

Lower Thames Crossing

9.11 Post-event submissions, including written submission of oral comments, for ISH2

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1 Introduction

This document summarises the case put forward by National Highways (the Applicant) in relation to the A122 Lower Thames Crossing (the “Project”) at Issue Specific Hearing 2 (ISH2) on the draft Development Consent Order (dDCO), which took place virtually on Thursday 22 June 2023.

1.1 Agenda item 1: welcome, introductions, arrangements for the Hearing

- 1.1.1 Tom Henderson and Mustafa Latif-Aramesh, Partners at the Law Firm BDB Pitmans LLP, introduced themselves on behalf of and for the Applicant.
- 1.1.2 The Examining Authority (ExA) explained the purpose of ISH2 before proceeding to agenda item 3.

1.2 Agenda item 3: Applicant’s drafting approach

Agenda item 3(a): the structure of the dDCO

- 1.2.1 Mr Latif-Aramesh made three preliminary observations before addressing the structure of the dDCO:
 - a. First, Mr Latif-Aramesh explained that the Applicant had, as part of its preparation for ISH2, produced a detailed draft note responding to the ExA’s questions on the dDCO in Annex A to the published agenda, which the Applicant was happy to submit at the relevant deadline [**Post-hearing note**: a note setting out the Applicant’s responses to the ExA’s questions at Annex A to the agenda for ISH2 has been submitted with this summary of case on 6 July 2023 [[AS-089](#)].
 - b. Second, Mr Latif-Aramesh confirmed that he and Mr Henderson would be referring to the second iteration of the dDCO, [with examination library reference [AS-038](#)], and would also be referring to the Explanatory Memorandum (EM) submitted with the DCO application [[APP-057](#)].
 - c. Third, Mr Latif-Aramesh also confirmed that he would be referring throughout ISH2 to the detailed engagement which the Applicant has undertaken with Interested Parties in relation to the dDCO. Mr Latif-Aramesh explained that Schedule 2 to the dDCO, which contains the Requirements securing relevant control documents and management plans, was itself a document that had been included in the Community Impacts Consultation in Summer 2021. In addition, Mr Latif-Aramesh explained that, through detailed engagement with stakeholders, a number of significant changes had been made to the dDCO. Mr Latif-Aramesh therefore emphasised that the Applicant had stress-tested the positions that it had landed on in terms of the drafting of the dDCO and that the Applicant had, where possible, made modifications to the dDCO to reflect Interested Parties’ comments.

- 1.2.2 Mr Latif-Aramesh noted a few examples where detailed engagement with stakeholders had resulted in changes to the dDCO, in particular:
- a. The time period for compulsory acquisition of interests and rights in land under article 27 of the dDCO, which had been reduced from 10 years to 8 years, following comments from stakeholders.
 - b. The notice period in respect of a number of provisions, including the provision authorising temporary possession of land to be taken for the purposes of construction, which was increased from 14 days to 28 days.
 - c. Article 48 of the dDCO, which related to the protection of the tunnel area in the River Thames, which was refined to reflect comments and amendments proposed by the Port of London Authority (PLA).
 - d. Schedule 2 to the dDCO, which had been amended to include a provision which, in respect of any consultation relating to the discharge of Requirements, required a period of at least 28 days for such consultation and a mechanism whereby this period could be extended to 42 days where requested by the relevant planning authority.
 - e. A number of ancillary works in Schedule 1 to the dDCO were refined to works which do not give rise to materially new or materially different environmental effects compared with those reported in the Environmental Statement [[APP-138](#) to [APP-485](#)].
- 1.2.3 Mr Latif-Aramesh then proceeded to provide an overview of the structure of the dDCO. Mr Latif-Aramesh explained that the dDCO follows a heavily precedented structure and approach, containing seven parts comprising:
- a. Part 1, which contained the preliminary matters including the standard citation and commencement article, and article 2 which set out the definitions of terms which are used throughout the dDCO as well as further interpretive provisions.
 - b. Part 2 which contained the ‘Principal Powers’, including in particular the powers to carry out, operate and maintain the authorised development, and power to transfer the benefit of the Order.
 - c. Part 3 which contained powers and provisions relating to ‘Streets’, including maintenance obligations, traffic regulation powers, and highway classification provisions.
 - d. Part 4 which contained certain supplemental powers, including in relation to the navigation of watercourses, discharge of water, protective works, surveying and vegetation.

