PINS Reference number: TR010032
Document reference: TR010032/APP/9.48

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6 July 2023

Dear Mr Smith

A122 Lower Thames Crossing (Reference Number TR010032)

Discretionary submission

1 Response to Issue Specific Hearing (ISH) 2 draft DCO

1.1.1 In response to the Examining Authority's observations on the drafting of the draft Order contained within Annex A of the ISH 2 draft DCO agenda [EV-015], the Applicant has prepared a detailed response to the points raised. This also includes a response to the points made by Interested Parties during the ISH itself in relation to Annex A.

1.1.2 It was understood that early submission of this document would allow the Examining Authority and other Interested Parties to have early sight of the Applicant's approach, and be helpful in the context of preparing submissions for Deadline 1.

1.1.3 The Applicant therefore has submitted this outside of the Examination Programme for the consideration of the Examining Authority to accept.

Document reference	Document title
TR010032/EXAM/9.49	Applicant's response to matters raised in Annex A of the Agenda for the Issue Specific Hearing 2 Draft DCO [EV-015]

2 Other matters

2.1.1 The Applicant has no other matters to raise at this time, but would note that its full written submission in respect of ISH 2 (excluding Annex A) will be submitted at Deadline 1.

Yours sincerely

Dr Tim Wright, Head of Consents – Lower Thames Crossing

national highways

Lower Thames Crossing

ISH2 Discretionary Submission Annex A Responses

Infrastructure Planning (Examination Procedure) Rules 2010

Volume 9

DATE: July 2023

Planning Inspectorate Scheme Ref: TR010032
Application Document Ref: TR010032/APP/9.49

VERSION: 1.0

Lower Thames Crossing

ISH2 Discretionary Submission Annex A Responses (Clean version)

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Table A.1 Applicant's responses to matters raised in Annex A of the agenda for the Issue Specific Hearing 2 draft DCO [EV-015]

Annex A matter/ provision	Issues or questions raised	Applicant's response
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.	The Applicant has had careful regard to these principles in drafting the Development Consent Order (DCO) and consider that they have all been met. As explained in the Explanatory Memorandum [**Application Document APP-057**], although the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (the Model Provisions) has been repealed, the dDCO draws on the Model Provisions, as well as precedent set by DCOs that have been made and particularly those relating to highways NSIPs, as well as Orders made under Transport and Works Act 1992 relating to underground / tunnel projects. The Applicant has provided below an enhanced level of appropriate and proportionate Project-specific rationale for the inclusion of the provisions without prejudice to the requirement to do the same on any of its other projects. Where the Examining Authority has raised queries, responses to these are set out in further detail in the responses given below.
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	The Applicant does not consider that the interpretive provision changes the meaning of "materially new or materially different"; instead, it seeks to confirm the position that references to "materially new or materially different" are not intended to prevent variations within the terms of the DCO being progressed where they would entail an environmental betterment. This interpretive provision is intended to ensure certainty and clarity on this issue in a transparent way. The drafting is acceptable and necessary because a contrary interpretation would lead to:

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	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?	• restricting the ability to take opportunities that emerge through the detailed design of the Project to deliver it in a way that is less harmful to the environment, and/or gives rise to greater beneficial environmental effects; • operating in tension with the pressures to adopt a conservative approach to Environmental Impact Assessment (EIA) which results in assessed effects being precautionary, meaning the ability to make improvements which are not materially different is therefore restricted. The Applicant has necessarily undertaken an EIA which conforms to the "Rochdale envelope" approach (as explained in Advice Note Nine and R. v Rochdale MBC ex parte Milne (No. 1) and R. v Rochdale MBC ex parte Tew [1999] and R. v Rochdale MBC ex parte Milne (No. 2) [2000]). The purpose of such an assessment is to ensure that a reasonable worst-case scenario is adopted so that mitigation measures which protect the environment on that basis are incorporated. The proposed provision (article 2(10)) in the dDCO is consistent with that approach; and the requirement to ensure an appropriately precautionary assessment should not be read as requiring the delivery of that worst case scenario. Instead, that requirement is properly understood as setting an envelope in which activity and works can be carried out; • undermining relationships with important stakeholders as a result of the constraints on the Applicant's ability to improve environmental effects; and • constraining the Applicant's ability to comply with the conditions of its licence which oblige it to "minimise the environmental impacts of operating, maintaining and improving its network and seek to protect and enhance the quality of the surrounding environment". The compliance with this obligation in the licence is a legal requirement imposed upon it under the Infrastructure Act 2015. The absence of a clear ability to carry out activity or

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		works with environmentally better outcomes puts it at risk of not being able to comply with that obligation. In addition to the reasons provided above, the Applicant considers the drafting to be acceptable for four reasons. 1. It positively addresses the aforementioned section 51 advice from the Inspectorate which sets out: *"…the Planning Inspectorate noted that the judgement of 'materially different' within the DCO would benefit from being clearly defined"* The provision therefore clarifies that reductions and removals of adverse effects are not to be taken as materially new or materially different, providing further certainty as to the interpretation of the "materially new or materially different" test, where relevant. 2. The amendment confirms that where a proposed change or activity avoids, removes or reduces adverse environmental effects that were reported in the Environmental Statement, a material or non-material amendment to the DCO is not required. Requiring a material or non-material amendment to the DCO would introduce significant delay and therefore disincentivises appointed contractors from delivering the Project in a manner with environmentally better outcomes. The Applicant does not consider it is the Secretary of State's intention to place barriers to delivering improved environmental outcomes in relation to the sensitive environment in which the Project is situated. It is to be noted that the Secretary of State confirmed that it was not the intention to avoid environmentally better outcomes in the correction notice issued in connection with the A19/A184 Testo's Junction Alternation Development Consent Order. In particular, the Secretary of State confirmed that: *"It is the Secretary of State's view that the recommended wording would allow the necessary scope for changes that are better for the environment providing such changes do not result in significant*

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		effects that have not already been previously identified and assessed in the Environmental Statement." The Applicant would further note that a recent DCO confirmed that the Secretary of State had no in-principle objection to what is intended: the A57 Link Roads DCO uses the phrase "*materially new or materially worse*". The Applicant has elected on this occasion not to utilise that drafting as it is mindful that the precedented "materially new or materially different" drafting "*reflects the Secretary of State's preferred drafting and ensures a consistency of approach across transport development consent orders*". This was noted by the Inspectorate in their advice dated 11 November 2021. In particular, the Inspectorate advised: *"...it is worth the Applicant being fully aware of, for example, SoS Decision Letters which give a clear steer as to preferred approaches. It is noted, for example, that paragraph 12.2.13 uses the phrase "materially new or materially different" which the SoS has stated in the decision letter on Great Yarmouth Third River Crossing is wording preferred by the SoS."* For completeness, the Applicant considers that the comments above address the comments raised by Gravesham Borough Council in relation to this drafting. Thurrock Council also made a submission in relation to the "materially new or materially different" test. The Applicant does not agree with Thurrock Council that the test would permit a change which would lead to "*one thing* [which] *might be less of an adverse effect, but there* [is another area which would give rise to] *a greater adverse effect*..." – the "greater" likely significant adverse effect referred to would plainly be a materially different effect. The comments raised by Thurrock Council are objections to the principle, not a Project-specific objection, to the consistent drafting of the Secretary of State.

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	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.	It is not considered necessary to amend the other provisions which use the phrase "materially new or materially different" because the interpretive provision applies to them all ("*In this Order, references to materially new or materially different environmental effects*…")
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).	See below
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.	See below
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 considers the provisions contained in Article 56 to be necessary because they avoid an unintended outcome in two cases: 1. Planning permissions which conflict with the DCO or Project can proceed without the risk of enforcement action being taken, notwithstanding any incompatibility between the DCO or Project and the development authorised under a planning permission. 2. Planning permissions which conflict with the Project are not intended to prevent the exercise of a power under the DCO. The provisions in article 56 are included by reference to section 120(3) of the Planning Act 2008, which provides that an order granting development consent may make provision relating, or to matters ancillary to, the development for which consent is granted.

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	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. 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.	It is considered necessary to prevent the conflicts we have set out, but also to provide legal certainty to the Applicant in implementing the DCO, as well as developers who bring forward future planning applications inside the Order limits. In this context, it should be noted that the new provisions articulate the heavily precedented provision contained in article 56(1) in the phraseology adopted by their Lordships in the Hillside judgment. We further note that article 3(3) of the Lake Lothing (Lowestoft) Third Crossing Order 2020 has substantively the same effect. Whilst it is correct that the judgment in Hillside concerned two local permissions, it is the Applicant's view that the case is of more general application. This is borne out by recent infrastructure experience: we note that the Transport and Works Act Order (TWAO) granted for the Cambridge South Station development contains provisions which deal with a conflict between the TWAO and local permissions, for example (see article 35 of the Network Rail (Cambridge South Infrastructure Enhancements) Order 2022). It is also common for DCOs to disapply local permissions (see, for example, the Hinkley Point C Nuclear Power Station Order 2013). To give a concrete example in the case of this Project, the planning permission with reference 20191217 (Gravesham Borough Council) which contains a condition 19956779.4 61 requiring National Highways to restore land at Marling Cross, which is included within the Order Limits and is required for use as a site compound during the construction phase. The provisions in article 56 confirm that where that construction compound is used under the powers relating to the DCO, there is no question that enforcement action in respect of the local permission can be taken because of a potential conflict with a condition in the planning permission. The Applicant notes and welcomes submissions from Thurrock Council at Issue Specific Hearing 2 that the provisions "*are there to deal with the Hillside case*" and that the council "*understand*[s]

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		why this has been put in and the council doesn't object to this, and the reason for this is although it's not a restatement of the law, it has been in planning terms something of a – has caused some concerns in changes to the way that things were previously interpreted where it might have been slightly more grey is now slightly more certain and the judgment does cause some issues". Thurrock Council's position that the provisions "*makes the situation clearer for the council, but there is less uncertainty on that point*" is also welcomed. Mr Holland, on behalf of landowners, sought "*further clarification within the draft wording as to how restrictive covenants and, indeed, under article 56 in relation to planning permissions, what the effect of that drafting is on land that is temporarily acquired and then is returned to the landowner*". In response, the Applicant notes that the planning permission only ceases to have effect "*To the extent any development carried out or used pursuant to a planning permission ... is inconsistent with the exercise of any power or right under this Order*". At Issue Specific Hearing 2, Gravesham Borough Council requested details of "*what existing planning permissions actually are in place which they think will be subject to this article*". The Applicant notes the examples provided above, and further cross-refers to the Interrelationship with other Nationally Significant Infrastructure Projects and Major Development Schemes [**Application Document APP-550**] which provides further examples. The Applicant would stress that the provision applies to future permissions following the grant of the Order and is necessary for the reasons set out above. For completeness, Gravesham Borough Council also raised a more general question about Article 56 which is addressed above.
	On a drafting point, there appear to be some words missing in the second line of Article 56(4):	We thank the Examining Authority for highlighting this; the omitted word is "permission" before the word "granted". We will make this update to the dDCO at Deadline 1.

