.		

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