- e. Part 5 which contained powers relating to the compulsory acquisition of land and rights in land, and powers to take temporary possession of land. Provision was also made in relation to special category land and Crown land.
- f. Part 6 was concerned with operational provisions. This included powers to operate and regulate the use of the road tunnels and powers to impose road user charges.
- g. Finally, Part 7 contained miscellaneous and general powers, including the disapplication of certain legislative provisions, the interaction with the Town and Country Planning Act 1990 regime, and the deemed marine licence.

1.2.4

Mr Latif-Aramesh explained that the main body of the dDCO was then supported by a number of Schedules which were introduced by the relevant article. Mr Latif-Aramesh clarified that, again, the layout and content of the Schedules followed a heavily precedented and conventional approach:

- a. Schedule 1 described the authorised development, comprising ‘numbered’ works and was supported by ancillary letters works.
- b. Schedule 2 set out the Requirements.
- c. Schedules 3 to 6 related to traffic regulation, permanent stopping up and the classification of roads.
- d. Schedule 7 concerned Tree Preservation Orders.
- e. Schedules 8 to 11 related to compulsory acquisition and temporary possession.
- f. Schedules 12 and 13 addressed road user charging and tunnel byelaws respectively.
- g. Schedule 14 contained protective provisions for certain specified Interested Parties.
- h. Schedule 15 contained the Deemed Marine Licence.
- i. Schedule 16 listed the documents to be certified should development consent be granted.

1.2.5

Mr Latif-Aramesh confirmed that this concluded the Applicant’s submissions under agenda item 3(a).

Agenda item 3(b): the powers sought and their relationship to the Project

1.2.6

Mr Henderson introduced this agenda item by noting that the EM described the powers sought within the dDCO and contained an enhanced level of project-specific rationale for the inclusion of the provisions in the dDCO. By way of indication of this, Mr Henderson confirmed that the EM ran to more than 100 pages.

- 1.2.7 Mr Henderson made some brief comments on the general approach to the drafting of the dDCO. Mr Henderson confirmed that the Applicant had, in particular, structured the dDCO having regard to the Planning Inspectorate's Advice Note 15, which at paragraph 3.1 sets out that:
- It may also assist applicants to consider the drafting conventions of made DCOs published by the same department as would authorise their DCO, which may help to identify that department's drafting preferences.*
- 1.2.8 In relation to this specific point, Mr Henderson explained that it should be observed that, in recent highway DCO decisions, the Secretary of State had made clear that there should be a degree of consistency across DCOs. Mr Henderson confirmed that the Applicant would cite some examples of this approach in this written summary of oral evidence.
- 1.2.9 **Post-hearing note:** see, for example, the reference to 'maintain[ing] consistency with highways DCOs' in the M25 Junction 28 decision letter, and the rationale for refusing a correction in relation to the A303 Stonehenge scheme was that the Secretary of State's wording reflected 'preferred drafting and ensures a consistency of approach across transport development consent orders.'
- 1.2.10 Mr Henderson therefore confirmed that the starting point had been to follow the precedented approach to drafting routinely included in made DCOs where relevant for this project. Mr Henderson emphasised, in this regard, that the dDCO was supported by wide-ranging DCO practice, subject to limited exceptions which would be explored under the ExA's questions on aspects of novel drafting. However, Mr Henderson noted that there were relatively few examples of novel drafting in the dDCO, the provisions relating to road user charging being one case. Mr Henderson confirmed that this concluded the Applicant's submissions under agenda item 3(b).
- Agenda item 3(c): the relationship between the dDCO and plans securing the construction and operational performance of the proposed development*
- 1.2.11 Mr Latif-Aramesh began this agenda item by confirming that each of the documents that were specifically listed under this item of the agenda for ISH2, namely the Design Principles [[APP-516](#)], the Environmental Masterplan [[APP-159 to APP-168](#)], the first iteration of the Environmental Management Plan [[APP-336](#)], the outline Landscape and Ecology Management Plan [[APP-490 to APP-493](#)], were all legally secured by the dDCO.
- 1.2.12 Mr Latif-Aramesh explained that the Applicant's position was that, through the inclusion of project parameters and the submission of outline management plans and documents such as the Design Principles, it had provided an appropriate level of certainty as part of the application, commensurate with this stage in the development of the Project.
- 1.2.13 Mr Latif-Aramesh also confirmed that, as well as securing the management plans and documents through Schedule 2 to the dDCO, the Applicant had baked in further consultation with relevant stakeholders in relation to those plans and documents. In this regard, Mr Latif-Aramesh referred to the drafting in Schedule 2 to the dDCO which, in a number of cases, provided for consultation with relevant stakeholders prior to the submission of a plan or document for the approval of the Secretary of State.

