The Planning Inspectorate

Application by National Highways for an Order Granting Development Consent for the Lower Thames Crossing

Draft Agenda[1] for Issue Specific Hearing 2 (ISH2): the draft Development Consent Order

Hearing	Date and Time	Location
Issue Specific Hearing 2 (ISH2) on the draft Development Consent Order (dDCO)	**Thursday 22 June 2023** **Hearing Starts at 10am** Virtual Registration Process from 9:15am	By virtual means using Microsoft Teams

Agenda

1. Welcome, introductions, arrangements for the Hearing

2. Purpose of the Issue Specific Hearing

3. Applicant's Drafting Approach

The Applicant will be asked to explain its approach to the drafting of the dDCO.

a)	**The structure of the dDCO**
b)	**The powers sought and their relationship to the project**
c)	**The relationship between the dDCO and plans securing the construction and operational performance of the proposed development** • the design principles document • the environmental masterplan • The Environmental Management Plan (EMP) and iterations • The Landscape and Ecology Management Plan (LEMP) (outline and full) • Any other relevant plans and documents
d)	**The discharging role of the Secretary of State and other local and public authorities**
e)	**Matters to be secured by alternative methods** • Planning obligations

[1] This is a draft Agenda, issued before the commencement of the Examination. If decisions to vary Examination process are taken, this Agenda may be amended. If a decision is taken not to commence the Examination until after the date appointed for this hearing, this Agenda will be withdrawn.

	• Other forms of agreements
f)	**Ongoing work with implications for the dDCO** • The change application • Any other intended changes to the dDCO

4. ExA's Questions on the dDCO

The ExA will ask questions about the dDCO and seek observations from IPs present. Noting that this hearing is in the earliest stages of the Examination, the primary purpose of this Agenda item will be for the ExA to raise its own initial questions. Other IPs will be welcome to participate but will not be expected to frame their own detailed positions until the submission of their Written Representations, Local Impact Reports and participation in a DCO ISH in September 2023.

The Applicant will be provided with a right of reply.

a)	**The structure of the dDCO**
b)	**The powers sought and their relationship to the project**
c)	**The relationship between the dDCO and plans securing the construction and operational performance of the proposed development**
d)	**The discharging role of the Secretary of State and other local and public authorities**
e)	**Tunnelling provisions**
f)	**Traffic regulation provisions**
g)	**Road charging provisions**
h)	**Protective provisions**
i)	**The Deemed Marine Licence**
j)	**ExA observations on drafting** (see **Annex A**)
k)	**Any other matters relating to the dDCO**

5. Next Steps

6. Closing

Purpose of this ISH

The purpose of this ISH is to inquire into the draft Development Consent Order (dDCO), providing the Applicant with an initial opportunity to explain the structure, content and drafting approach (Agenda Item 3) and for the ExA to explore initial questions about the drafting approach taken with the Applicant and with bodies who are proposed or who might hold powers or duties under the dDCO (Agenda Item 4).

This ISHs into the dDCO will be conducted *without prejudice* to the in-principle positions taken by Interested Parties (IPs) in relevant or written representations. This means for example that IPs are at liberty to seek improvements to provisions in the dDCO without conceding an in-principle position that there should be no such

provisions or that the dDCO itself should not be made. It is held in the interests of ensuring that the dDCO becomes the best draft that can be obtained in the circumstances and is also *without prejudice* to the ExA's future deliberations on its recommendation to the Secretary of State about whether or not the dDCO should be made.

This hearing will use the Version 2 Tracked dDCO [AS-039] as its main reference source.

Attendees

The ExA would find it helpful if the following parties could attend this Hearing.

- The Applicant
- Any host local authority
- Any other public authority with a proposed function under the dDCO
- Any proposed beneficiary of protective provisions
- Any utility service provider or statutory undertaker with land, infrastructure, alignments or apparatus affected by the dDCO
- Any port authority or port operator affected by the dDCO
- The Marine Management Organisation (MMO)

However, this does not indicate that other parties will not be able to contribute. All Interested Parties (IP) are invited to attend and make oral representations on the matters set out in the Agenda, subject to the ExA's ability to control the Hearing.

The ExA has sought to provide sufficient detail to assist the parties to prepare for the Hearing. The details set out above are indicative and the ExA may find it necessary to include additional Agenda items or to amend the order in which the items are dealt with.

The event will be livestreamed and a link for watching the livestream will be posted on the project webpage of the National Infrastructure Planning website closer to the Hearing date. IPs and members of the public who wish to observe the Hearing can therefore view and listen to the Hearing using the livestream, or view and listen to the recording, after it has concluded.

Registration Process

Parties who have registered to speak will receive a Joining Instruction email the day before the Hearing which will include a link to the virtual event on Microsoft Teams, and a telephone number should they need to participate by telephone. To enable the Hearing to start on time at **10am** please join promptly at **9:15am** to ensure that all virtual attendees can complete the Registration Process in good time.