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	"*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	<u>Background:</u> The Project would involve demolition of the Gammon Fields Travellers' site which lies within the Order Limits. The residents of Gammon Fields have requested that the replacement travellers' site is located within the surrounding area close to existing schools, healthcare and community facilities and has a similar pitch orientation. The proposed replacement travellers' site is located east of the existing site, and retains accessibility to existing facilities. The replacement travellers' site would have the same access off Long Lane or Gammonfields Way as at present with pedestrian access to public transport which runs along the A1013. The site would be designed to ensure safe access and egress onto the road network and is not located within the flood zone. The replacement site would have essential services provided before it is occupied. The replacement site is equivalent to the existing in terms of size, quality and access arrangements from Long Lane. The likely effect has therefore been assessed as neutral and not significant. <u>Application of "related housing development" criteria</u> The replacement travellers' site is "related housing development" for the purposes of section 115(1)(c). The replacement site meets the tests set out in section 115(4B) namely: • (a) consists of or includes the construction or extension of one or more dwellings, • (b) is on the same site as, or is next to or close to the part of the project forming the nationally significant infrastructure project (and is also otherwise associated with that development) • (c) is to be carried out wholly in England

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	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).	It also meets the distinct criteria in section 115(4C) as it relates to a site in England. Under the Government's guidance, related housing development is permitted where there is a "a functional need for the housing in terms of the construction or operation of a project" or where "the housing is not functionally linked to the infrastructure project but is in geographical proximity to the project". The proposed replacement site for the travellers' meets falls into the second category, i.e., it is geographical proximate there is also functional need for the replacement because the existing site is proposed to be used and acquired in connection with the project; notwithstanding it is also geographically proximate to the project. In terms of other elements of the Government's guidance on housing development in DCO applications ("Planning Act 2008: Guidance on Nationally Significant Infrastructure Projects and Housing"), in general terms it is worth noting that the focus of that guidance is on new housing development, but that does not limit it to such development. The proposals for the replacement site fully accord with that guidance, in particular: • Paragraph 13: "*An application for development consent that includes housing may also include other development associated with that housing, such as local infrastructure. Any such development should be integral to the housing proposed and be proportionate to the scale of housing for which consent is sought*." – in general terms, the replacement site is equivalent to the existing in terms of size, quality and access arrangements from Long Lane. The Design Principle relating to the travellers site includes associated amenity structures and landscaping which are directly related to the housing elements proposed. • Paragraphs 17 and 18 limit the number of dwellings permitted to 500. The replacement site would provide 21 residential pitches

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		(please see responses in respect of Requirement 13 below which explain how this is secured). • Paragraph 24: "*Where housing is being provided on the basis of geographical proximity to the infrastructure project for which development consent is sought, developers will need to demonstrate that it is on the same site as, or is next to or close to, any part of that project. In this context, "close to" should be considered to be up to 1 mile away from any part of the infrastructure*" – the proposed replacement site is directly adjacent to the Project boundary. • Paragraph 28 sets out the factors to be considered, we address each in turn: – the justification for any housing where it is being provided to meet a functional need – this is provided above; – the amount of housing being proposed – the amount of housing being provided reflects the number of existing pitches on the site, and is secured under the terms of the Design Principles – The location; the location is geographically proximate to the existing site (and well within 1 mile of the Project boundary as per paragraph 24) • Paragraph 30: "*Policies in the development plan are also likely to be an important and relevant consideration for the Secretary of State when deciding whether to grant development consent for the housing element of the scheme*." The Applicant notes that Appendix B of the Planning Statement (at pages 83-84) [**Application Document APP-497**] shows how the proposals accord with Policy CSTP3 of the Thurrock Local Plan, where the site is situated. • Paragraph 33: "*Engagement with local authorities and local communities on any proposed infrastructure projects that will involve housing is essential*." The Applicant notes that the

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		replacement for the travellers' site was consulted on in the pre-application consultation. At the Supplementary Consultation (in 2020), the Applicant specifically consulted on two potential locations for the relocation of the travellers' site. In addition, the Applicant has had extensive engagement with Thurrock Council, with 12 meetings specifically discussing the location and design of the travellers' site. Due to the COVID-19 pandemic and restrictions in place prior to, and throughout, the RIBA Stage 2 design phase, it was not possible to physically consult with the travellers in person. The Applicant and Thurrock Council discussed the situation and agreed how the consultation should take place. There was no suitable facility available near the existing travellers' site, where a physical consultation could take place that would meet the requirements of social distancing. Therefore, it was agreed to set up a private Facebook group where the Project could post a series of videos, which included diagrams, drawings and voiceovers, to obtain feedback and comments from the travellers. This video was supplemented by phone calls to individuals who were known to not be on Facebook or have no internet access. The Applicant has also engaged with the Essex Police on the replacement site. The Applicant has been encouraged that the plan which is included in the Design Principles has been agreed at the officer level, though we are still awaiting formal approval from Thurrock Council. • Paragraph 38: "*Where housing is being provided on the basis of geographical proximity, the developer should provide an assessment of the impact of the housing proposed in terms of local plan provision and local housing supply*" – as this site is a replacement of the existing travellers' supply, it is not considered this paragraph is directly applicable. We would further note that Policy G of the "Planning policy for traveller sites" states that "*Local planning authorities should work*

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		with the planning applicant and the affected traveller community to identify a site or sites suitable for relocation of the community if a major development proposal requires the permanent or temporary relocation of a traveller site. Local planning authorities are entitled to expect the applicant to identify and provide an alternative site, providing the development on the original site is authorised." This guidance clearly deals with a situation under the conventional planning regime, but the Applicant considers that it stands for the general proposition that travellers' sites should be replaced where appropriate. For all of the reasons above, in addition to falling under section 115(1)(c), the travellers' site replacement also falls squarely within section 120(3) on the basis that it mitigates an adverse impact of the project. We are happy to update the Explanatory Memorandum to reflect this for Deadline 1.
	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 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.	In relation to the timing, the Applicant is proposing to introduce a commitment in the Stakeholder Actions and Commitments Register [**Application Document APP-554**] at Deadline 1 which will secure that the replacement site will be available for occupation prior to the start of significant construction works.
	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	No conditions have been requested to date by Thurrock Council, but the Applicant is happy to hear whether they consider any additional provisions would be necessary. The Applicant does not consider it necessary to provide confirmation that the site can be used as a replacement travellers' site on the basis that such use is

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	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.	authorised via Schedule 1 / article 3 which provides consent for the replacement of the site. The Applicant does not consider it appropriate to pursue a Town and Country Planning Act application outside of the DCO application given the Planning Act 2008 can consent related housing development, and such a need is integrally and functionally connected with the authorised development. The Applicant further notes that should, in future, a planning application be progressed to change the use of the land there is no provision in the dDCO which would prevent this (we refer to our comments in relation to article 56 below in this context).
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.	Article 2(10) has been addressed above. <u>Flexibility</u> A proportionate and necessary degree of flexibility has been built into the draft DCO and supporting documents, reflecting the preliminary nature of the design and that detailed design, which would be undertaken by the appointed Contractors, will be undertaken at a later stage. There is a public interest in flexibility – it ensures that the Project can be delivered in both an environmentally sensitive and cost-effective way, avoiding where possible unforeseen circumstances and potential impediments to delivery. The flexibility afforded by the dDCO has been assessed as part of the environmental impact assessment. The PLA raised a comment in relation to matters relating to flexibility. The first related to why Plot 16-45 in the Land Plans was required in connection with the outfall. The Applicant has been engaging with the PLA on a provision which was intended to provide comfort relating to the issue. Following the close of Issue Specific Hearing 1, the PLA responded to the Applicant. As a result, the Applicant is proposing to reduce the area in which it is proposed to acquire rights in connection with the outfall (please see the second notification of proposed change (Document

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	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 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.	10.2)submitted on 3 July 2023 which sets out details of this amendment which is being made in response to those concerned expressed by the PLA). The PLA also raised a comment in relation to ensuring that the tunnel design can provide for a protected dredged navigational channel depth of 12.5m below chart datum with an additional 0.5m to allow for over-dredging. The Applicant notes that Paragraph 99(1)-(2) of Schedule 14 to the dDCO provide protections in this context. However, to strengthen the requirement, the Applicant is proposing to submit the following substitution of those paragraphs: "***99.***—*(1) The detailed design and construction of the tunnelling works in the river Thames must—* *(a) provide for a protected dredged navigational channel depth of 12.5m below chart datum with an additional 0.5m to allow for over-dredging attributable to standard dredging methodology; and* *(b) ensure that that channel depth can be maintained where scour protection is required,* *unless otherwise agreed with the Secretary of State, following consultation by the undertaker with the PLA and the Port of Tilbury London Limited provided that the Secretary of State is satisfied that the safe and commercial use of the navigable channel is not affected*." This ensures that even in the unlikely event scour protection is required, the depths must be adhered to. In addition, article 6(2)(o) and (p) will both be amended so that "*subject to paragraph 99(1) of Schedule 14 to this Order*" is inserted at the start. This this removes any residual doubt that the LoDs can be used to conflict with the depths which the Applicant has already agreed to. At the time of drafting this note, the PLA have not yet commented on the proposed provisions, but the Applicant will provide an update at Deadline 1. The Applicant is also proposing to provide updates

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		associated with river works (these have previously been notified to the ExA: namely, updates to the River Restrictions Plans, an ES Addenda and related updates to the Statement of Reasons). <u>Preliminary Works</u> Requirement 4(1) requires that preliminary works are carried out in accordance with the Preliminary Works Environmental Management Plan (EMP) which includes the Preliminary Works Register of Environmental Actions and Commitments (REAC). This ensures that, for works carried out prior to the discharge of Requirement 4(2), appropriate controls are actually in place at the point such works are proposed to be carried out. The approach of permitting works to be carried out prior to the discharge of requirement, but subject to particular controls, was endorsed in the M42 Junction 6 Development Consent Order 2020 and A303 Stonehenge Order 2020 (prior to its quashing). The purpose of the preliminary works process is to facilitate expeditious delivery of the construction programme. The preliminary works have been identified as works that may be carried out early in the construction programme, and that would have negligible or relatively minor environmental impacts. They have all been taken into account in the environmental impact assessment process. "Preliminary works" are defined, limited and controlled through four key mechanisms. **Firstly,** Requirement 1(1) defines preliminary works as meaning operations consisting of: • archaeological investigations and preconstruction ecological mitigation (including vegetation clearance), • environmental surveys and monitoring, • investigations for the purpose of assessing and monitoring ground conditions and levels,

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		• erection of any temporary means of enclosure, • receipt and erection of construction plant and equipment for advanced compound areas, • diversion and laying of underground apparatus (except any excluded utilities works) for advanced compound areas, • vegetation clearance and accesses for advanced compound areas, • temporary display of site notices or information; "Excluded utilities works" are defined by Requirement 1(1) as meaning Works Nos. G1a to G10, Work No. TFGP1, Works Nos. MU1 to MU92 and Works Nos. MUT1 to MUT32. These are the major underground utilities works in Schedule 1 to the DCO. It will be noted that *overground* apparatus are excluded. "Advanced compound areas" are defined by Requirement 1(1) as meaning the areas shown as advanced compound areas in Plate 3.1 of ES Appendix 2.2: Code of Construction Practice [**Application Document APP-336**]. **Secondly,** Requirement 4(1) provides that the preliminary works must be carried out in accordance with Preliminary Works EMP. The only preliminary works that can be undertaken, and their locations, are listed in Table 1.1 of the Preliminary Works EMP [**Application Document APP-339**]. **Thirdly** and importantly, these preliminary works must be undertaken in accordance with commitments in the Preliminary Works REAC (see paragraph 1.1.4 onwards and Table 2.1 of the Preliminary Works EMP). These include some 28 REAC commitments which primarily serve to provide for: pre-condition surveys; measures for the protection of ecology, trees and agriculture; and Section 61 controls over noise. **Fourthly**, ecology activities will also (where applicable) require protected species licences, thereby adding an additional layer of

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		control. Requirement 7 of the Schedule 2 to the dDCO will also apply. In summary, the Preliminary Works EMP (including the Preliminary Works REAC) is therefore a secured document, and (unlike an outline document) will be certified "as final" if the DCO is granted consent. In other words, the detail has been provided "up front" as a control document for approval as part of the DCO consent, rather than under post-consent discharge processes. This is an approach which the DCO process can validly accommodate. The Applicant considers the response above addresses the comments raised by Thurrock Council at Issue Specific Hearing 2. In this context, we note that Kent County Council requested details in relation to Requirement 2 (time limits). The Applicant can confirm that carrying out preliminary works would discharge that Requirement, and there are no further time limit requirements for commencing the development. This is no different to the "spades in the ground" rule referred to by the Examining Authority, and the explicit use of "begin" is endorsed (see, for example, Requirement 2 of the A428 Black Cat to Caxton Gibbet Development Consent Order 2022).
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	The Applicant has carried out a proportionate search of local legislation that applies within reasonably close proximity to land within the Order limits, but no search can be completely exhaustive and there remains the possibility that a local act or provision may have been overlooked. Including this article ensures that the construction and operation of the Project are not jeopardised by any incompatible statutory provisions which might exist, i.e. a provision which would be an absolute restriction that