- 1.2.14 Mr Latif-Aramesh also noted that, in a number of instances, the outline plans and documents themselves provided for the creation of working groups and forums during the construction and operational phases of the Project, where other parties would be able to participate and make their views known as the Project developed.
- 1.2.15 Mr Latif-Aramesh also observed that the consent sought was for a preliminary scheme design and not a detailed design. To ensure that Contractors were not constrained in delivering the Project in an environmentally sensitive and cost-effective way, Mr Latif-Aramesh therefore confirmed that there was a need for a proportionate degree of flexibility, which the Applicant had sought to reflect in the Schedule 2 Requirements of the dDCO.
- 1.2.16 Taking each of the outline documents listed in the agenda for ISH2 in turn:
- a. **The Design Principles:** Mr Latif-Aramesh explained that this control document, which was secured by Requirements 3 and 5 of the dDCO, was not common for transport DCOs. Mr Latif-Aramesh confirmed that, under Requirement 3, the detailed design of the Project must be carried out in accordance with the Design Principles. This was to ensure that those principles were properly secured and considered at the start of the detailed design process itself. Mr Latif-Aramesh noted that Requirement 5, which relates to landscaping, similarly referenced the Design Principles, stating that the Landscape and Ecology Management Plan submitted as part of the post-DCO process must 'reflect' the Design Principles.
 - b. For completeness, Mr Latif-Aramesh also explained that Requirement 13, which related to the travellers' site, referenced clause number S11.12 of the Design Principles, which related specifically to how the replacement travellers' site was to be designed. Mr Latif-Aramesh confirmed that the effect of this design principle was to require the replacement site:
 - i. To be developed in accordance with the Government's guidance on 'Designing Gypsy and Traveller Sites: Good Practice Guide'
 - ii. To include 21 residential pitches in three groupings, reflecting the existing site
 - iii. To be laid out in accordance with Essex Police's 'Designing Out Crime' guidance.
- 1.2.17 Mr Latif-Aramesh also noted that clause S11.12 secured an indicative plan contained in Annex C to the Design Principles. Mr Latif-Aramesh explained that this was a good example of where it would not be appropriate to provide this kind of detail in the dDCO itself. Mr Latif-Aramesh therefore explained that the approach had been to provide for the substantive controls to be contained in the outline documents and plans and to then create, via the Schedule 2 Requirements, the legal nexus between the dDCO and those outline documents and plans.

Notwithstanding the relatively short references to the Design Principles in the Schedule 2 Requirements, Mr Latif-Aramesh therefore noted that the substantive effect of them was to impose significant controls over how parts of the authorised development would be designed and developed.

- c. **The Environmental Masterplan:** Mr Latif-Aramesh confirmed that the Environmental Masterplan sets out the illustrative design of the Project and the proposed planting and landscaping. Mr Latif-Aramesh explained that this was the mechanism which secured the location of environmental mitigation and compensation features embedded within the Project design. Mr Latif-Aramesh confirmed that the Environmental Masterplan was secured by Requirement 5 of the dDCO, which provided that the Landscape and Ecology Management Plan must be '*based on the environmental masterplan*'.
- d. **The first iteration of the Environmental Management Plan:** Mr Latif-Aramesh explained that the Applicant's approach to the preparation of environmental management plans was based on the Design Manual for Roads and Bridges, specifically standard LA 120. Mr Latif-Aramesh confirmed that LA 120 required the production of three phases of management plans, relating to the design phase, the construction phase and the operational phase respectively. Mr Latif-Aramesh confirmed that the Code of Construction Practice (CoCP) [[APP-336](#)] was the first iteration of the Environmental Management Plan and was, in effect, the first of those plans required under LA 120. So far as the securing mechanism was concerned, Mr Latif-Aramesh confirmed that this was Requirement 4(2) of Schedule 2 to the dDCO, which required the Environmental Management Plan for the construction phase (i.e., the second iteration of the Environmental Management Plan) to be substantially in accordance with the CoCP.