Procedure at an ISH

Guidance under the Planning Act 2008 and the Infrastructure Planning (Examination Procedure) Rules 2010 provides that it is for the ExA to probe, test and assess the evidence through direct questions of persons making oral representations at

Hearings. Questioning at the Hearing will be led by the ExA. Cross questioning of a person giving evidence by another person will only be permitted if the ExA decides it is necessary to ensure representations are adequately tested or that an IP has had a fair chance to puts its case.

ANNEX A

ExA Observations on Drafting

General observations

Matter	Provision	Issues or Questions Raised
1. Novel drafting		The purpose of and necessity for any provision which uses novel drafting and which does not have a clear precedent in a made DCO or similar statutory order should be explained in the Explanatory Memorandum. The Planning Act 2008 power on which any such provision is based should also be identified in the Explanatory Memorandum. The drafting should: • be unambiguous; • be precise; • achieve the purpose sought for the proposed development by the applicant; • be consistent with any related definitions or expressions in other provisions of the dDCO; and • follow guidance and best practice for SI drafting.
	Article 2(10) –	This is apparently novel drafting which seeks to amend the meaning of "*materially new or materially different environmental effects in comparison with those reported in the ES*" to exclude effects which would avoid, remove or reduce an adverse environmental effect reported in the ES. The phrase "materially new or materially different environmental effects" is used several times in the DCO, including in the definition of maintain, the limits of deviation and requirements securing essential mitigation. The drafting here appears to provide that it is acceptable for work which has the effect of avoiding, reducing or removing an adverse effect to be undertaken without further scrutiny, even if the effect is materially different from that assessed in the ES. Views are sought on the degree to which that approach is being provided for here and, if it is, is acceptable? If it is considered acceptable, then there is an argument in favour of amending drafting in this provision and elsewhere in the dDCO to ensure consistency. Slightly different phraseology is used throughout the dDCO in relation to material new and materially different environmental effects – for example, see the definition of 'maintain', Article 6(3), ancillary works preamble and (p), In Requirements 3, 8, 18, and in the Protective provisions.

Matter	Provision	Issues or Questions Raised
		See comments in section 2 below.
	Article 27 – time limits for CA, start date	Article 27 – See comments in section 4 below re novel approach to start date and extent of time limits for Compulsory Acquisition (CA).
	Article 28 – extent of imposition of transfer of CA powers without consent	Article 28 – See comments in section 4 below re novel approach/ precedent for the extent of imposition of restrictive covenants and the transfer of benefit of imposed covenants.
	Article 56(3), (4) planning permission etc.	The Applicant states that this novel provision is required as a result of the Supreme Court judgement in ***Hillside Parks Ltd*** *v* ***Snowdonia National Park Authority*** *2022 UKSC [30] ('**Hillside**')* The ExA does not currently understand why the Applicant considers this provision to be necessary. We understand that ***Hillside*** confirmed the existing position established in case law, that a planning permission incapable of being implemented is of no effect. On the basis that ***Hillside*** is not understood by the ExA to be a statement of new law, then the rationale for the provisions drafted here is not understood. The Applicant is requested to: • provide detailed legal submissions explaining why it considers these provisions are necessary and to detail the section of PA 2008 which empowers the inclusion of this provision in the dDCO; and • provide details of any planning permissions within the order limits that this provision would apply to. Consideration will be given as to whether it is permissible or within the purposes and policy relevant to a DCO to include a provision preventing the taking of enforcement action by a local planning authority in a DCO. The views of the relevant local planning authorities will be sought on this point.

Matter	Provision	Issues or Questions Raised
		In relation to Article 56(4), the ExA notes that ***Hillside*** relates to the grant of a planning permission, and it is not clear from the judgment that it would apply equally to consent granted under a DCO. The Applicant's legal submissions on this point are sought. On a drafting point, there appear to be some words missing in the second line of Article 56(4): "*under the authority of a granted under section 57 of the 1990 Act*". Amended drafting is sought.
	Work No. 7R – Traveller site & Requirement 13	Work No. 7R is described in part as "re-provision of a traveller site". In effect, it provides for the grant of consent for change of use of a plot of land within the order limits to use as a Traveller site, which appears to be a use of land that is residential in nature. The ExA's primary question is about whether this is *intra vires*, within the powers of a DCO. It is arguable that the proposed work is not a matter that a DCO may in principle provide for, having regard to PA2008 s 120(3), (4) and Part 1 of Schedule 5. Further, the proposed work does not appear to be part of the NSIP or NSIPs for which development consent is sought, as (per PA2008 s 115(1)(c)) the development does not appear to be 'related housing development'. It appears that it may not be capable of being consented as associated development, as (per PA2008 s 115(2)) associated development is development that amongst other characteristics 'does not consist of or include the construction or extension of one or more dwellings'. The Applicant is requested to provide detailed legal submissions explaining the statutory basis upon which it is possible to include a provision in a DCO granting consent for change of use of land to a traveller site, with particular reference to whether it is considered to be 'related housing development', or associated development with a residential element. Consideration should be given to whether the provision of pitches and related facilities on a traveller site fall under the definition of a dwelling (which is expressly excluded from the definition of associated development). If the change of use to the proposed use arising from Work No. 7R is permissible within a DCO, then the Applicant is requested to consider further drafting for inclusion in the dDCO to secure the