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	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.	could not be dealt with unless by statutory amendment. The provision would prevent delay in this situation by ensuring that the Project could be constructed without impediment. Specific local enactments identified through National Highways' proportionate search of local legislation are disapplied under article 55 (Application of local legislation). The Applicant also notes the Secretary of State's (SoS's) general power in s.120(5)(c) to include within the order any provision that appears to be necessary or expedient for giving full effect to any other provision of the order. The Applicant considers that this power should be exercised here on the basis that there is still a risk that relevant provisions have not been identified, despite the Applicant's search of statutory provisions that may affect the Project. In terms of the geographical scope of Article 3(3) "adjoining or sharing a common boundary with" means any land which is next to the land inside the Order limits but does not fall within the Order limits itself. Quite how far this extends to is a matter of fact and degree to be considered on a case-by-case basis. The Applicant takes the view it is necessary to include such land as there may be statutory provisions that are expressed to relate to land which falls just outside the Order limits, but may also have an effect on land within the Order limits. The Applicant does not consider the scale of the Project to affect the need for the provision; indeed, the scale means that there are likely to be further enactments which affect the delivery of the Project. At the Issue Specific Hearing, the Port of Tilbury commented that this provision "would appear to allow an extraordinary amount of interference with the Port of Tilbury's powers". The Applicant does not agree, and would comment that the Order must be seen as a whole. In particular, Part 10 of Schedule 14 to the Order contains protective provisions for the Port of Tilbury. Paragraph 129(1) sets

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		out that the Applicant "must, before the carrying out of any specified work, supply to PoTLL proper and sufficient plans of that work for the reasonable approval of PoTLL and the specified work must not begin except in accordance with such plans as have been approved in writing by PoTLL". Specified works in this context includes the relevant works over the Port of Tilbury's land. It is considered this approval function provides appropriate protection. Whilst not related to Article 3(3), we note that Thurrock Council queried why "*article 3*[(1)] *now specifically removes the limitation in relation to undertaking the [authorised] development within order limits*". The explanation for this is contained in paragraph 5.16 of the Explanatory Memorandum [**Application Document APP-057**], and has previously been provided to Thurrock Council (i.e., the dDCO provides for certain activities to be carried out beyond the Order limits (e.g. articles 20 (protective works to buildings and land) and 21 (authority to survey and investigate land)). These articles are routinely included in DCOs, are necessary to support the delivery of the authorised development and also serve to reduce in scope the amount of land required for temporary powers of possession and/or compulsory acquisition, since the land would otherwise need to be included within the Order limits. The approach therefore reflects the clear intention that such activities should benefit from development consent and should not be subject to a requirement for further planning approval outside the DCO process. National Highways notes that the Secretary of State has explicitly endorsed the removal of the phrase "*within the Order limits*" in the A303 Amesbury to Berwick Down Correction Order "*in recognition that the Order provides powers to carry out limited activities beyond the Order limits*". This drafting approach does not affect the limits of deviation for the works which are controlled under article 6.

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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).	**Introductory remarks** Notwithstanding that the utilities works are a necessary component of delivering the Lower Thames Crossing highway, the thresholds and definitions in section 16 and section 20 mean that some of the utilities works are themselves NSIPs. The starting position is that where something meets the definition of a Nationally Significant Infrastructure Project, it must be granted development consent. It is not possible to consent such development by way of associated development. The Applicant's position is that the Project meets the definition of a highways NSIP for the reasons we have discussed in ISH1, namely that it entails a highways construction NSIP. The Applicant is preparing a legal note on this point for Deadline 1.
	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?	**Electrical lines** Annex 2 of the Explanatory Memorandum [**Application Document APP-057**] contains a detailed analysis of the overhead line works and whether those works constitute an NSIP in their own right. Section 14 (Nationally significant infrastructure projects: general) of the Planning Act 2008 sets out what constitutes an NSIP (which must then be authorised by DCO). So far as relevant to the works, s.14 provides— *"(1) In this Act "nationally significant infrastructure project" means a project which consists of any of the following … (b) the installation of an electric line above ground …*" Section 16(1) and (2) state– *"(1) The installation of an electric line above ground is within section 14(1)(b) only if (when installed) the electric line will be— (a) wholly in England, (b) wholly in Wales, (c)partly in England and partly in Wales, or (d) partly in England and partly in Scotland, subject to subsection (2).* *(2) In the case of an electric line falling within subsection (1)(d), the installation of the line above ground is within section 14(1)(b) only to the extent that (when installed) the line will be in England."*

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		All of the works are wholly within England so the condition in s.16(1)(a) is met. Conditions (1)(b) to (d) and s.16(2) are not relevant to the Project. Section 16(3) provides that installation of electric line above ground is not within s.14(1)(b) (i.e. is not an NSIP) where the conditions are met in subsection (3) are not met. Work OH7 involves the installation of an electric line above ground near the A13. Accordingly, as this installation is "wholly within England" (as per section 16(1) of the 2008 Act), this element of the Project is also an NSIP under sections 14(1)(b) and 16(1)(a). None of the exceptions set out in section 16(3) apply to exclude the installation of the electric line above ground as an NSIP: the nominal voltage is above 132kV; the length is greater than 2km, the distance between the existing line and a new support will be greater than 60m. In addition, the electric line would not (when installed) be within premises in the occupation or control of a person responsible for its installation and it does not fall under a category of work which would not require a consent under section 37(1) of the Electricity Act 1989 by virtue of the Overhead Lines (Exemption) (England and Wales) Regulations 2009 (as amended). In respect of the other electrical line works, Annex 2 of the Explanatory Memorandum [**Application Document APP-057**] contains a "summary table" which sets out that OH1-6 and OH8 are not NSIPs in their own right primarily because the condition in section 16(3)(aa) is met (i.e., they are not electrical lines over 2km). The Applicant has worked closely with National Grid who have confirmed their agreement with the interpretation and application of section 16 presented in Annex 2.
	Having regard to the definition of a gas transporter pipeline NSIP in PA2008 s 20, is it	**Gas pipelines**

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	clear that the proposed gas transporter pipeline works meet that definition? Is there any reason why alternatively the gas transporter pipeline works could not proceed as associated development (under PA2008 s 115) to the highway NSIP?	Section 20 of the Planning Act 2008 sets out the following conditions for the construction of a gas transporter pipeline to be an NSIP: *"(1) The construction of a pipeline by a gas transporter is within section 14(1)(f) only if (when constructed) each of the conditions in subsections (2) to (5) is expected to be met in relation to the pipeline.* *(2) The pipeline must be wholly or partly in England.* *(3) Either – (a) the pipeline must be more than 800 millimetres in diameter and more than 40 kilometres in length, or (b) the construction of the pipeline must be likely to have a significant effect on the environment.* *(4) The pipeline must have a design operating pressure of more than 7 bar gauge. (5) The pipeline must convey gas for supply (directly or indirectly) to at least 50,000 customers, or potential customers, of one or more gas suppliers*." ES Appendix 1.3 [**Application Document APP-334**] applies these conditions (see Table 1.1 for a summary of the application of the proposed gas pipeline works against this criteria). That Appendix goes on to specifically consider the condition in section 20(3)(b) which is whether the gas pipeline works would entail a significant effect on the environment. In line with best practice, and the requirements of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017, the Environmental Statement and the topic chapters therein has assessed the Project as a whole, rather than disaggregating the different elements of the Project (which would run the risk of 'salami slicing' the Relevant Gas Pipeline Works from the other elements of the Project). The assessment in Appendix 1.3 is necessarily based on a hypothetical scenario where the Relevant Gas Pipeline Works are disaggregated from

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		other aspects of the Project for the purposes of making a determination under section 20(3)(b) of the Planning Act 2008. No environmental assessment is required for gas pipeline works that have a design operating pressure of 7 bar gauge or less, on the basis that such gas pipeline works are excluded from being NSIPs under section 20(4) of the Planning Act 2008. Works Nos. G2, G3, and G4 are each NSIPs under section 20 of the 2008 Act. This is because those works entail the construction of a gas pipeline, are to be constructed wholly in England, are each likely to have a significant effect on the environment, have a design operating pressure of more than 7 bar gauge and, when constructed, will convey gas for the supply (directly or indirectly) to at least 50,000 customers, or potential customers, of one or more gas suppliers. These works are expected to be constructed by National Grid Gas Plc (the current operator of the gas pipelines to be diverted) who is a "gas transporter" (as it holds a licence under the Gas Act 1986) and would be transferred the relevant powers to carry out the works under article 8 of the Order. Accordingly, for each of these works, each of the conditions in sections 20(2) to (5) of the 2008 Act is satisfied. We would note that Appendix 1 of the Explanatory Memorandum [**Application Document APP-057**] contains information relating to the gas pipelines in accordance with regulation 6(4) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009. The approach taken by the Applicant in connection with these gas pipelines was adopted, and endorsed, in the grant A428 Black Caxton to Gibbet DCO project. In that case, an Appendix was produced (based on the Applicant's approach for the Lower Thames Crossing). That is the only DCO known to us where a gas pipeline and highways NSIP have been consented. In relation to the ancillary works in Schedule 1, Gravesham Borough Council queried whether the preamble "restricts the

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		geographical area within which the ancillary works can take place". The Applicant can confirm it does not explicitly do this, but that the Applicant only has powers in relation to temporary possession of land, and compulsory acquisition of land, within the Order limits. Those powers are limited (e.g., the purposes for which temporary possession can be taken is confined to taking possession for the purposes in Schedule 11). The works powers are further limited so they cannot be utilised where they give rise to materially new or materially different environmental effects. In addition, other controls secured in the dDCO are considered sufficient to provide appropriate protection in the use of the ancillary powers (e.g. Requirement 3 which only permits carrying out the authorised development in accordance with the preliminary scheme design which is secured in the relevant plans and drawings). The drafting adopted, including the omission of the Order limits, is precedented (e.g., the A303 (Amesbury to Berwick Down) Development Consent Order 2020 was granted with the same preamble for the ancillary works therein; that Order has now been quashed, but the reasons for that are unrelated to this drafting).
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	In preparing the draft Development Consent Order (dDCO) [**Additional Submission AS-038**], the Applicant has had careful regard to the Planning Inspectorate's Advice Note Fifteen: Drafting Development Consent Orders (July 2018, version 2). The Explanatory Memorandum [**Application Document APP-057**] submitted with the Application gives some examples of drafting which has been informed by the approach set out in Advice Note Fifteen (see, for example, paragraph 5.124 of the Explanatory Memorandum [**Application Document APP-057**]).

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	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.	The Applicant appreciates that the effect of the drafting of these articles is likely to be tested further in the context of any compulsory acquisition (CA) hearings and throughout the Examination more generally. We have, however, prepared responses to the specific questions which the Examining Authority has raised under this heading of the agenda. **Crown land** The Applicant understands that, over time, a range of approaches have been taken to ensure that the compulsory acquisition of an interest held by or on behalf of a Crown *cannot* be authorised under the Development Consent Order. The Applicant's starting position is that article 43 (Crown rights) of the dDCO provides sufficient clarity that interests held by or on behalf of the Crown are excluded from the ambit of CA powers. Article 43(1) provides that: *"Nothing in this Order affects prejudicially any estate, right, power, privilege, authority or exemption of the Crown…"* In the Applicant's view, this is sufficient to capture the general and established legal principle that land which is vested in the Crown is immune from compulsory acquisition. Clearly, in the Applicant's view, the acquisition of an interest for the time being held by or on behalf of the Crown would be prejudicial to an estate, right, privilege or exemption of the Crown. Nevertheless, the Applicant has sought to emphasise the point further by ensuring that, in line with the first of the three approaches identified by the Examining Authority under this agenda item, the Book of Reference [**Additional Submission AS-042**] includes the following words in relation to those plots where a Crown interest is held: *"(excluding all interests of the Crown)"*

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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.	This exclusion is tied to the Order provisions because article 25 of the dDCO provides that: *"(1) The undertaker may acquire compulsorily so much of the Order land as is required…"* This same relationship between the exercise of land powers and the Order land applies to the compulsory acquisition of rights under article 28 of the dDCO, the acquisition of subsoil and airspace under article 33 of the dDCO and the temporary possession of land under articles 35 and 36 of the dDCO. The "Order land" is defined by article 2(1) to mean: *"… the land shown on the land plans which is within the limits of land to be acquired or used permanently or temporarily and described in the book of reference".* Therefore, the power to acquire land under article 25 of the dDCO does not apply to those plots identified in the Book of Reference in respect of which the interests of the Crown have been excluded. On this basis, the Applicant considers that the dDCO is sufficiently clear in its current form. **Compulsory acquisition of rights** The justification for the approach to the drafting of this article is set out fully in paragraphs 5.122 to 5.130 of the Explanatory Memorandum [**Application Document APP-057**]. In summary terms, however, the Applicant has sought to identify all of the plots of land which are to be subject to the acquisition or creation of rights and has set these out in the Book of Reference, the Land Plans [**Additional Submissions AS-006, AS-008 and AS-010**] and Schedule 8 to the dDCO. Therefore, the Book of Reference defines with precision the extent of the area which is to be subject to the permanent acquisition of rights. The Land Plans provide the visual depiction of the area which is to be subject to such rights. Schedule 8 to the dDCO then