1.2.18 Mr Latif-Aramesh made two further observations in respect of the first iteration of the Environmental Management Plan:

- a. It was considered that the requirement for the second iteration of the Environmental Management Plan to be substantially in accordance with the first iteration was appropriate. This was on the basis that the first iteration was an outline document which would necessarily develop as the detailed design and construction programme progressed. Mr Latif-Aramesh referred in this regard to the A47 Wansford to Sutton decision letter, where an attempt to remove the phrase '*substantially in accordance with*' was rebuffed by the Secretary of State. In doing so, Mr Latif-Aramesh noted that, in the decision letter for that project, it was said that '*the Secretary of State considers its omission an inappropriate fettering of his discretion*'.
- b. Attention was drawn to Table 2.1 of the CoCP, which listed the stakeholders that would be consulted prior to the submission of the second

iteration of the Environmental Management Plan to the Secretary of State for approval. Accordingly, to the extent that stakeholders considered that further matters should be included in the second iteration of the plan, Mr Latif-Aramesh confirmed that this would be considered in the round. Mr Latif-Aramesh further noted that paragraph 20 of Schedule 2 to the dDCO set out that, where consultation was required under a particular Requirement in Schedule 2, due consideration would be given to any responses to that consultation; and the Applicant would, in its application to the Secretary of State for approval, need to include copies of any representations made about the proposed application and provide account of how those representations had been taken into account as part of the submission made to the Secretary of State.

- 1.2.19 Mr Latif-Aramesh considered this was an important example of the provisions which the Applicant had included in the dDCO to provide assurance that the consultation would be transparent and meaningful in relation to the process for discharging Requirements.
- 1.2.20 **Outline Landscape and Ecology Management Plan:** Mr Latif-Aramesh explained that the outline Landscape and Ecology Management Plan set out the management regimes, expectations and monitoring requirements for the proposals in each land parcel depicted on the Environmental Masterplan. Mr Latif-Aramesh confirmed that a Landscape and Ecology Management Plan would need to be submitted to and approved by the Secretary of State, following the grant of consent, which must accord with the outline Landscape and Ecology Management Plan submitted with the application.
- 1.2.21 This concluded the Applicant's submissions under agenda item 3(c).
Agenda Item 3(d): the discharging role of the Secretary of State and other local and public authorities
- 1.2.22 Mr Latif-Aramesh began by making two preliminary observations in relation to this agenda item:
- a. First, mindful that the appropriate discharging authority under the Requirements was specifically drawn out in the agenda for ISH2, Mr Latif-Aramesh confirmed that this was one area where the Applicant had robustly tested the position that it had settled upon in the dDCO.
 - b. Second, Mr Latif-Aramesh confirmed that paragraph 6.3 of the EM included detailed reasons for why the Applicant had concluded that the Secretary of State was the appropriate discharging authority under the Requirements in Schedule 2 to the dDCO.
- 1.2.23 Mr Latif-Aramesh then proceeded to summarise the Applicant's position why the Secretary of State was the appropriate discharging authority in this case, which were:
- a. The number of local authorities across the route of the Project and the need for consistency in decision making warranted a single discharging authority.

- b. The complexity of the Project, including its scale and the need to consider significant utilities works, works on the strategic road network and the disparate elements of the Project being intrinsically linked together, justified a single discharging authority with competence across the entire range of the Project's features. Mr Latif-Aramesh noted that any attempt to disaggregate Project features, with different discharging authorities responsible for discreet parts, would be wholly impractical and artificial.
- c. The Requirements reflected arrangements agreed with the Department for Transport (DfT) and, in particular, in 2016 the DfT had agreed to be the competent authority for signing off compliance with the Requirements for DCOs promoted by National Highways. Mr Latif-Aramesh observed that there was now a specific team within the DfT, the purpose of which was to fulfil this function.
- d. In light of these agreed arrangements, Mr Latif-Aramesh noted that there were resources in place which were capable and competent to deal with the discharging function. If any local authority was given the function, it was considered that they would likely not have the resources to administer it, leading to duplicated aspects of public administration and inefficient use of taxpayer funds.
- e. The Planning Act 2008 (the 2008 Act) was specifically designed to simplify and streamline the overall process for nationally significant infrastructure projects (NSIPs). If a local authority was to refuse permission in its capacity as discharging authority, Mr Latif-Aramesh explained that it would be reasonable for there to be an appeal process. This implied a second, separate level of approval relating to all Requirements, which Mr Latif-Aramesh explained would dilute the fundamental purpose of the 2008 Act and could lead to delays in the delivery of the Project, leading to further disruption for local communities.
- f. In relation to a number of the Requirements, including Requirements 4, 5, 6, 8, 9, 10, 11, 12 and 14, Mr Latif-Aramesh noted that local authorities and relevant statutory bodies would be consulted prior to the submission of detailed plans to the Secretary of State for approval. Mr Latif-Aramesh referred again to the process under Requirement 20 of Schedule 2 to the dDCO, which ensured that consultation with local authorities would be transparent and meaningful.
- g. Separately to the project-specific justification provided, Mr Latif-Aramesh also confirmed that, across a number of contexts, DCOs promoted by National Highways, it had been the Secretary of State's position that it was the appropriate discharging authority for DCO Requirements. To emphasise this point, Mr Latif-Aramesh referred to the A303 Sparkford to Ilchester project, where the Secretary of State had in granting consent for that project

taken the decision to remove a local authority’s proposed discharge function in relation to a local road under a correction order. [