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		change of use of land and to impose those conditions on that new use that would be normal for such a consent, such as limiting the use of the land to Gypsies and Travellers etc.. Observations from the local planning authority about the nature of the conditions that would normally be applied to such a change of use will also be sought. Further consideration will also need to be given to the appropriateness of any such conditions being within a DCO (and thus only capable of being changed via a change to the DCO) or whether an alternative approach might be that the applicant submits an application for planning permission to the LPA (under the Town and Country Planning Act 1990) seeking approval before works can take place on the existing traveller site, or any CA of that land is authorised. The views of the local planning authority on applicable policy and process for such an approach will be sought, as will views on timing, certainty (or otherwise) of outcome and the effects of a refusal or delay on the deliverability of the dDCO proposed development overall.
2. Flexibility of operation	Articles 2, 4, 5, 6 and generally – Definitions, maintenance and limits of deviation Requirement 4(1) – "carve out" for preliminary works (The Preliminary Works EMP)	As a general point, the extent of flexibility provided by the dDCO should be fully explained, such as the scope of maintenance works and ancillary works, limits of deviation and any proposed ability of discharging authorities to authorise subsequent amendments. Drafting which gives rise to an element of flexibility should provide clearly for unforeseen circumstances but also define the scope of what is being authorised with sufficient precision. One established DCO drafting approach to managing flexibility whilst providing clarity about and security for what is consented is to limit the works (or amendments to them) to those that would not give rise to any materially new or materially different environmental effects to those identified in the environmental statement. Section 17 of Advice Note 15 provides advice on tailpieces that is also relevant. Observations on novel drafting in Article 2(10) above are relevant here. In relation to the flexibility to carry out preliminary works, the nature and extent of the works in the Preliminary Works EMP and hence of the "carve out" in Requirement 4(1) from the definition of "commencement" needs to be fully understood and justified. It should be demonstrated that all such works are de minimis and do not have environmental impacts which are unassessed or materially different from those assessed and or would themselves need to be controlled by

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		requirement (see section 21 of Advice Note 15). None should be works the advance delivery of which could defeat the purpose of this or any other Requirement. Submissions from hearing participants on the adequacy and appropriateness of provisions providing flexibility will be sought.
3. Development consent etc granted by the order	Article 3(3) – General disapplication of provisions applying to land	The intent of this article is to avoid inconsistency with other relevant statutory provisions applying in the vicinity and is precedented in highways made Orders. The drafting in its current form has the effect of a general disapplication of other statutory provisions applying to land, including land lying beyond the Order land. However, the proposed development in this instance and the extent of the Order land are very large and understood to be larger than the extent of Order. It follows that the potential effect of the disapplication sought could be very large. Notwithstanding other precedents, as much information as possible should be provided about "*any enactments applying to land within, adjoining or sharing a common boundary*" together with clarification about how far from the Order limits the provision might take effect. Additional diligence on and justification for the disapplications sought are required, as in general terms a statutory disapplication is a matter that is specifically examined, to avoid the possibility of inadvertent adverse effects or frustration of the intent of Parliament arising from a disapplication of statutory provisions.
	Schedule 1 – Authorised Development Part 1 – Authorised Works	The authorised works are stated as being co-equally a nationally significant infrastructure project (NSIP) arising under PA2008 s 16 (electric lines), s 20 (gas transporter pipelines, and s 22 (highways). Having regard to the definition of an electric line NSIP in PA2008 s 16, is it clear that the proposed electric line works meet that definition? Is there any reason why alternatively the electric line works could not proceed as associated development (under PA2008 s 115) to the highway NSIP? Having regard to the definition of a gas transporter pipeline NSIP in PA2008 s 20, is it clear that the proposed gas transporter pipeline works meet that definition? Is there any reason why