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		provides the textual description of the purpose for which these rights may be acquired. These three elements together ensure there is a high degree of accuracy and precision in relation to the rights which the Applicant is seeking over land. Notwithstanding the above, the Applicant is seeking a reasonable and proportionate degree of flexibility within the drafting of article 28. Specifically, article 28(1) allows the Applicant to acquire existing rights and create new rights over the Order land as may be required for any purpose for which that land may be acquired under article 25 (compulsory acquisition of land). The rationale for this is rooted in the public interest, since it would allow the Applicant, if appropriate, to reduce the area of outright acquisition and rely on the creation and acquisition of rights instead. Without this article, National Highways would be left with no alternative but to acquire the land outright, in circumstances where an agreement could not be reached privately with the landowner. This position would be contrary to the public interest in minimising interference with land interests and reducing the financial burden of compensation to the public purse. The Applicant does not consider that this would result in the potential for accidental over-acquisition. The intent of the article is to enable the Applicant to *reduce* the extent of outright acquisition, by enabling the acquisition of rights over land instead of outright acquisition. Paragraph 5.123 of the Explanatory Memorandum [**Application Document APP-057**] explains that the approach which has been taken to the drafting of article 28 to the dDCO is widely precedented in Orders granting consent for infrastructure works, including Orders under the Planning Act 2008. For completeness, we consider that Thurrock Council's commentary on the extent of compulsory acquisition requires further particularisation, and can

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		be addressed as part of any Compulsory Acquisition Hearings the ExA decides to hold.
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 Applicant had initially proposed a 10-year period, but following representations from Thurrock Council re-considered its approach, and further considered where efficiencies could be secured. This led to a reduction to the 8-year period currently in the dDCO. The 8-year time limit reflects the scale of the development and is precedented for other significant, complex and large linear schemes (see article 45 of the Thames Tideway Order, for example, which also includes a 10-year period). This period reflects the long construction period for the main works, the complexity of the Project, and the fact that the Project includes a number of long-term assets which will need to be completed even after the main construction period. The period will also ensure that the Applicant can progress its design and works to a stage where permanent acquisition can be minimised. We note that the period would mirror other longer linear projects (e.g., the Hinkley Point C Connection authorised an 8-year compulsory acquisition period). The Applicant, as a public-sector body, must ensure the proper and reasonable use of taxpayer funds. The Applicant has experienced on its other DCO promotions instances where judicial reviews, even where unsuccessful, effectively mean that projects are paused where legal challenges are considered. This ensures that projects are not proceeded with in the event of an adverse judicial decision, and ensures that landowners are not subject to compulsory acquisition in those circumstances. That delay is the driver for starting the compulsory acquisition period from the final determination of a legal challenge. In the absence of this provision, there is a potential of a legal challenge having the effect of 'freezing' construction and putting further pressure on the utilisation of compulsory acquisition powers, leading to not being able to minimise land interference of powers

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	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?	The effect of a longer-than-standard period on landowners has been duly and specifically considered. Nonetheless, The Applicant considers the public interest in delivering this nationally significant project, together with its scale and complexity, and the potential of legal challenge preventing commencement thereby removing the opportunities to further reduce land interference, strongly justifies the provision as drafted. As we have said, the Applicant has considered whether reductions are possible, and has reduced the period by 2 years from its initial position. The Applicant would note that the structure of having a compulsory acquisition dependent on the completion of a legal challenge is precedented (see article 21 of the Manston Airport Development Consent Order 2022). It should also be noted that the timescales in Requirement 2 (relating to the time limit to begin development) has no bearing on the time period for exercise the powers of compulsory acquisition and temporary possession contained in Article 27. For completeness, the above response addresses the comments made by Thurrock Council and Mr Holland, representing a number of landowners, at Issue Specific Hearing 1.
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 wide-ranging power in the*	The Applicant acknowledges that in the M4 Junction 3-12 (Smart Motorways) project decision letter, a general power to acquire rights and impose restrictive covenants was removed. The power sought in the M4 project was general in nature and, in the Secretary of State's view, "without an indication of how the power would be used" (as per the decision letter). This Project and the dDCO is readily distinguishable from the factors influencing the Secretary of State's decision on the M4 project. In particular, and by way of explanation, the power to acquire rights or impose restrictive covenants over the "Order land" is set out in article 28(1) of the dDCO. The general power is also subject to paragraph (2) which limits the power of acquisition to only acquire rights and impose restrictive covenants over the

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	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	land listed in Schedule 8, and shown in blue on the land plans for the purposes stated in that Schedule. When taken together with article 28(2), the power to acquire rights or impose restrictive covenants under article 28(1) is limited to land which the Applicant seeks authorisation to acquire outright and ("pink land" in the land plans). This power to acquire rights or impose restrictive covenants over the "pink land" is justified on this project because it may be the case that the Applicant could achieve its aim through an alternative means, through the exercise of a lesser power to acquire rights or impose restrictive covenants, instead of acquiring the "pink land" outright and depriving the owners of that land wholly and permanently. Such a determination cannot be made at this juncture because of the stage of design development. As the Project is designed in further detail, there may be scope to delineate the rights and restrictions that it could acquire instead of outright acquisition. Having the flexibility to exercise its powers in this way, and to offer an alternative strategy to landowners where appropriate, would allow the Applicant to take this proportionate approach should the opportunity arise. The general power in article 22(1) would enable this more proportionate exercise of powers as an alternative to acquisition at a later date. Without this provision the Applicant would have no alternative but to acquire the land outright if an alternative agreement could not be reached by agreed private treaty. Alternatively, the Applicant would have to acquire the land outright, and then re-sell it back to the owner subject to the necessary rights and restrictive covenants leading to an administrative burden. This approach would also benefit preserving public funds in connection with the Project. This approach of having a general power over "pink land" (i.e., land proposed to be acquired outright) whilst also having clear parameters for the acquisition of rights and imposition of restrictive covenants for "blue land" therefore complies with Advice Note 15.

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	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".	There are particular circumstances which justify following this approach in the Project dDCO: for example, subject to detailed design HE may seek to acquire only the land required to accommodate a viaduct but impose restrictions necessary to protect the viaduct embankments, together with the necessary rights to access the embankment for maintenance purposes, over the land on the surface that is crossed by the viaduct. This very approach is identical to the approach endorsed by the Secretary of State in the A47/A11 Thickthorn Junction Development Consent Order 2022, the Lake Lothing (Lowestoft) Third Crossing Order 2020 and the Great Yarmouth Third River Crossing Development Consent Order 2020 (all of which are Orders which have been made following the M4 Junctions 3-12 project). We thank the ExA for drawing our attention to this and would propose to amend article 28 so it is aligned with article 8 in excluding the transfer of the liability to pay compensation. We will further amend article 8(6) to remove the reference to "or 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 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	This article is, as the ExA acknowledges, in a well-precedented form. In summary, the position under the draft Development Consent Order (dDCO) [**Additional Submission AS-038**] is that *all* land within the Order limits is subject to powers of temporary possession. There is a clear and reasoned justification for this, as we will come on to explain. It is worth noting at the outset that under article 35(1)(a)(i), the Applicant may take temporary possession *only* of those plots of land which are: • identified in Schedule 11 to the draft Development Consent Order as land of which temporary possession may be taken; • described in the Book of Reference as subject to temporary possession and use; and

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	terms possession of land is a matter that is specifically examined, to avoid the possibility of inadvertent adverse effects.	• shown coloured green on the Land Plans, which is indicated on those plans to mean "temporary possession of land". The purpose for which this land is required is also described in the Statement of Reasons [**Additional Submission AS-040**]. The land referred to in article 35(1)(a)(i) is, as noted, subject to temporary possession only. The intent of identifying this land in Schedule 11 is to clarify that none of this land shall be subject to CA powers. Second, however, under article 35(1)(a)(ii), the Applicant may also take temporary possession of any Order land in respect of which no notice of entry has been served and no general vesting declaration has been made. The justification for this provision is set out fully in paragraph 5.158 of the Explanatory Memorandum [**Application Document APP-057**] and is, as noted, widely precedented. Briefly, however, the rationale for this provision is that it gives rise to the potential for the amount of land that is required to be subject to outright acquisition, to be reduced. The alternative, in the absence of an agreement with the relevant landowner, is that the Applicant would be required to proceed to acquire the land outright in order to construct the project. This means that the opportunity to reduce the extent of land subject to permanent acquisition, to reflect the scheme as constructed, would be lost. The clear benefits of this approach are reduced impacts to landowners and lower costs, which is in the public interest. This approach – of temporary possession followed by later permanent acquisition – is widely precedented and has become standard practice for the reasons mentioned. In addition, the Applicant does not consider that the exercise of temporary possession powers in respect of land would give rise to inadvertent adverse effects. Temporary possession would only be exercised in respect of land and for timescales which have been

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		assessed as part of the Rochdale Envelope approach to assessment which is described in Chapter 2 of the Environmental Statement [**Application Document APP-140**]. At Issue Specific Hearing 2, Mr Church on behalf of Thurrock Council stated that "*it's not clear to us whether temporary possession is a single event or a multiple event*" as the ability to do so "*would have some benefits to the residents in the borough in that they would be, for instance, able to access their public open space*". The Applicant refers to article 35(11) which confirms that "*Nothing in this article prevents the taking of temporary possession more than once in relation to any land specified in paragraph (1).*"
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.	It is helpful to begin by explaining how this article is intended to function in conjunction with other provisions of the draft Development Consent Order (dDCO) [**Additional Submission AS-038**]. First, the general position, in accordance with article 29 (private rights over land) of the dDCO, is that private rights over land which is • subject to compulsory acquisition under the dDCO are extinguished, from the date of acquisition or entry on the land; • subject to compulsory acquisition of rights under the dDCO are extinguished in so far as their continuance would be inconsistent with the exercise of the right, from the date of acquisition, the date of entry, or the date of carrying out of any activity authorised by the dDCO; and • subject to temporary possession under the dDCO are suspended, for as long as the undertaker remains in lawful possession of the land. Article 29 of the dDCO is widely precedented in Development Consent Orders under the Planning Act 2008, is based on the Model Provisions and is necessary to ensure that the scheme can

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	Are all such persons considered to be Category 3 Persons. Are they all identified in the Book of Reference at Part 2?	proceed notwithstanding the existence of private interests and rights over land. It should, however, be noted that the power in article 29 only applies in respect of land which has been acquired or subject to temporary possession *under the provisions of the dDCO*. By way of example, private rights are, as noted, suspended over land of which temporary possession has been taken, but only to the extent that temporary possession has been taken under article 35 of the dDCO. It would not, therefore, provide for the suspension of private rights over land to the extent that an agreement has been reached with the landowner to take temporary possession of the land. Furthermore, the exercise of certain powers under the dDCO is not contingent upon the exercise of land powers under the dDCO. An example of this is article 13 (use of private roads). The exercise of the power in that article does not, and indeed is not intended to be, subject to the prior exercise by the Applicant of the power to take temporary possession of land under article 35 of the dDCO. This does therefore give rise to a potential lacuna. Specifically, the Applicant considers there is a risk that, where the general position under article 29 of the dDCO is not engaged for any of the reasons mentioned, the rights of third parties would be preserved and, in principle at least, enforceable. This situation would be highly unsatisfactory, since the preservation and enforceability of conflicting rights and restrictions over land has the potential to frustrate the delivery of the scheme. The purpose of article 66 is to address this lacuna. It provides that the Applicant may undertake authorised activities within the Order limits notwithstanding that they involve an interference with third party rights, or a breach of a restriction the benefit of which is held by a third party. Article 66 requires compensation to be paid to those affected by the exercise of the power.