- 1.2.24 **Post-hearing note:** the full list of precedents on this point includes the A556 Knutsford to Bowdon Scheme, A160 - A180 Port of Immingham Improvement, A14 Cambridge to Huntingdon Improvement Scheme, M4 Junctions 3 to 12 Smart Motorway, M20 Junction 10A, A19 / A184 Testos Junction Improvement, A19 Downhill Lane, A63 Castle Street, M42 Junction 6, A303 Amesbury to Berwick Down, A38 Derby Junctions, the A1 Birley to Coalhouse, the A47 Wansford to Sutton, A57 Link Roads, A417 Missing Link, A47 - A11 Thickthorn Junction, A47 North Tuddenham to Easton, A428 Black Cat to Caxton Gibbet Road, and A47 Blofield to North Burlingham; the sole exception is a A19 Coast Road project which was made at a time when the functions of the DfT were being transferred to the highways agency and involved only one local authority (neither of these circumstances apply to the Project).
- 1.2.25 Notwithstanding the detailed points made in support of the position adopted in the dDCO, Mr Latif-Aramesh also noted that the dDCO provided for an appropriate and proportionate local authority approval function in certain contexts. For example, Mr Latif-Aramesh confirmed that, in relation to the traffic regulation provisions in Part 3 of the dDCO, the consent of the local authority was required in certain circumstances. Mr Latif-Aramesh also referred to Requirement 13 which, as previously discussed, provided for Thurrock Council to be the discharging authority in relation to the detailed layout and design of the proposed traveller’s site.
- 1.2.26 Mr Latif-Aramesh confirmed that this concluded the Applicant’s submissions under agenda item 3(d).
Agenda item 3(e): matters to be secured by alternative methods
- 1.2.27 Mr Henderson confirmed that, notwithstanding the Applicant’s aim of securing as much as possible via the dDCO and the supporting control documents, there would be a need for additional legal agreements and consents. Mr Henderson referred in this regard to two documents which formed part of the DCO application, namely:
- a. The Consents and Agreements Position Statement [APP-058](#)], which sets out a full list of the further agreements and consents the Applicant considered would be required in addition to the DCO, and this included a need for planning obligation agreements under section 106 of the Town and Country Planning Act 1990. Mr Henderson confirmed that updates to the Consents and Agreements Position Statement would be provided on a rolling basis at each deadline in the examination, with a nil return where there were no updates to note.
 - b. The Section 106 Agreements – Heads of Terms [APP-505](#)], which sets out the heads of terms proposed for section 106 agreements which were intended to be agreed individually with six authorities and were in progress in terms of their negotiation. Mr Henderson confirmed that it was the Applicant’s intention that these would be executed before the end of the

examination, mindful of the ExA's steer to this effect at the preliminary meeting.

1.2.28 Mr Henderson confirmed that this concluded the Applicant's submissions in respect of agenda item 3(e).

Agenda item 4(f): ongoing work with implications for the dDCO

1.2.29 Mr Henderson explained that the proposed changes which were currently the subject of the Minor Refinements Consultation would require changes to various plans and management documents. As a result, Mr Henderson confirmed that the changes which would be required to the dDCO itself were limited but there would nevertheless be minor changes to:

- a. Schedules 8 and 11 to the dDCO to reflect changes in land use requirements
- b. Schedule 1 to the dDCO to reflect changes in the location of construction compounds

1.2.30 Mr Henderson also confirmed that, in addition to these changes, there were a number of further minor updates to be made to the dDCO in due course. For example, further to discussions with the PLA, Mr Henderson reported that changes were proposed to be made to the protective provisions as well as article 32, which related to the acquisition of easements and restrictive covenants in the River Thames and to the drafting of article 44, which related to the Applicant's powers to use and close the tunnels. Mr Henderson also confirmed that the Applicant was proposing to address some minor typographic errors that had been identified following submission.

1.2.31 In relation to the protective provisions in Schedule 14 to the dDCO, Mr Henderson confirmed that the Applicant had included within the dDCO very well developed sets of protective provisions, which were the product of detailed negotiations with Statutory Undertakers over a number of years. Mr Henderson confirmed that the Applicant remained in discussions with Statutory Undertakers, which meant there may be some further refinements to the protective provisions, however this did not alter the Applicant's position that the provisions were well progressed and were considered to be generally close to their final form.