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		alternatively the gas transporter pipeline works could not proceed as associated development (under PA2008 s 115) to the highway NSIP?
4. Compulsory acquisition and extinguishment of rights	Articles 25 – 34 – Articles 35 – 36 – Article 66 – Compulsory Acquisition (CA), Temporary Possession (TP) and related powers	These provisions (and any relevant plans) should be drafted in accordance with the guidance in Advice Note 15, in particular sections 23 (extinguishment of rights) and 24 (restrictive covenants). The effect of the drafting discussed here will be tested in Compulsory Acquisition Hearing 1 (CAH1) and may be the subject of oral or written submissions by Affected Persons. The purpose of this hearing will be to examine the basis for the drafting approach taken. As a general observation, compulsory acquisition (CA) of an interest in land held by or on behalf of the Crown cannot be authorised through an article. Ensuring clarity on this can be achieved through various means, for example: • by expressly excluding all interests held by or on behalf of the Crown in the book of reference land descriptions for relevant plots (where the DCO is drafted to tie compulsory acquisition powers to the book of reference entries); • by excepting them from the definition of the Order land (if 'Order land' definition is not used for other purposes in the DCO); or • by drafting the relevant compulsory acquisition article to expressly exclude them. Where an applicant wishes to CA some other person's interest in the same land where there is a Crown interest, that can still only be done if the appropriate Crown authority consents to it under s135(1) of the Planning Act 2008. Where the applicant wishes to create and compulsorily acquire new rights over land, those rights should be fully, accurately and precisely defined for each relevant plot and the compulsory acquisition should be limited to the rights described. This could be done by drafting which limits the compulsory acquisition of new rights to those described in a schedule in the DCO or to those described in the book of reference. There should be no accidental over-acquisition.

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		In all respects (including in relation to the book of reference), the applicant should follow *Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land* published by DCLG (now MHCLG) in September 2013.
	Article 27 time limit for the exercise of CA powers	Article 27(1), time limit for the exercise of CA powers, allows 8 years for the powers to be exercised. This is longer than the normal 5 years which has been standard for most DCOs to date. The applicant will need to justify the requirement for an additional 3 years to exercise the CA powers in consideration of the additional interference with the rights of persons with an interest in the land and the possibility of blight. Additionally, Article 27(3) defines the start date for the 8-year period as being the date after the expiry of the period within which a legal challenge could be made under s118 PA 2008, or after the final determination of any legal challenge made under that section. The more normal, certain and precedented drafting in DCOs to date is for a 5-year period to commence on the date of the making of the Order. This amended definition of the start date could have the effect of significantly adding to the 8-year period within which persons with an interest in land will have their land burdened with the threat of CA before it is compulsorily acquired. This represents an additional interference with their rights (over and above those that normally arise from CA) which must be justified. The start date definition adds an additional element of uncertainty, as it is not possible to know how long any challenge may take to be finally determined – and it is not impossible that one running through an appeal to the Court of Appeal and thence to the Supreme Court might take a long time. Are these approaches to drafting acceptable, considering their effect on the rights of persons with an interest in land and the possibility of blight?
	Article 28 restrictive covenants and transfer	Article 28(1) of this order contains a wide power to impose undefined restrictive covenants over all of the order land (save for land contained in schedule 11 – see article 35(10)(a)). The Secretary of State for Transport's decision in the M4 Motorway (Junctions 3 to 12) (Smart Motorway) DCO) should be noted: "*to remove the power to impose restrictive covenants and related provisions as he does not consider that it is appropriate to give such a general power over any of the Order land as defined in article 2(1) in the absence of a specific and clear justification for conferring such a*

Matter	Provision	Issues or Questions Raised
		wide-ranging power in the circumstances of the proposed development and without an indication of how the power would be used" (paragraph 62). Other DfT decisions have included similar positions, eg, the A556 (Knutsford to Bowdon Improvement) DCO and the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) DCO. The applicant has not explained in the Explanatory Memorandum (EM) (see para 5.122 – 5.130) [APP-057] why undefined restrictive covenants are justified in this case. The EM only contains a short justification for rights and restrictive covenants taken together and does not appear to provide reasons to justify a departure from the SoS' previous positions on this matter. Article 28 (3) and (4) purport to enable the power to acquire rights and impose restrictive covenants compulsorily to be transferred to a statutory undertaker (defined by reference to s127 PA 2008), save for the requirement to pay compensation. This provision is linked to the approach taken to the transfer of benefit article (Article 8), but the two provisions do not appear to be fully consistent in their drafting. The drafting of Article 8(3) may require amendment to reflect Article 28(3) and (4). It will be very important to ensure that the drafting of the DCO ensures that the undertaker always remains liable for all compensation for CA. If the DCO is to permit CA powers to be exercised by unknown individuals or statutory undertakers whose ability to meet CA costs has not been examined, there is potential for a power to acquire to be transferred to a person who is not 'good' for the related liability in compensation. Precision of intent and effect are very important here. At present Article 8(6) implies that article 28(3) enables the CA powers to be transferred to be exercised by persons other than statutory undertakers. Article 28(3) as presently drafted only permits the transfer of CA powers to statutory undertakers. If 28(3) reflects the correct intention, article 8(6) should be amended to remove reference to "any other person".
	Articles 35 & 36 – Temporary Possession	These articles follow a well-precedented form. However, Article 35(1)(a)(ii) and Article 36 (1)(b) enable Temporary Possession (TP) to be taken of any Order land (subject only to limited exceptions). The proposed development in this instance and the extent of the Order land are very