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		Importantly, article 66 does not provide for the suspension or permanent extinguishment of third-party rights or restrictions but for their non-enforceability to the extent necessary to accommodate the delivery of the scheme, subject to the payment of appropriate compensation. This article only applies in relation to land within the Order limits. It would therefore only be capable of affecting those persons who have the benefits of rights and restrictions in respect of land located within the Order limits. Such persons are recorded in the Book of Reference [**Additional Submission AS-042**] as Category 2 persons with an interest in land. Those persons have been consulted at the pre-application stage under section 42 of the 2008 Act and received notice under section 56 of the 2008 Act following acceptance of the application for examination. Those persons have therefore been notified of the potential impact of the scheme on their land interest. Given that the exercise of article 66 is parasitic on other DCO powers, it would not result in unforeseen effects on private rights compared to what is already apparent from the land plans and Book of Reference. Taking the temporary land example above, if article 66 was deployed (in tandem with an agreement to use land) instead of articles 29 and 35 in respect of that land, the owner if the right would only experience a temporary interference with their right.
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,	The Applicant directs the Examining Authority's attention to Appendix D of the Planning Statement which comprehensively sets out the application of sections 131 and 132 to the proposed acquisition of special category land. This matter is also addressed in Section 7.2 of the Statement of Reasons [**Additional Submission AS-040**]. In all cases of compulsory acquisition of

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	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. 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	land or rights, the Applicant is confident that an exemption from special parliamentary procedure applies. In short: 1. Section 131(4) – i.e., circumstances where replacement land is being provided – applies to: • Claylane Wood (plots 06-133, 06-143, 06-157, 06-159 and 06-163) • Folkes Lane Woodland (plot 46-18) • Orsett Fen (plots 35-14, 35-39, 37-01 and 38-58) • Ron Evans Memorial Field (plots 29-02, 29-09 and 33-18) • Shorne Woods Country Park (plots 04-88, 04-144, 04-250, 04-264 and 04-265) • Thames Chase Forest Centre (plots 43-08, 43-22, 43-23, 43-24, 43-25, 43-31, 43-33, 43-39, 44-12 and 44-51) • Tilbury Green (plots 20-63 and 23-106) 2. Section 131(5) – i.e., where land to be acquired does not exceed 200 metres or is required for the widening or drainage of an existing highway and the giving of land in exchange is unnecessary – applies to Roman Road Open Space (plot 06-15). 3. Section 132(3) – i.e., where land over which rights are to be acquired will be no less advantageous – applies to:

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	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.	• Cyclopark (plots 07-02, 07-04, 07-05, 08-13, 08-14 and 08-15) • Folkes Lane Woodland (plots 46-04, 46-26 and 47-26) • Jeskyns Community Woodland (plot 06-56) • Orsett Fen (plots 35-13 and 38-55) • Roman Road Open Space (plots 06-03, 07-01, 07-15, 07-17, 07-20, 07-22, 07-23, 07-27, 07-28, 07-41, 08-07 and 08-12) • Ron Evans Memorial Field (plots 29-03 and 29-04) • Shorne Woods Country Park (plot 04-145) • Thames Chase Forest Centre (plots 43-18, 43-19, 43-35, 43-104, 43-105, 43-107, 43-108, 43-111 and 44-08) • Tilbury Green (plots 20-75, 20-76 and 23-120) • Walton Common and Parsonage Common (plots 21-25 and 23-170) 4. Section 132(4) – i.e., where replacement land is provided in connection with rights to be acquired applies to: • Claylane Wood (plots 06-144, 06-151, 06-152 and 06-158) • Folkes Lane Woodland (plots 46-06, 46-08, 46-09, 46-11, 46-12, 46-13 and 46-55) • Ron Evans Memorial Field (plots 29-282, 29-283 and 33-35) • Shorne Woods Country Park (plots 03-14 and 04-274) • Thames Chase Forest Centre (plots 43-07, 43-09, 43-106, 43-109 and 43-110) There are no instances where the Applicant is seeking to rely on section 131(4A), i.e., where replacement land in exchange is not available or would only be available at a prohibitive cost. The Applicant considers timing of works, and provision of replacement land, in connection with the compulsory acquisition of land and rights over open space to be one of the factors which falls to be considered under the "no less advantageousness" test.

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		There is no legislative provision in sections 131/132 which requires the replacement land to be laid out prior to acquisition of the replacement land. In particular, the legal requirement is that replacement "has been or will be" provided, implying it does not have to be co-terminus. The approach to laying out replacement land in accordance with a scheme, and that land only vesting on completion of that scheme, is heavily precedented (see, for example, article 30(3) of the A30 Chiverton to Carland Cross Development Consent Order 2020, article 26 of the M20 Junction 10a Development Consent Order 2017 and article 39(4) of the A417 Missing Link Development Consent Order 2022). The Applicant's approach has been to consider the period for works or the maturity of environment mitigation in connection with the compulsory acquisition of land to be considered in determining whether the land is no less advantageous. Appendix D provides the full details of this multi-factorial consideration which we appreciate you may wish to explore at Compulsory Acquisition Hearing. By way of example, 17,808m^2 of Folkes Lane Woodland is to be acquired and the replacement land is 29,179m^2. That amount takes into account that the replacement land is anticipated to become available for public use four years after the existing Folkes Lane Woodland is impacted by the Project, except that some areas of new planting/habitat may be fenced off to allow for them to mature. The new planting/habitat is generally anticipated to have a maturity period of five years. That planting/habitat (as well as the other factors) ensures that the replacement land is no less advantageous. At Issue Specific Hearing 2, Thurrock Council commented that in respect of the temporary possession of open space, "The loss of the provision is not addressed, and that bites to the core of section 19 of the Acquisition of Land Act". In response, to the Applicant would note that the relevant provisions in connection with special

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		category land are sections 131 and 132 of the Planning Act 2008. The Applicant strongly disagrees with the position that temporary possession of such land is caught by those provisions.
	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.	The definition of "special category land" in article 40 relates only to those plots where section 131(4) or section 132(4) (i.e., where replacement land is being provided). This is noted in the latter part of the definition in article 40(8) ("…*being the land in respect of which the Secretary of State is satisfied that section 131(4) or section 132(4) of the 2008 Act applies*"). The Applicant would be happy to amend this definition to "specified special category land" if that would assist the ExA.
	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".	The Applicant is happy to make this change, and will update the dDCO for Deadline 1 to that effect.
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	In relation to the tests in sections 127 and 138 of the Planning Act 2008, the Applicant has set out in Section 7.4 of the Statement of Reasons [**Additional Submission AS-040**] the basis on which it considers that these tests would be met in this case.

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	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.	As regards section 127, the Applicant considers that adequate protection for statutory undertakers' assets is included within the suite of protective provisions included in Schedule 14 to the draft Development Consent Order (dDCO) [**Additional Submission AS-038**], which will be supplemented by any further protection provisions and / or asset protection agreements that emerge as necessary in response to ongoing engagement with affected parties. The Applicant is also seeking express powers under the Order to acquire land or rights in land in order to divert the apparatus of statutory undertakers and the most significant of these works have been identified specifically within Schedule 1 to the dDCO. Accordingly, the Applicant considers that statutory undertakers will not suffer serious detriment to the carrying on of their undertaking as a result of the compulsory acquisition of the land (or rights in the land). The tests set out in section 127(3) and 127(6) are therefore satisfied in the Applicant's view. In relation to section 138, the powers which the Applicant is seeking under the dDCO to extinguish the rights of statutory undertakers, or to remove the apparatus of statutory undertakers, is necessary for the purpose of carrying out the development to which the dDCO relates. The exercise of these powers would, however, be carried out in accordance with the protective provisions contained in Schedule 14 to the dDCO and / or the terms of any private asset protection agreements. Negotiations with statutory undertakers in relation to protective provisions and asset protection agreements are progressing well. As noted, a number of protective provisions have already been included in Schedule 14 to the dDCO and are under discussion with the relevant parties. The Schedule of Negotiations in Appendix B to the Statement of Reasons sets out the status of progress in relation to negotiations with statutory undertakers, as well as the Statements of Common Ground submitted to the

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		Examination. These will be updated as the Examination progresses.
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.	The Applicant believes it is necessary to include this provision to ensure it is clear that where it needs to obtain any other planning permission relating to the proposed development, the implementation of that planning permission will not constitute a breach of the terms of this Order. This article has become standard for recently consented DCOs and there are no features unique to the project which justify a departure from that practice. The DCO process provides for two types of development to be consented: the NSIP itself, which can only be consented by way of a DCO, and associated development required to support the construction or operation of the principal development, or to mitigate its impacts. It is possible for works of associated development to be consented through alternative regimes such as the Town and Country Planning Act 1990. If planning permission for the development is obtained then compliance with that planning permission is not taken to be a breach of the terms of the DCO if all the rest of the terms are complied with. It also means that works of associated development – which could have been promoted by way of planning permission – can be varied through planning permission, if required, without being in breach of the Planning Act 2008. By way of example, the replacement travellers' site is an example of an asset which, if desired in future by the local planning authority, could be capable of variation via the Town and Country Planning Act 1990 regime. It is not considered appropriate or proportionate for a material or non-material amendment order application to be progressed in connection with such assets; and it is not the intention of the

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		Planning Act 2008 to specify that any variation, or development, which follows a DCO should be subject to the procedures under the Planning Act 2008. In addition to the Project-specific justification provided above, the Applicant notes that this provision and the principle of it is heavily precedented: see, for example, M20 Junction 10a Development Consent Order 2017 (article 7) and the A30 Chiverton to Carland Cross Development Consent Order 2020 (article 7), M25 Junction 28 Development Consent Order 2022 (article 6), A57 Link Roads Development Consent Order 2022 (article 6), A428 Black Cat to Caxton Gibbet Development Consent Order 2022 (article 7) and A47 Wansford to Sutton Development Consent Order 2023 (article 7). At Issue Specific Hearing 1, Gravesham Borough Council queried "*about what* [National Highways] *have in mind for the park in terms of facilities, whether it be cafeterias or whatever, that would normally require planning permission, and whether they intend to bring them forward somehow within the scope of the DCO or later on in a planning application*". The Applicant can confirm that no further planning application is anticipated in connection with Chalk Park. The Applicant notes that Clause S3.04 of the Design Principles [**Application Document APP-516**] and the Environmental Masterplan [**Application Documents APP-159 to APP-168**] make provision in connection with the laying out of Chalk Park. Please note other interested parties raised comments on article 56(3) and these are dealt with above.
8. Classification of roads **9. Clearways, prohibitions and restrictions**		

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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.	The statutory basis for these provisions is section 120(5)(a) of the Planning Act 2008 ("the 2008 Act"), which provides that an order granting development consent may apply statutory provisions which relate to any matters for which provision may be made in the order. These provisions ensure that statutory powers which are already available to the Applicant, for example the power to vary the classification of roads under the Highways Act 1980 ("the 1980 Act"), can be deployed without also amending the Order. This is necessary to provide equivalent powers to those which would be available if the Project were proceeding other than by means of a development consent order. To require the Applicant to seek a modification to the DCO for these purposes would place the Applicant in a worse position than it would have been if it were relying on its powers under the 1980 Act, or under the Road Traffic Regulation Act 1984. The Applicant does not consider that it can have been Parliament's intention that an operational distinction should be made between highways promoted and constructed under the 2008 Act regime and those promoted and constructed by other means. The Explanatory Memorandum [**Application Document APP-057**] confirms that the inclusion of these provisions is widely precedented in orders under the 2008 Act and, in the Applicant's view therefore, the principle for their inclusion is firmly established. The Applicant has reviewed the transcript and notes no interested parties raised comments about these provisions.
11. Temporary stopping up and restriction of use of streets		

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Articles 12 & 13 – Article 14 –	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. 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.	In relation to article 12, which provides for the temporary closure, alteration, diversion and restriction of use of streets and private means of access, the Applicant considers that the power strikes an appropriate balance between ensuring that the Applicant is able to take appropriate temporary measures in relation to streets and private means of access, to facilitate the expeditious delivery of the Project, and protecting the rights of those who would be affected by the exercise of the power. The protections referred to include: • article 12(3), which requires the Applicant to provide reasonable access for pedestrians going to or from premises abutting a street or private means of access affected by the temporary closure, alteration, diversion or restriction of a street or private means of access; • article 12(5), which confirms that the Applicant must consult with the street authority before temporarily closing, altering, diverting or restricting the use of streets set out in Schedule 3 to the dDCO; and in respect of those streets which are not listed in Schedule 3, must obtain the prior consent of the street authority before temporarily closing, altering, diverting or restricting the use of those streets; and • article 12(6), which provides for the payment of compensation to any person who suffers loss by reason of the suspension of any private right of way under article 12. Furthermore, the Applicant would note that the power to use any street which has been temporarily closed, altered, diverted or restricted under article 12 as a temporary working site is restricted to those streets which are *within* the Order limits. In this regard, article 12(2) confirms: *"… the undertaker may use any street temporarily closed, altered, diverted or restricted under the powers conferred by*