1.2.32 This concluded the Applicant's submissions under agenda item 3(f).

1.3 Agenda item 4: ExA's questions on the dDCO

Agenda item 4(a): the structure of the DCO

1.3.1 The PLA made submissions against this agenda item, referring to the Applicant's use of precedent to inform the dDCO. In particular, although recognising the value of precedent, the PLA submitted that the precedents used by the Applicant related principally to highways DCOs further upstream than the location of this project and did not therefore take into account the size of the river, higher traffic and volumes of river trade in this case.

1.3.2 In response, Mr Latif-Aramesh noted that, whilst precedent had been an important factor in guiding the Applicant's approach to drafting for the reasons

explained under agenda item 3, the Applicant had also considered the need for project-specific variation. For example, Mr Latif-Aramesh confirmed that article 48, which contained provisions relating to the protection of the tunnel area, had been developed in collaboration with the PLA.

- 1.3.3 As well as reviewing made highways DCOs, Mr Latif-Aramesh also referred to paragraph 5.2 of the EM [[APP-057](#)], which confirmed that the Applicant had also referred to made Orders under the Transport and Works Act 1992 relating to underground and tunnel projects, including river projects.
- 1.3.4 In response to concerns raised by the PLA about its continued ability to dredge in the River Thames to an appropriate depth as a result of the Project tunnels, Mr Latif-Aramesh noted that the Applicant was awaiting comments from the PLA on draft provisions which the Applicant had proposed in order to seek to provide comfort to the PLA on this issue. Mr Latif-Aramesh confirmed that the Applicant was confident that the proposed provisions which it had put to the PLA would provide the assurance which the PLA was seeking
- 1.3.5 **Post-hearing note:** a provision is now included in paragraph 99(1) of Schedule 14 of the dDCO submitted at Deadline 1, and article 6(2) has been amended to make clear that limits of deviation take effect subject to paragraph 99(1). This removes any residual doubt and confirms that the depths of the tunnels agreed with the PLA will be preserved. These amendments were shared with the PLA, but at the time of finalising this note, no response has been provided by the PLA. The Applicant further refers to Annex C which is a sketch showing a composite image of the river restrictions in the River Restrictions Plan with the limits of deviation in the Tunnels Limits of Deviation Plan which shows that the upper extent of the limits of deviation for the tunnel is at some distance from the navigable channel. The Applicant further refers to commentary on this issue in its response to Annex A submitted on 6 July [[AS-089](#)].
- 1.3.6 Mr Latif-Aramesh also observed that paragraph 99 of the protective provisions for the benefit of the PLA in the dDCO specifically required the design and construction of the tunnelling works to maintain a depth of 12.5 metres. Mr Latif-Aramesh noted that the same paragraph required the Applicant to allow for potential 'over-dredge' of 0.5 metres. Mr Latif-Aramesh therefore confirmed that, in the Applicant's view, the design of the tunnels was such that the future aspirations of the port would not be impacted.
- 1.3.7 As regards the PLA's comments about the impact of the Project on the River Thames in this location, Mr Latif-Aramesh also noted that, unlike some other Orders, the extent of physical interference above the river bed in this case was limited. Mr Latif-Aramesh confirmed that, for the vast majority of the extent of the tunnel area, the only powers that the dDCO was seeking were those associated with subsoil works and subsoil acquisition. This meant that there was no power to take temporary possession of the surface of the River Thames.
- 1.3.8 Mr Latif-Aramesh confirmed that the only circumstances where it was anticipated that powers under the dDCO would be exercised on the river bed related to a temporary outfall, a permanent outfall and other ground investigation works.