Matter	Provision	Issues or Questions Raised
		large. It follows that the potential effect of the TP powers sought could be very large and could arise in locations in respect of which persons may not expect it to arise. Notwithstanding other precedents, as much information as possible should be provided about land potentially capable of being subject to TP. Additional diligence on and justification for the extent of TP sought are required, as in general terms possession of land is a matter that is specifically examined, to avoid the possibility of inadvertent adverse effects.
	Article 66 – power to override easements etc.	Article 66 grants a wide power for the undertaker or those acting on its behalf, to interfere with interests and rights and breach restrictions on any land within the order limits either temporarily or permanently. Despite the inference in the EM that it only applies to land vested in the undertaker, the power is not limited to land subject to CA but applies to all land within the Order limits (including but not limited to that subject to temporary possession). It follows that it creates a class of acquisition applicable to persons who may not be aware that they are subject to it over a very large area of land. As with any such general powers, diligence and care is required to ensure that unintended or unjustified consequences do not flow from the operation of this power and that compensation can be paid at the right time and to the right persons. Are all such persons considered to be Category 3 Persons. Are they all identified in the Book of Reference at Part 2?
5. Special category land	Article 40 – (and preamble)	If it is argued that Special Parliamentary Procedure (SPP) is not to apply (before authorising CA of land or rights in land being special category land), full details should be provided to support the application of the relevant subsections in PA2008 Sections 130, 131 or 132, for example (in relation to common, open space or fuel or field garden allotments) : • where it is argued that land will be no less advantageous when burdened with the order right, identifying specifically the persons in whom it is vested and other persons, if any, entitled to rights of common or other rights, and clarifying the extent of public use of the land • where it is argued that any suitable open space land to be given in exchange is available only at prohibitive cost, identifying specifically those costs.

Matter	Provision	Issues or Questions Raised
		Article 40(1) prevents the special category land from vesting in the undertaker until the replacement land has been acquired and the SoS has certified that a scheme has been received from the undertaker for provision of the replacement land. The second element of this provision (certification by the SoS that a scheme has been received) appears to permit the undertaker to CA the special category land and rights without the scheme having been at that time fully implemented and the replacement land vested in those with rights in the special category land. The ExA asks whether this is sufficiently secure to enable the SoS to certify that replacement land will be given in exchange for the order land or right in accordance with s.131(4) and s.132(4)? Although Article 40(3) provides that the applicant must implement the certified scheme, and that once it is implemented the replacement land must vest in the persons with an interest in the special category land, it would still appear to allow the undertaker to CA the special category land before the replacement land is available to use and without any particular security or limitation preventing or confining the prolongation of the time between the certification of a scheme and the completion of the transfer of the replacement land. If the undertaker did not then implement the scheme or delays implementing the scheme it could fall to the LPA to seek to enforce this provision, which could take a significant time, during which persons would be deprived of access to the special category land. This does not seem to align in spirit with the intention of the legislative provisions on special category land, which seek (amongst other provisions) its replacement without a period of delay. The drafting of Article 40 generally is confusing and the ExA remains unsure of whether it meets the intention of the applicant. For example, Article 40(1) refers to the “special category land” which appears to be defined in the article as including all the special category land; however Article 40(1) is presumably only intended to apply to the special category land which requires replacement land to be given in exchange (i.e not including “excepted land”). The applicant should consider revised drafting where possible to simplify this provision and clarify its intention. Article 40(6)(a) provides that the certified scheme “must not conflict with the outline LEMP”. (The outline LEMP refers to the Outline Landscape and Ecology Management Plan). In general terms, such drafting should by preference be positive and provide that it “must comply with the outline LEMP”.