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	Article 14 relates to permanent stopping up of streets. Should 14(4)(e) be a new paragraph (5)?	*this article and which is within the Order limits as a temporary working site".* This power does not therefore extend to streets located outside the Order limits. In relation to article 13, this article provides for the use of private roads within the Order limits for the purposes of, or in connection with, the construction and maintenance of the authorised development, without the need for the Applicant to take temporary possession of the relevant land under article 35 of the dDCO. Accordingly, the power involves a lesser form of interference with land, proportionate to the limited nature of the use which the Applicant requires of it. The power in article 13 applies only in respect of those private roads which are located within the Order limits. Article 13(2) also provides for the payment of compensation for any loss or damage which a person may suffer by the reason of the use of the private road by the Applicant. The Applicant agrees that article 14(4)(e) of the dDCO should not form part of article 14(4) and should instead become a new article 14(5). This will be corrected in the version of the dDCO to be submitted at Deadline 1.
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	We have assumed that this is a reference to paragraph (a) of the ancillary works in Schedule 1 to the dDCO. In relation to the ancillary works, the Applicant notes that it is standard drafting to have a list of development which may be undertaken within the Order limits for the purposes of or in connection with the construction of any of the numbered works. The Applicant has adhered to standard practice and is not of the view that this list should be amended or altered. The provision is justified for the following reasons:

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		1. We note there is an important limitation in that any of the ancillary works can only be carried out where they are "not likely to give rise to any materially new or materially different environmental effects to those assessed in the environmental statement". This effectively puts a limitation on the implementation of the related powers in connection with the numbered works which make up the authorised development. 2. Additionally and importantly, the dDCO needs to be read as a whole and in conjunction with number of other documents, including but not limited to the requirements in Schedule 2 requiring compliance with the preliminary design, the references to the REAC, and Schedule 8 and 11 of the dDCO which sets out the land which temporary possession may be taken as well as the purpose of it, and also the purposes for which permanent rights can be taken. The Works Plans [**Application Documents APP-018 and APP-021 and Additional Submissions AS-024, AS-026, AS-028 and AS-030**], as well as the Engineering Drawings and Sections [**Application Documents APP-030 to APP-037**] and General Arrangements Plans [**Application Documents APP-015 to APP-017**] together show the preliminary scheme design to an appropriate level at this stage of design development. 3. In connection with local roads, the Applicant intends to utilise the permit schemes operated by local authorities under the New Roads and Street Works Act, subject to limited and appropriate number of modifications. This provides an important mechanism for local authority input. Further, with regards to alterations to streets, the power needs to be read in conjunction with Article 10 where any alterations are to be completed to reasonable satisfaction of local highway authority.
13. Disapplication or amendment of		

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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.	The information requested by the ExA is provided in paragraphs 5.227 to 5.235 and paragraph 5.239 of the Explanatory Memorandum [**Application Document APP-057**]. In relation to article 53, the Explanatory Memorandum identifies the relevant provisions, whether a consent is required under section 150, and whether that consent has been obtained. The Applicant anticipates providing updates on the status of these consents during the course of the examination. The Applicant will amend the title of the provision so that the "etc.," is added to the title to reflect that it relates to Orders and Byelaws made under local legislation, and not just the enactments which fall within the umbrella term of local legislation. At Issue Specific Hearing 2, the Port of Tilbury raised a concern that article 53(5) "does not extend to any other licence, permit, or

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		other protection such as those for protected species". The Applicant requests that the Port of Tilbury clarify which licences and permits it is referring to. The Applicant refers to paragraphs 6.2.5 to 6.2.21 of the Interrelationship with other Nationally Significant Infrastructure Projects and Major Development Schemes [**Application Document APP-550**], which set out how the Project would interface with the Tilbury2 development. The Applicant has engaged with the Port of Tilbury on the detailed requirements and the implementation of its ecological management plans, and following that engagement, included in the Register of Environmental Actions and Commitment (REAC) a commitment (REAC Ref. TB023) which requires the Contractor to micro-site the conveyor footings during installation to avoid existing ditches and use a bailey bridge for any temporary crossings of the ditches required during the conveyor's installation and decommissioning. The exact location of the footings and the bridge will be agreed with the Environmental Clerk of Works prior to installation. In addition to controls such as these, the Applicant reiterates its comments above that the dDCO must be considered as a whole, and the relevant approvals which will have to be obtained are considered appropriate to manage the interfaces further.
14. Crown rights		
Article 43 –	The word "take" should be removed from this article. Consent under section 135 (1) and (2) should also be obtained from the Crown authority	The Applicant will make this amendment for Deadline 1. The Applicant is in continued discussions with the relevant Government Departments, and the Crown Estate, and will provide an update on reaching agreement on consents during the course of the examination. The Applicant is hopeful that it will be able to confirm all Crown consents prior to the end of the Examination.
15. Felling or lopping of trees		

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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?	The Applicant has had regard to the approach set out in Section 22 of Advice Note 15 in drafting this article. For example, to reflect good practice point 6 in Advice Note 15, the Applicant has included a relevant Schedule – Schedule 7 to the draft Development Consent Order (dDCO) [**Additional Submission AS-038**] – and plan – the Hedgerow and Tree Preservation Order Plans [**Application Documents APP-053 to APP-055**], which identify the trees affected that are protected by Tree Preservation Orders and fall within the scope of the power in article 24 of the dDCO. Those plans also identify the hedgerows that are located along the route of the Project, distinguishing between important hedgerows (as defined by the Hedgerow Regulations 1997) and other hedgerows. However, the Applicant has not opted to include a separate schedule for hedgerows. The Applicant recognises that precedent for and against this approach can be identified but is of the view that the approach which has been taken in the dDCO is correct and appropriate. This is on the basis that: • For the purposes of DCO drafting, at least, hedgerows which are not important hedgerows within the meaning of the Hedgerows Regulations 1997 fall to be considered on the same basis as trees which are not subject to TPOs. Except for trees which are subject to TPOs, Advice Note 15 does not indicate that trees affected by a scheme should be identified in a separate schedule.

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		• The removal of hedgerows which are important hedgerows within the meaning of the Hedgerows Regulations 1997 would, in the case of development authorised by planning permission, be permitted under the permitted works rights found in regulation 6 of the 1997 Regulations. Therefore, to require important hedgerows to be identified in a schedule would, in effect, place the applicant for a DCO in a worse position than an applicant for planning permission, since the assumption would be that any works proposed to be undertaken to important hedgerows which are not identified in the schedule would require prior approval. In the Applicant's view, this would be an illogical outcome given the national significance of schemes promoted under the Planning Act 2008. Notwithstanding the above, however, the Applicant has for illustrative purposes submitted with the Application plans showing the location of both hedgerows and important hedgerows affected by the scheme. As regards the Examining Authority's suggestion in relation to article 23 of the dDCO, the Applicant would note that the power under that provision is limited in scope to trees within *or overhanging land* within the Order limits. The Applicant therefore considers that this drafting achieves substantially the same result as the Examining Authority's suggested approach of linking the power in article 23 to trees 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	The article was inserted into the main body of the Order following requests from Thurrock Council that an appeals provision was necessary. The Applicant considers that it is more appropriate to include the appeals provisions in the main body of the Order on the basis that the approvals which are caught by the provision are included in the main body of the Order. It is acknowledged that utilities projects which utilise an appeals provision often include

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	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 notices under the Control of Pollution Act the applicant will need to	this in Schedules but all but one of the requirements in Schedule 2 are proposed to be discharged by the Secretary of State. The Applicant notes that appeals provisions have been included in the main body of transport DCOs (see, for example, article 52 of the M25 Junction 28 Development Consent Order 2022 and article 44 of the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016). The Applicant has reviewed the transcript, and has not identified any comments from interested parties on this provision. As stated, this provision was requested by Thurrock Council and the Applicant has acceded to the request on this occasion. We note that article 52 of the M25 Junction 28 Development Consent Order 2022 and article 44 of the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 both contain an appeals provision relating to the Control of Pollution Act. As set out in the Explanatory Memorandum [**Application Document APP-057**], the use in relation to other approvals is also precedented (Paragraph 16 of Schedule 2 to the Port of Tilbury (Expansion) Order 2019). In respect of the Control of Pollution Act 1974, both sections 60 and 61 include provisions which allow the recipient of a notice, or National Highways in the case of a consent (as the case may be), to appeal to a magistrates' court within 21 days. Section 70 states that any appeal shall be by way of complaint for an order and that the Magistrates' Court Act 1980 applies to the proceedings.

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	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.	Further provisions as to appeals under these sections are included in Regulation 5 (in respect of appeals under section 60) and Regulation 6 (in respect of appeals under section 61) of the Control of Noise (Appeals) Regulations 1975. Part 2 of the Magistrates' Court Act 1980 contains provisions for the hearing of civil complaints. It does not, however, prescribe specific timescales. Section 144 of the 2008 Act contains an enabling provision for the making of rules for regulating and prescribing the procedure and practice to be followed in magistrates' courts in civil matters. An extensive number of statutory instruments have been made under this section, but the primary rules are considered to be those set out in the Magistrates' Court Rules 1981. Those rules impose a duty on the court to actively manage cases, and confer a range of powers to do so. However, they do not prescribe a specific procedure for the hearing of complaints Due to the need for certainty and the expeditious resolution both of any disagreements under sections 60 and 61 of the Control of Pollution Act 1974 and also Requirement 12, and to ensure that the construction of the authorised development is not subject to unnecessary delay, this article prescribes a clear procedure for the resolution of appeals by the Secretary of State. As set out further above, the Secretary of State has an agreed process for the discharge of Requirements and is therefore well placed to deal with such appeals. National Highways notes that an equivalent provision (in connection with the Control of Pollution Act 1974 only) was recently removed from the A38 Derby Junctions Development Consent Order 2021 on the basis that it was considered the process under the Control of Pollution Act 1974 was sufficient. National Highways considers that given the need for consistent and expeditious decision making across the Project, the need to deliver a complex Project in an expeditious manner with fixed timescales, that the appeals process set out in article 65 is appropriate in this case.

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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.	The Applicant notes that this query cross-refers to article 7, but the substance of the question relates to article 8. On that basis we have addressed the latter. The removal of the need for a further consent by the Secretary of State under paragraph (5) for the benefit of the Order to be transferred is justified by the fact that such consent is sought for the purposes of this application; thus interested parties, the Examining Authority and ultimately the Secretary of State will have an opportunity to consider the appropriateness of this power as part of this application, and therefore avoid unnecessary administrative burden in the implementation of the DCO. The Applicant considers that consent should not be required for the following reasons: • The named utility undertakers have assets which require diversion as a result of the project; and the protective provisions make provision for those works to be carried out by those undertakers, or with their consent. • The transfers are limited to specific works because the article only allows a transfer "in respect of works relating to their undertaking" • The approach of permitting works to be transferred without subsequent consent by reference to the utility-related status of a transferee is precedented (see, for example, article 9(4) of the South Humber Bank Energy Centre Order 2021). • Article 8(5) makes clear that the liability for any compensation payable in respect of the compulsory acquisition of land or rights would rest with the undertaker so it is not considered that these provisions give rise to the need to consider the funding arrangements or standing of the named bodies. Relatedly, article 8(4) does not itemise particular work numbers in respect of which transfers to named statutory undertakers without

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		the consent of the Secretary of State can take place. The itemised approach may be appropriate for a comparatively smaller scheme requiring a smaller number of rights to be acquired for the benefit of third parties, and where the detailed scheme design has been further advanced, but it is not feasible in relation to this Project as some utilities works will be carried out under the "lettered" works in Schedule 1 to the Order, rather than specific numbered works. Nonetheless, the Order provides appropriate control over the powers which can be transferred without the Secretary of State's consent by making clear that the works which are the subject of a proposed transfer must relate to the undertaking of the relevant undertaker. At Issue Specific Hearing 2, Mr Holland raised that landowners may have to deal with multiple different parties. The Applicant acknowledges that this will inevitably be the case for a complex project which involves both highways and utilities works. Nonetheless, it is proportionate to deliver the significant benefits which the Project will deliver, and is necessary given that statutory undertakers may wish to undertake relevant works on their assets in their own right.
19. Discharge of Water		

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Article 19 –	The applicant should be aware of and mindful of section 146 of the Planning Act 2008.	The Applicant has had regard to section 146 of the 2008 Act. The effect of that provision is to provide that the person to whom an order granting development consent authorising the discharge of water into inland waters or underground strata is granted, does not acquire the right to take water or require discharges to be made from that source of water. Article 19 of the draft Development Consent Order (dDCO) [**Additional Submission AS-038**] would authorise the Applicant to use watercourses or public sewers or drains for the drainage of water in connection with the carrying out or maintenance or use of the authorised development. That provision does not authorise water to be taken or discharges to be made from such watercourses, consent for which would where appropriate be sought separately. In this regard, the Consents and Agreements Position Statement [**Application Document APP-058**] explains that water abstraction licences under sections 24 and 25 of the Water Resources Act 1991 are likely to be required for construction activities, such as concrete processing. These consents would be sought from the Environment Agency, as the consenting authority, following detailed design, when more specific information regarding water usage is available.
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	The Applicant agrees and acknowledges that temporary possession is not compulsory acquisition but appreciates the ExA will want to raise queries where it considers it necessary. In relation to temporary possession, the Applicant notes the ExA's preliminary observations and has sought to address these under the first sub-item of agenda item 4. We do not propose to repeat them here.