Agenda item 4(b): the powers sought and their relationship to the Project

- 1.3.9 The ExA opened this agenda item by asking whether there was in this case a potential for multiple Secretaries of State to be the decision makers in relation to the dDCO. In reply, Mr Latif-Aramesh confirmed that a letter had been published by the DfT which confirmed that the DfT would make the decisions in cases such as these (i.e., where there was a primary highway development with utilities NSIPs), in consultation with the Department for Energy Security and Net Zero. Mr Latif-Aramesh confirmed that the Applicant was content to submit this letter to the examination. [**Post-hearing written submission:** this letter is included at Annex A to this summary of case.]
- 1.3.10 In response to the ExA's comments regarding the ability of an Order under the 2008 Act to authorise multiple NSIPs, Mr Latif-Aramesh confirmed that the approach was precedented. Mr Latif-Aramesh referred by way of example to the A428 highway project, which contained both a gas pipeline NSIP and the highways NSIP. Mr Latif-Aramesh also noted that there were examples in a non-highways context, for example the Galloper Wind Farm development and some of the rail freight DCOs.
- 1.3.11 As regards the question of how the Applicant had sought to provide for the authorisation of a number of NSIPs within the dDCO, Mr Latif-Aramesh confirmed that Schedule 1 to the dDCO contained the relevant Works and that the preamble to the dDCO included references to those sections of the 2008 Act under which the energy NSIPs were promoted, namely section 20 of the 2008 Act in connection with the gas pipeline NSIP and section 16 in respect of the electrical line NSIPs.
- 1.3.12 The ExA also referred to submissions made by Interested Parties at Issue Specific Hearing 1 on Project Definition, regarding the question of whether it was possible that works which satisfied the statutory definition of an NSIP in their own right were also something that could be associated development in relation to another primary NSIP.
- 1.3.13 In response, Mr Latif-Aramesh explained that, whilst the Applicant was happy to collaborate with Interested Parties on this issue, it agreed with submissions made on behalf of Thurrock Council that the point was largely academic. This was because the dDCO contained the relevant powers to construct each NSIP, the Applicant had assessed the relevant utilities NSIPs and Appendix B to the Planning Statement [**Application Document APP-497**] contained the consideration of the National Policy Statements relating to the energy works.
- 1.3.14 **Post-hearing written submission:** see Annex D for a Joint Legal Note on the Overlap between NSIP and Associated Development.
- 1.3.15 The ExA then turned to address the issue of ancillary works. The ExA asked the Applicant whether there were general or ancillary works in Schedule 1 to the dDCO that needed to become located works, shown as numbered works on the Works Plans [**APP-018 and APP-021 and AS-024, AS-026, AS-028 and AS-030**], in order to ensure that the environmental effects of those works remained within the worst-case identified in the Environmental Statement.
- 1.3.16 Mr Henderson confirmed that, in the Applicant's view, this was not necessary. Mr Henderson made the following submissions in support of that summary position:

- a. It was confirmed that the ancillary works listed in Schedule 1 to the dDCO had two important caveats drafted into them. First, the ancillary works powers could only be exercised for the purposes of, or in connection with, the other works specified in the dDCO. Mr Henderson emphasised that, in Schedule 1 to the dDCO, the Applicant had included a very detailed list of the ‘numbered works’, to which those lettered ancillary works would need to connect.
- b. It was also noted that the ancillary works in Schedule 1 were limited to those which would not be likely to give rise to any materially new or materially different environmental effects. Mr Henderson noted that this important caveat represented a well-trodden approach used in other DCOs.
- c. The ancillary works powers remained subject to all of the controls which the Applicant had referred to in Schedule 2 to the dDCO, namely the various plans and control documents that would need to be adhered to in carrying out any of those lettered works.

1.3.17 For these reasons, Mr Henderson confirmed that it was the Applicant’s view that the ancillary works provisions provided an appropriate degree of flexibility to deliver the works, whilst operating within the framework of the extensive controls provided for by the dDCO. Mr Henderson also confirmed that the approach to the drafting of the ancillary works powers was heavily precedented and, in that regard, there was nothing new or novel in what the Applicant was proposing.

Agenda item 4(c): the relationship between the dDCO and plans securing the construction and operational performance of the proposed development; and Agenda item 4(d): the discharging role of the Secretary of State and other local and public authorities

1.3.18 A number of Interested Parties made submissions against these agenda items, notably the appropriateness of the discharging role of the Secretary of State in the dDCO. Several Interested Parties made submissions to the effect that the discharging authority in relation to the dDCO should be the local authorities.

1.3.19 Mr Latif-Aramesh made a number of submissions by way of response on this issue. First, Mr Latif-Aramesh stated that it was the Applicant’s view that there was nothing unique about this project which justified a departure from the practice of the DfT in relation to DCOs pertaining to the strategic road network. Mr Latif-Aramesh submitted that the presence of utilities NSIPs in this case did not justify a different approach, noting that in the A428 DCO application cited earlier – which had both a gas pipeline NSIP and highways NSIP – the Secretary of State remained the discharging authority.

1.3.20 On a related note, Mr Latif-Aramesh observed that a number of National Highways DCOs included significant utilities works which did not quite meet the thresholds of an NSIP but were, nevertheless, significant in scale and complexity. Mr Latif-Aramesh cited the A19 Testo’s Junction and M42 Junction 6 projects by way of examples. In those cases, Mr Latif-Aramesh confirmed that the Secretary of State had remained the discharging authority.