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6. Statutory undertakers and apparatus	Articles 37 & 38 –	Where a representation is made by a statutory undertaker (or some other person) that engages section 127(1) of the Planning Act 2008 and has not been withdrawn, the Secretary of State will be unable to authorise compulsory acquisition powers relating to that statutory undertaker land unless satisfied of specified matters set out in section 127. If the representation is not withdrawn by the end of the examination, the ExA will need to reach a conclusion whether or not to recommend that the relevant statutory test has been met in accordance with s.127. The Secretary of State will be unable to authorise removal or repositioning of apparatus (or extinguishment of a right for it) unless satisfied that the extinguishment or removal is necessary for the purpose of carrying out the development to which the order relates in accordance with section 138 of the Planning Act 2008. Justification will be needed to show that extinguishment or removal is necessary.
7. Planning permission	Article 56 –	This article is intended to allow development not authorised by the DCO to be carried out within the Order limits pursuant to planning permission. This would appear to obviate the need, in such circumstances, to apply to change the DCO (through section 153 of the Planning Act 2008). This article should be justified.
8. Classification of roads **9. Clearways, prohibitions and restrictions** **10. Speed restrictions**	Articles 15, 16 and 17 –	Variation of the application of provisions in these articles is apparently possible using extensive means including by agreement. Arguably, this has the effect of disapplying PA2008 section 153 which provides a procedure for changing a DCO. Is this approach necessary and justified? There may be precedent in other made DCOs for the same drafting, but the Applicant needs to be clear under which section 120 power these articles are made and if necessary provide justification as to why the provisions are necessary or expedient to give full effect to any other provision of the DCO.
11. Temporary stopping up and	Articles 12 & 13 –	Notwithstanding other precedents, justification should be provided as to why the power is appropriate and proportionate having regard to the impacts on pedestrians and others of authorising temporary working sites in these streets.

Matter	Provision	Issues or Questions Raised
restriction of use of streets		The power to temporarily stop up streets and use as a temporary working site in article 12 is not limited to streets within the Order limits. To the extent that this can take effect outside the Order limits this is a wide power that needs to be justified. It is also uncertain in effect.
	Article 14 –	Article 14 relates to permanent stopping up of streets. Should 14(4)(e) be a new paragraph (5)?
12. Power to alter layout of streets		This is a wide power – authorising alteration etc. of any street within the Order limits. It should be clear why this power is necessary and consideration given to whether or not it should be limited to identified streets, locations or in relation to specific Works.
13. Disapplication or amendment of legislation/ statutory provisions	Articles 53 & 55 –	The guidance in section 25 of Advice Note 15 should be followed and, if not already provided, additional information sought such as • the purpose of the legislation/statutory provision • the persons/body having the power being disapplied • an explanation as to the effect of disapplication and whether any protective provisions or requirements are required to prevent any adverse impact arising as a result of disapplying the legislative controls • (by reference to section 120 of and Schedule 5 to the Planning Act 2008) how each disapplied provision constitutes a matter for which provision may be made in the DCO. Where the consent falls within a schedule to the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015 evidence will be required that the regulator has consented to removing the need for the consent in accordance with s.150 Planning Act 2008. Article 55 is headed the application of local legislation, but it is actually an article excluding the application of enactments, orders and byelaws where they are inconsistent with the order.
14. Crown rights	Article 43 –	The word “take” should be removed from this article.

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		Consent under section 135 (1) and (2) should also be obtained from the Crown authority.
15. Felling or lopping of trees and removal of hedgerows **16. Trees subject to tree preservation orders**	Articles 23 & 24 –	The guidance in section 22 of Advice Note 15 should be followed. If it hasn't been followed justification should be provided as to why this is the case. If the 'felling or lopping' article is drafted to allow such actions to trees both within and 'near' the Order limits, should consideration be given to amending that, so that it only applies to trees within or 'encroaching upon' the Order limits?
17. Procedure for discharge of requirements	Article 65 – Schedule 2 Part 2	Advice Note 15 provides standard drafting for articles dealing with discharge of requirements. If this guidance hasn't been followed justification should be provided as to why this is the case. In the South Humber Energy Bank Centre DCO BEIS Secretary of State removed an article which sought to apply the s.78 and s.79 TCPA 1990 appeal provisions to the discharge of requirements and replaced it with a specific appeal procedure in the article itself. BEIS Secretary of State explained in their decision letter that the specific appeal procedure was the "preferred approach for appeals". Advice Note 15 suggests that the specific appeal procedure should be included in a schedule to the DCO rather than in the article itself. Although the Secretary of State in South Humber did include the specific procedure in the article itself, the decision letter refers to the specific appeal procedure being the preferred approach rather than the inclusion of it in the article. It is therefore considered acceptable for the specific appeal procedure to be set out in a schedule to the DCO as set out in the Advice Note. It is also worth noting that the South Humber decision is from BEIS Secretary of State and does not necessarily reflect the views of any other Secretary of State. Article 65 permits a number of appeals to the SoS, including from an LPA decision under certain articles and a notice issued under the Control of Pollution Act. I have not seen this provision before and query whether the SoS will want to undertake this role? In relation to appeals from