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	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 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?	As regards the ExA's suggestion that consideration should be given to the addition of a provision obliging the Applicant to remove from land of which temporary possession has been taken any equipment, vehicles or temporary works, the Applicant would note that the draft Development Consent Order (dDCO) [**Additional Submission AS-038**] includes the widely precedented provision, at article 38(5), requiring the undertaker, before giving up possession of land of which temporary possession has been taken, to *"… removal all temporary works and restore the land to the reasonable satisfaction of the owners of the land"*. The obligation to remove temporary works from land is therefore already secured by the dDCO. The Applicant does not consider it is necessary to make express provision for the removal of equipment and vehicles, as this goes hand in hand with the obligation to give up temporary possession of the land. In relation to the ExA's observations regarding the provisions of the Neighbourhood Planning Act 2017 ("the 2017 Act"), the Applicant is of the view that it is not currently possible to understand or reflect accurately the temporary possession provisions intended by Government in respect of DCOs. The Applicant stands by its rationale for the disapplication of the provisions relating to temporary possession in the 2017 Act, which received Royal Assent more than six years ago. This rationale being that these provisions have not yet come into force, nor have any regulations required to provide more detail on the operation of the regime been made (or even consulted on), including any transitional provisions. There appears to be a lack of certainty about Government's intention as to whether they will ever be brought into force. Accordingly, there is no understanding of how these provisions could apply, or indeed if they would apply, to the authorised development. The Applicant is therefore preserving the current position in the light of this uncertainty.

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	• 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"?	Addressing the specific points highlighted by the ExA in respect of the 2017 Act: • A period of 28 days' notice prior to taking temporary possession of land is considered to be reasonable and proportionate, balancing the interest of those who would be affected by the exercise of the power and ensuring that the Project can be delivered expeditiously. As set out in the Explanatory Memorandum [**Application Document APP-057**], a number of complex DCO projects have provided for a period of 14 days and the period set out in the dDCO is therefore double that; • Article 35(2) requires that a notice to take temporary possession of land must state the works, facilities or other purpose for which the undertaker intends to take temporary possession of land. The Applicant has not gone so far as to require the period for which temporary possession may be taken to be specified in the notice. The Applicant is seeking powers to take temporary possession of land within the time periods specified in the dDCO, which are defined in article 27 and article 35(4). To require time periods to be specified in the dDCO, in circumstances where it may prove to necessary to exceed those time periods, could give rise to significant delays to the delivery of the scheme. It would also be capable of giving rise to other unwelcome consequences. For example, if the period were to expire but temporary possession of land was required by the Applicant beyond that period, then possession of the land may need to be given up, with the consequences which follow from that under the provisions of the dDCO, including the removal of temporary works and restoration of the land. The Applicant would then be required to take further temporary possession of the land under the dDCO and potentially reconstruct temporary works which had been removed, thereby doubling the impacts and disruption to landowners. The Applicant considers that this position can and should be avoided, nor is it aware that other

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		DCOs have taken a different approach to that which it is proposing in the dDCO; and • The Applicant notes that the power to serve a counter-notice under the 2017 Act which provides that an authority may not take temporary possession of land is only available to those with a leasehold interest in, and the right to occupy, land. It is not available to landowners generally, including notably those with a freehold interest in land. In any event and as noted, the provision has not entered into force, nor is there any certainty if and how Government intends the provision should apply to DCOs. As a matter of principle, however, the Applicant considers that the inclusion of such a provision within the dDCO would be inappropriate. The objective of article 35 is *inter alia* to enable the Applicant to reduce the amount of land subject to permanent acquisition, thereby reducing the impact of the scheme on landowners (and those with a right over land, which would be extinguished if the Applicant were to acquire the land) and the burden of compensation to the public purse. A provision which effectively required the Applicant to acquire land outright in circumstances where this were to prove unnecessary, would be contrary to these objectives. In relation to article 36, the Applicant considers that the reference to "part" in that provision will be sufficiently clear, as it will fall to be construed in the same way as Schedule 2 to the dDCO, which requires plans to be approved in relation to parts of the authorised development. The relevant part, under consideration, will therefore correspond to the part defined in plans submitted for approval under the requirements in Schedule 2 to the dDCO.
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	The Applicant notes the recent decisions referred to by the Examining Authority in relation to applications for development consent in the energy sector.

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	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: 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	Article 64 (arbitration) of the draft Development Consent Order (dDCO) [**Additional Submission AS-038**] provides that: *"Except where otherwise expressly provided for in this Order … any difference under any provision of this Order … must be referred to and settled by a single arbitrator to be agreed between the parties …"* Therefore, article 64 recognises that there may be circumstances where alternative provision may be made elsewhere by the dDCO. In this regard, it should be noted that under paragraph 23 of Part 5 to the Deemed Marine Licence in Schedule 15 to the dDCO, it is confirmed that: *"Regulations made under section 73 of the [Marine and Coastal Access Act 2009] apply to any difference under any provision of this licence and article 64 (arbitration) does not apply".* Accordingly, matters in respect of which an approval or consent of the Marine Management Organisation (MMO) would be required pursuant to the DML are, in effect, already excluded from the ambit of the arbitration provision in article 64. The Applicant therefore considers that the drafting of this provision therefore reflects the request made by the Marine Management Organisation at Issue Specific Hearing 2 on the draft DCO on Thursday 22 June 2023. The Applicant acknowledges, however, that whilst this would address the position of the MMO, it would not extend to decisions or approvals which the Secretary of State may be called upon to give under the dDCO, for example under the Requirements in Schedule 2 to the dDCO. The Applicant notes that, in the recent A428 Black Cat to Caxton Gibbet Development Consent Order 2022, the following drafting was added to article 50 (arbitration) of that Order:

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	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.*	*"(2) Any matter for which the consent or approval of Secretary of State is required under any provision of this Order is not subject to arbitration".* Substantially the same drafting has been incorporated in the latest draft DCO in respect of the A12 Chelmsford to A120 Widening Project, which is currently in examination. Whilst not consistent across the board, the Applicant considers that there does therefore appear to be some momentum behind this approach to drafting in relation to highway schemes. The Applicant has no objection to this drafting and a modification to the dDCO in these terms would reflect the Applicant's intention that decisions of the Secretary of State should *not* be the subject of arbitration proceedings. The Applicant therefore proposes to make this amendment to the dDCO in the next iteration of the dDCO to be submitted to the Examination. The comments raised by the Marine Management Organisation at Issue Specific Hearing 2 in relation to arbitration are addressed in the first four paragraphs above.
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.	The Statement of Statutory Nuisance [**Application Document APP-489**] included with the application sets out the forms of nuisance that are potentially engaged by the proposals (including but not limited to noise), and explains how the suite of application documents secure measures to avoid or minimise the risk of those forms of nuisance arising. The Applicant considers that these are sufficient to justify the defence to the relevant forms of nuisance provided by article 58.

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		However, there is an important wider context to this question. Section 158 of the Planning Act 2008 provides statutory authority as *general and comprehensive* defence to any civil or criminal proceedings for nuisance. Hence Parliament, in enacting the 2008 Act, has endorsed the general principle of a defence of statutory authority for nationally significant infrastructure projects. Where section 158 applies, it should be noted that section 152 provides a right of compensation. Section 158 also allows for contrary provision to be made in a dDCO. As the Explanatory Memorandum [**Application Document APP-057**] states at paragraph 5.247, article 58 represents such a contrary provision. It makes that contrary provision in respect of proceedings under section 82(1) of the Environmental Protection Act 1990, in line with precedent in the vast majority of "made" DCOs. It provides a more detailed regime for the circumstances in which the statutory nuisance defence is engaged under section 82.
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	The Applicant refers to the response above in relation to arbitration (article 65). The Applicant held extensive discussions on the dDML with the MMO in advance of submission. Those discussions are continuing and the Applicant is reviewing the MMO's latest comments on the dDML submitted as part of their relevant representation [RR-0649]. The Applicant notes that at Issue Specific Hearing 2, the MMO reiterated its view that the "*timeframes are amended to 13 weeks*". While the Applicant remains keen to discuss matters with the MMO, it does not agree that deemed consent provisions at Part 5 – Discharge of Conditions are unreasonable. 13 weeks is not an appropriate time frame in light of the details provided in the

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	Hornsea Three provides reasons at 20.5.25 – 20.5.29.	application, as well as the need for the expeditious delivery of a nationally significant infrastructure project. The deemed consent provisions at condition 20(2) of the dDML are precedented and have been endorsed by the Secretary of State on the Great Yarmouth Third River Crossing Development Consent Order 2020 (see condition 17(2) of the DML at Schedule 13 to the DCO). Matters relating to the arbitration provision are dealt with above, in respect of article 65.
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.	The Applicant has given consideration to human rights as set out in Section 6 of the Statement of Reasons [**Additional Submission AS-040**]. Broadly, the Statement of Reasons concludes that the Order would engage article 1 of the First Protocol, article 6 and article 8 of the European Convention on Human Rights, but such interference would be justified by the compelling case in the public interest for the Scheme, and that any interference is proportionate and otherwise justified. The power to 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 could theoretically apply to houseboats; however, the Applicant has not identified any houseboats which are contained in those parts of the river Thames in the Order limits. As part of its pre-application consultation and engagement, the Applicant served notices of the project on all those persons with an interest in land and, as part of its due diligence, it has not identified any houseboat. However, the power is nonetheless necessary in

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		circumstances a mooring of any kind is established in the period between the examination and the implementation of the Order. In addition, the power provides recourse to compensation which further limit an interference of human rights protected under the European Convention of Human Rights. The article also sets out that the undertaker must use reasonable endeavours (except in case of emergency) to notify the owner of any mooring affected by the exercise of powers conferred by paragraph 1(b). The Applicant would further note that unlike other schemes in river environment, there is a limited interference above the riverbed itself. The interference is not proposed to interfere with any public rights of navigation, and the only works authorised in the river Thames are those associated with temporary and permanent outfalls, and the self-regulating valve at Coal House fort. The tunnels, as they go under the river Thames, are explicitly included in a 'land category' in the Land Plans which exclude possession of the surface of land, i.e., the riverbed. The Applicant therefore considers the inclusion of the power to be both necessary in ensuring that a mooring which prevents the delivery of this nationally significant infrastructure project can be moved, and proportionate in light of the reduced interference in the river Thames, suitable protections in the form of compensation and notice requirements. The Applicant notes that this approach has been endorsed on numerous projects notwithstanding the potential for future houseboats in canals and waterways (see for example, article 16 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 and article 20 of the M25 Junction 28 Development Consent Order 2022; cf. the Silvertown Tunnel Order 2018 which also included the power to "remove or relocate any mooring" in its ancillary works in Schedule 1). At Issue Specific Hearing 2, the Examining Authority raised "question of the degree to which those article 18 points bear also

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		on safe navigation and the maintenance of safe navigation" and specifically whether a navigational risk assessment had been considered in this context. In response, the Applicant would emphasise that the Order as a whole provides appropriate and well-defined powers. In particular, the Applicant notes that the Protective Provisions for the Port of London Authority (see paragraphs 98(1)-(2) in Schedule 14) specifically require plans in relation to "specified functions" (and this includes article 18). Those plans must include navigational risk assessments, and in addition, paragraph 104(3) restricts the use of article 18(1)(e) (I.e., those relating to 'interference' in the river Thames) to specific matters. At Issue Specific Hearing 2, the Port of Tilbury stated that this provision was "excessive, essentially unfettered, and it is difficult to see how this can be considered to be proportionate or necessary". The Applicant does not agree for the reasons set out above, and reiterates its comments made in response to the Port of Tilbury in respect of Article 3(3) (i.e., that the Order must be read as a whole, and there are protections in place for the benefit of the Port in Schedule 14 of the dDCO).
25. Suspension of road user charging		

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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?	The Applicant is grateful, and will amend the provision so that the provision refers to the Secretary of State, who is proposed to be the charging authority. The Applicant will make this change at Deadline 1. The Applicant notes that the London Borough of Havering raised comments on the substantive issue of road user charging discounts. The Applicant notes that these comments do not relate to the drafting of the dDCO. However, the Applicant strongly refutes the suggestion that the Applicant's road user charging proposals do not align with government policy. The full note relating to Issue Specific Hearing 2 will append a letter from the Department for Transport confirming, in its capacity as the proposed charging authority, that the proposed regime (including the discounts) are in line with government policy. The Applicant considers the appropriate position on discounts to be that discounts should be provided to the residents of the two host authorities where the portals are located.
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.	See our earlier answer on this. In essence we a seeking approval of the relevant management plan (the Preliminary Works EMP) at the DCO application stage.
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.	See our earlier answers on flexibility – our position is that the level of flexibility is necessary and justified for this particular scheme. Whilst not a justification in its own right, it is consistent with the approach taken on other large scale NSIPs.