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		notices under the Control of Pollution Act the applicant will need to explain why it is necessary for the provisions in the DCO to replace the existing appeal procedures under the Control of Pollution Act and explain any discrepancies between the procedures set out in the DCO and those that would normally apply. A direct comparison between the two may be helpful.
18. Benefit of the Order	Article 7 –	Where this article is drafted so as to allow any transfer of benefit by the applicant (undertaker) to any other named person or category of person without the need for the Secretary of State's consent, then the applicant should provide full justification as to why a transfer to such person is appropriate. Where the purpose of the provision is to enable such person(s) to undertake specific works authorised by the DCO the transfer of benefit should be restricted to those works. If the provision seeks to permit transfer of compulsory acquisition powers the applicant should provide evidence to satisfy the Secretary of State that such person has sufficient funds to meet the compensation costs of the acquisition. See 23 below in relation to references to arbitration in this article.
19. Discharge of Water	Article 19 –	The applicant should be aware of and mindful of section 146 of the Planning Act 2008.
20. Temporary Possession	Articles 35 & 36 –	Temporary possession is not itself compulsory acquisition. Articles giving temporary possession powers will be considered carefully to check whether or not they allow temporary possession of any land within the Order limits, regardless of whether or not it is listed in any Schedule to the DCO which details specific plots over which temporary possession may be taken for specific purposes listed in that Schedule. If they do, then the applicant should justify why those wider powers (which also allow temporary possession of land not listed in that Schedule) are necessary and appropriate and explain what steps they have taken to alert all landowners, occupiers, etc. within the Order limits to this possibility. If not already clearly present, consideration should also be given to adding in a provision obliging the applicant (undertaker) to remove from such land (on ceasing to occupy it temporarily) any equipment, vehicles or temporary works they carry out on it (save for rebuilding demolished

Matter	Provision	Issues or Questions Raised
		buildings under powers given by the DCO), unless, before ceasing to occupy temporarily, they have implemented any separate power under the DCO to compulsorily acquire it. Given the parliamentary approval to the temporary possession regime under the Neighbourhood Planning Act 2017 ('NPA 2017'), which were subject to consultation and debate before being enacted, should any provisions relating to notices/counter notices which do not reflect the NPA 2017 proposed regime (not yet in force) be modified to more closely reflect the incoming statutory regime where possible? As examples: • The notice period that will be required under the NPA 2017 Act is 3 months, longer than the 28 days required under article 35. Other than prior precedent, what is the justification for only requiring 28 days' notice in this case? • Under the NPA 2017, the notice would also have to state the period for which the acquiring authority is to take possession. Should such a requirement be included in this case? • Powers of temporary possession are sometimes said to be justified because they are in the interests of landowners, whose land would not then need to be acquired permanently. The NPA 2017 Act provisions include the ability to serve a counter-notice objecting to the proposed temporary possession so that the landowner would have the option to choose whether temporary possession or permanent acquisition was desirable. Should this article make some such provision – whether or not in the form in the NPA 2017? Article 36(13) defines the maintenance period as the period of 5 years beginning with the date on which that part of the authorised development is first opened for use – is it sufficiently clear what this means? Will it be obvious what constitutes a "part" and when that "part" is "first open for use"?
21. Arbitration	Article 64	Whilst arbitration provisions have been a dynamic field of practice in dDCO drafting, recent decisions suggest that it is unlikely that a consenting Secretary of State will allow the arbitration provision wording to apply arbitration to decisions s/he, or, if relevant the Marine Management Organisation ('MMO') may have to make on future consents or approvals within their remit. By way of example:

Matter	Provision	Issues or Questions Raised
		The Secretary of State for BEIS included the following drafting in the arbitration article in the Norfolk Vanguard Offshore Windfarm DCO and the draft Hornsea Three Offshore Windfarm DCO (published with a minded to approve decision) to remove any doubt about the application of arbitration to decisions of the Secretary of State and the MMO under the DCO: *Any matter for which the consent or approval of the Secretary of State or the Marine Management Organisation is required under any provision of this Order shall not be subject to arbitration.* The Secretary of State for BEIS also agreed with an ExA recommendation to remove reference to arbitration in the transfer of the benefit article and the deemed marine licences (DMLs) in the Hornsea and Norfolk Vanguard DCOs. The Hornsea ExA recommendation report at 20.5.9 details the reasons for removal from the transfer of benefit article, and at 20.5.17 – 20.5.24 regarding removal from the DMLs. The Thanet Extension, East Anglia ONE North and East Anglia TWO Examinations addressed similar considerations. Whilst these are all energy cases, the same point appears to apply, that an arbitration provisions should not apply to the exercise of decision-making powers by a duly constituted and authorised public authority or Minister of the Crown. It should also be noted that the Secretary of State removed the following from the arbitration clause in both DCOs: *Should the Secretary of State fail to make an appointment under paragraph within 14 days 42 of a referral, the referring party may refer to the Centre for Effective Dispute Resolution for appointment of an arbitrator*.
22. Defence to proceedings in respect of statutory nuisance	Article 58 –	Are the controls on noise elsewhere in the DCO sufficient to justify the defence being provided by this article to statutory nuisance claims relating to noise? If the defence has been extended to other forms of nuisance under section 79(1) Environmental Protection Act 1990, the same question will apply to those nuisances.

Matter	Provision	Issues or Questions Raised
23. Deemed Marine Licences (DMLs)	Article 60 – Schedule 15	It is unlikely that a consenting Secretary of State will allow bespoke appeal procedures to apply to the Marine Management Organisation ('MMO') decisions on discharge of conditions in a deemed marine licence. By way of example: The Secretary of State for BEIS removed drafting in the Norfolk Vanguard Offshore Windfarm DCO and the Hornsea Three Offshore Wind Farm DMLs creating a bespoke appeal procedure against MMO decisions on discharge of conditions. The ExA recommendation report for Hornsea Three provides reasons at 20.5.25 – 20.5.29.
24. Powers in relation to relevant navigation and watercourses	Article 18	This article permits the undertaker to, among other things, remove or relocate any moorings so far as it may be reasonably necessary for the purposes of carrying out and maintaining the authorised development, regardless of any interference with any private rights. It appears that this could permit the relocation of a houseboat? This could represent interference with HRA rights with no apparent mechanism for the person affected to challenge the applicant's decision that the interference is reasonably necessary, to the extent that the undertaker considers it to be necessary or reasonably convenient. Notwithstanding precedent cited in the EM, consideration needs to be given to the acceptability of this.
25. Suspension of road user charging	Article 46	Article 46(1) provides that the SoS may suspend the operation of any road user charge imposed under article 45 if they consider it necessary to do so in the event of an emergency… However, 46(7) defines "emergency" as any circumstance which the undertaker considers is likely to cause danger… Should 46(7) say SoS instead of undertaker? Or should 46(1) refer to the undertaker instead of the SoS?

Observations on Requirements

Requirement	Comment
Requirement 1 Preliminary works	These works are permitted prior to discharge of any requirement. Consideration should be given to whether it is permissible to undertake these works before discharge of the requirements which secure essential mitigation
Requirement 3 Detailed design	The requirement firstly states that the authorised development must be designed in accordance with the design principles scheme etc but then contains a tailpiece which essentially permits the SoS to amend these documents. Although this is limited to amendments which do not give rise to any material new or materially different environmental effects, consideration should be given to whether this flexibility is necessary and acceptable.
Requirements 4, 5, 10,11	The phrase “substantially in accordance with” is uncertain and imprecise.
Requirements 7,8,9,10,11,16	The requirements permit discharge for part of the authorised development. Is it sufficiently clear what a “part” of the authorised development is?
Requirement 9	Is the phrase “reflecting the relevant mitigation measures” sufficiently certain?
Requirement 13 Travellers’ site	See comments above on Work 7R and questions regarding the acceptability of provision of the site via the DCO in principle. This requires replacement of a Traveller site. The only consultation required is consultation of “any person the undertaker considers appropriate”. The ExA understands that the existing traveller site is currently occupied and the closure of it may represent an interference with Human Rights Act 1998 (HRA1998) Schedule 1 Part 1 Article 8 rights of the occupants, as caravans may be their only home. The ExA’s starting point is that the undertaker should be required to consult with all occupants, the LPA and the highways authority on their proposal for the replacement site. Should there also be a requirement to replace like for like the facilities and number of pitches on the existing site?

Requirement	Comment
	It also contains a deemed approval provision which seems unlikely to be appropriate when the undertaker is in effect applying for approval of permission for a number of homes for travellers. Should there be a further provision in the DCO granting a specific planning permission for use of works number 7R as a traveller site to ensure that it will remain as a traveller site in perpetuity and to ensure that it is controlled by the appropriate conditions. Or if this is not permissible (see comments above) then should there be a requirement to submit a planning permission application to the LPA?
Requirement 15 Thurrock Flexible Generation Plant	It is not clear why this work is only necessary if the Thurrock Flexible Generation Plant Development Consent Order 2022 is commenced. What happens if it is not commenced but remains a live proposal? What happens if it is commenced but the undertaker decides not to carry out work TFGP1 in any event? The EM does not explain the interaction between the works and the other DCO so it is not possible to know if this requirement is adequately drafted. The Applicant is asked to direct the ExA to other application documents that deal with this point. Alternatively it will be raised in later questions or hearings.
Part 2, discharge of requirements Requirement 18	Is it permissible or appropriate to have a deemed discharge provision relating to the discharge of requirements that secure essential mitigation? Is it clear that the Secretary of State is content with the extent of the discharging powers provided to them by the Order? Where the Secretary of State is the discharging authority, are there any circumstances in which there should be additional obligations to seek the views of other local and public authorities before discharge? Is there any argument that persons other than the Secretary of State (including local and other public authorities) should be the discharging authorities for any particular requirements and if so which ones?