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Requirements 4, 5, 10,11	The phrase "substantially in accordance with" is uncertain and imprecise.	The Applicant considers the word "substantially in accordance with" to be sufficiently clear, and its usage in other DCOs (including on projects of significant scale and size, see for example Schedule 2 to the A428 Black Cat to Caxton Gibbet Development Consent Order 2022) supports this conclusion. In terms of specific justification for the Project, the use of the phrase is necessary and appropriate because the relevant outline management plans for the Project will be in outline and will require development following the DCO (if granted). We wish to draw the Examining Authority's specific attention to the A47 Wansford to Sutton decision letter. That project was promoted by the Applicant. The Secretary of State "reinstated the phase as – quote" the Secretary of State considers its omission is an inappropriate fettering of his discretion". There are no circumstances which distinguish that project from the Project in this context. We would respectfully submit therefore that the Secretary of State's discretion is not fettered. Whilst one DCO has removed this drafting, it is considered that this represents the Secretary of State's current (and more well-established) view. The Applicant considers that its response above addresses the matters raised by Thurrock Council and the London Borough of Havering in relation to the use of "substantially in accordance".
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?	The Applicant considers that the definition of "part" is sufficiently certain in relation to the stage of design development of the Project. The Applicant further notes that "Part" is the subject to an interpretive provision in paragraph 1 of the Schedule to the dDCO: *"(2) References in this Schedule to part of the authorised development are to be construed as references to stages, phases or elements of the authorised development in respect of which an application is made by the undertaker under this Schedule, and*

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		references to commencement of part of the authorised development in this Schedule are to be construed accordingly" The intention of this drafting is to provide that no element of the authorised development can commence construction or be opened for use (as the case may be) until the relevant requirements in relation to that element have been discharged. The Applicant's approach in this context reflects other complex highways DCOs (see, for example, the A428 Black Cat to Caxton Gibbet Development Consent Order 2022) which similarly use the phrase "parts of the authorised development" in relation to the discharge of requirements. That precedented approach is appropriate for this Project as the Applicant has not yet carried out the detailed design or the associated construction programme for the Project and it would therefore not be appropriate to specify these "parts" at this stage. Once the Applicant has carried out the detailed design and established a more detailed construction programme, the drafting enables the development to be divided into 'parts' that work practically rather than being restricted to discharging requirements and commencing one 'Work' (as defined in Schedule 1) at a time. The Applicant would further note that because the "part" relates to approvals which must be obtained from the Secretary of State, and which will be subject to further consultation, under the terms of Schedule 2, that the Secretary of State will need to be satisfied that all controls relevant to that part have been incorporated. The Applicant further notes paragraph 2.3.9 of the Code of Construction Practice [**Application Document APP-336**] sets out a requirement "that construction phasing plans are made available to the local authorities, prior to works commencement."
Requirement 9	Is the phrase "reflecting the relevant mitigation measures" sufficiently certain?	The Applicant considers that the phrase is sufficiently clear. As explained in the draft Archaeological Mitigation Strategy and Outline Written Scheme of Investigation, The Project construction

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		site has been split into four construction sections (Sections A to D). Construction Sections A to D have then been further divided into activities for the purposes of managing the construction process. For example, Section A: covers South of the River Thames: but is then subdivided into the area of the A2/M2 corridor, the proposed M2/A2/A122 Lower Thames Crossing junction and highways up to, and including, the proposed Thong Lane green bridge north over the A122. These are then referenced, along with more specific heritage assets in Table 9.1 (p.127) with specific mitigation techniques. Given the detail in this document, the drafting is therefore considered precise and 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.	The Applicant can confirm that its intention in referencing "any person the undertaker considers appropriate" was to consult the occupants of the existing travellers' site. The Applicant will amend Requirement 13 so that it refers to the local planning authority and the occupiers of the existing site. The Applicant would note that, in this context, the reference to "local highway authority" is unnecessary as the local highway authority in this area would already be consulted by virtue of being the local planning authority. It is noted that the ExA also wishes to include the highway authority. In this case, the local planning authority and the highway authority are the same body, so it is not proposed to make an amendment on that point. The Applicant will amend the drafting to reflect the existing Design Principle which specifies that engagement with the local planning authority should be carried out.
	Should there also be a requirement to replace like for like the facilities and number of pitches on the existing site?	This is already secured by the Design Principle referenced in the Requirement which requires that: "new site shall include 21 residential pitches with associated hardstanding, landscaping and

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		amenity blocks which reflect the local setting"; this specific design principle is specifically secured under Requirement 13.
	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.	The Applicant considers that the deemed consent provision is appropriate on the basis of the constructive and advanced level of engagement with Thurrock Council and the community. The Applicant notes that the replacement for the travellers' site was consulted on in the pre-application consultation. At the Supplementary Consultation (in 2020), the Applicant specifically consulted on two potential locations for the relocation of the travellers sit. In addition, the Applicant has had extensive engagement with Thurrock Council, with 12 meetings specifically discussing the location and design of the travellers' site. Due to the COVID-19 pandemic and restrictions in place prior to, and throughout, the RIBA Stage 2 design phase, it was not possible to physically consult with the travellers in person. The Project and Thurrock Council discussed the situation and agreed how the consultation should take place. There was no suitable facility available near the existing travellers' site, where a physical consultation could take place that would meet the requirements of social distancing. Therefore, it was agreed to set up a private Facebook group where the Project could post a series of videos, which included diagrams, drawings and voiceovers, to obtain feedback and comments from the travellers. This video was supplemented by phone calls to individuals who were known to not be on Facebook or have no internet access. The Applicant has also engaged with the Essex Police on the replacement site. The Applicant has been encouraged that the plan which is included in the Design Principles has been agreed at the officer level, though we are still awaiting formal approval from Thurrock Council. The Applicant notes and welcomes Thurrock Council's comments that they "have been engaging with National Highways for the better part of 18 months now, and the result of that engagement has been positive in the sense that the council is satisfied that the

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		location and/or design of the travellers' re-provision is covered both in the design principles secured through an indicative plan and indeed covered by requirement 13". At Issue Specific Hearing 2, Thurrock Council raised a general concern with deemed consent. The Applicant considers it is necessary to include deemed consent so as to prevent unnecessarily delaying delivery of the Project. The Applicant has proposed a reasonable period of time for the Council to determine such requests for approval (i.e., 28 days). The Council, and other authorities, will have had time during the consultation and examination of the Project to understand better (compared to any usual approval unrelated to a DCO) the particular impacts and proposals forming part of the DCO. The fact that deemed consent provisions take effect in relation to a failure to reach a decision, not a failure to give consent. It is, of course, open to the Council and other local authorities, if so minded, to refuse consent or to request further information within the time periods specified. The concept of deemed consent is well precedented: see, for example, article 12(6) of the A19/A184 Testo's Junction Alteration Order 2018, article 15(6) of the A30 Chiverton to Carland Cross Development Consent Order 2020, article 13(8) of the Southampton to London Pipeline Development Consent Order 2020 and article 15(6) of the A303 Sparkford to Ilchester Dualling Development Consent Order 2021. Thurrock Council suggested that the provision should include "being able to agree an extension". The Applicant does not consider that it would be an efficient use of time to incentivise protracted discussions on seeking to agree a longer time period, instead of considering an application. We reiterate that if the Council considered insufficient time or information had been provided, it could refuse the relevant application.
	Should there be a further provision in the DCO granting a specific planning permission for use of	The Applicant considers that appropriate permission has been granted for the use of the replacement site by virtue of Article 3 /

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	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?	Schedule 1 (which provides for the replacement travellers' site in Work No. 7R). By way of analogy, in circumstances where other replacement facilities are included, no specific provision is made (see, for example, Work No. 68 in the M42 Junction 6 Development Consent Order 2020 which relates to replacement facilities for the Gaelic Athletic Association).
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.	Work TFGP1 allows for the diversion of the prospective Thurrock Flexible Generation Plant (TFGP) pipeline connection, so that it is compatible with the Project alignment. This work is only necessary if the TFGP DCO is commenced, because if it is not, there is no requirement for this section of pipeline to be built. If the TFGP development is commenced but the pipeline is not taken forward, then equally National Highways would not be required to divert it. Our current understanding is that the TFGP proposal is under development and that it is highly likely that the pipeline in question will be constructed prior to the Project being built. National Highways secured protective provisions in the Thurrock Flexible Generation Plant Development Consent Order 2022 ("the 2022 Order") to ensure that TFGP will install jointing blocks at appropriate locations in their DCO-approved pipeline alignment which would provide a form of "future proofing" for the Project's diversion of that pipeline. See, in particular, paragraph 6(3)(a) of Part 8 of Schedule 8 to the 2022 Order. That paragraph 6 also includes provisions to avoid conflicting works and facilitate cooperation. In the unlikely event that the Project is built and open for traffic before the TFGP pipeline comes forward, the Project design accommodates a later installation of the TFGP pipeline (i.e. after Project is "open for traffic") since the pipeline would be installed under the span of a Project bridge in this location. National

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		Highways understands that TFGP supports the proposed diversion route. Further information on the interface is set out in the Interrelationship with other Nationally Significant Infrastructure Projects and Major Development Schemes [**Application Document APP-550**] which accompanied the application. See in particular Section 6.3. The parties are in active and constructive negotiations to develop an interface agreement that will formalise the in-principle positions which have been discussed.
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?	The Applicant's view is that it is appropriate to include the deeming provisions, noting that where any consulted body "considers it likely that the subject matter of the application would give rise to any materially new or materially different environmental effects in comparison with those reported in the environmental statement", then the application is deemed to be refused under paragraph 18(3). Whilst we acknowledge that Project-specific justification is required, we would note that the circumstances of other projects – which also require the delivery of essential mitigation – are fundamentally no different and there is a long line of precedent which incorporates these deeming provisions. We note, for example, Paragraph 15 of the A417 Missing Link Development Consent Order 2022 and Paragraph 26 of the A428 Black Cat to Caxton Gibbet Development Consent Order 2022). As we noted in the context of the discharging authority, the Applicant and the Secretary of State have agreed, via an exchange of letters, the handling arrangements for the discharge of requirements on highways DCOs. We are happy to submit that to the Examining Authority if you consider this necessary. Each requirement sets out the relevant authorities which should be consulted as part of the discharge. These are extensive, and are based on those authorities which have a function in connection with the relevant matter. It should be noted that there are examples of the local community being engaged and informed of

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	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?	matters which are secured in the relevant management plans; for example the Traffic Management Forum secured under the outline Traffic Management Plant for Construction. The Applicant has outlined its position on this matter and is firmly of the view that the Secretary of State is the appropriate discharging authority. The position is set out in paragraph 6.3 of the Explanatory Memorandum [**Application Document APP-057**] but the Applicant will expand further in its written submission relating to Issue Specific Hearing 2 at Deadline 1.

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Registered office Bridge House, 1 Walnut Tree Close, Guildford GU1 4LZ

National Highways Company Limited registered in England and Wales number 09346363