- 1.3.21 Mr Latif-Aramesh also emphasised the importance of understanding the process which was involved in the discharge of Requirements. Mr Latif-Aramesh explained that any application to the Secretary of State for approval under the Requirements would be preceded by extensive and detailed pre-application engagement with relevant stakeholders. It was therefore important to note that the process of engaging with and listening to stakeholders would not stop when the DCO was granted. Whilst the discharging role was properly one for the Secretary of State, Mr Latif-Aramesh therefore sought to emphasise the significant part which local authorities would play in the discharging process. In response to certain Interested Parties' comments regarding the independence of the discharging process, Mr Latif-Aramesh noted that the DfT and the Applicant were mindful of this and had set up processes to ensure that decisions taken were fair and reasonable. Mr Latif-Aramesh confirmed that information barriers and handling arrangements were in place within the DfT's designated unit, which ensured that decisions were taken fairly, transparently, and without any question as to independence.
- 1.3.22 **Post-hearing note:** Both the Applicant and the Secretary of State are subject to general public law principles and subject to judicial review on grounds of procedural unfairness in carrying out public functions. It would be inappropriate to assume that the Secretary of State would act unlawfully.
- 1.3.23 The Applicant notes the request from GBC (see ISH2 Action 7 [EV-030a]) to provide instances where the discharging body has refused an application for the discharge of a requirement from the undertaker of a made transport DCO. In response, the Applicant would highlight that:
- a. (1) The process of engagement between a National Highways project and the Secretary of State's case unit team is an iterative one, with the aim of ensuring that refusals do not eventualise. This iterative process is shown in the process map jointly agreed between National Highways and the DfT in Annex E to this document.
 - b. (2) It is important to emphasise the specific context of the discharge of Requirements: it involves approving detailed parameters of the development which have already been the subject of extensive examination, engagement and approval at the DCO consenting stage.
- In the context of these two points, it follows that refusals are extremely unlikely to arise. The Applicant would note that register of Requirements are publicly accessible, and the correspondence from the DfT on further information requests, and approvals generally can be readily viewed. The dDCO includes a requirement for this in the Project DCO at paragraph 21 of Schedule 2 to this Order][**end of post-hearing note**].
- 1.3.24 Turning to the substantive comments raised by Interested Parties calling for the discharging role to fall to local authorities instead of the Secretary of State, Mr Latif-Aramesh submitted that:

- a. There was significant scope for a project of this scale, with works which would traverse multiple local authority boundaries, to give rise to inconsistent decision making.
- b. The need for an appeal process to be included in the dDCO if local authorities were discharging authorities would lead to further time and costs for all parties involved.
- c. The extensive engagement which has taken place to date with local authorities, and which will continue to take place as part of the examination and beyond, including through the post-discharge forums, meant that local authorities were integral to the process, notwithstanding that the Secretary of State was the discharging authority.
- d. Precedent pointed very clearly to the discharge function being undertaken by the Secretary of State. Mr Latif-Aramesh referred again to the A303 Sparkford to Ilchester project, where the Examining Authority for that scheme had recommended that the local authority should be the discharging authority, however this was very quickly followed by a correction order substituting the local authority for the Secretary of State [**post-hearing note**: see full list of precedents above].

1.3.25 There was a robust process in place to ensure that decision-making by the Secretary of State was transparent and independent. Mr Latif-Aramesh then addressed comments by Interested Parties in relation to the duty to consult with local authorities under Requirement 20 of the dDCO prior to making any submission to the Secretary of State for approval under the Requirements:

- a. In response to the ExA's question of what would happen where the Applicant consulted with a local authority prior to making an application for approval to the Secretary of State, but there was no response, Mr Latif-Aramesh explained that:
 - i. It was important to note that the process which led to formal consultation with local authorities under Requirement 20 of the dDCO would necessarily have involved close engagement with those authorities, such that any proposed submission to the Secretary of State will have been informed by comments and suggestions received from local authorities.
 - ii. Requirement 20 included the ability for the Applicant to extend the consultation period from 28 days to 42 days, which would help to ease any resourcing constraints and enable local authorities to provide comments on a proposed submission within extended timescales.
 - iii. In other contexts, the dDCO preserved the existing position in relation to the timescales within which applications were considered by local authorities. Mr Latif-Aramesh referred to the local authority permit

schemes in this regard, which the Applicant was proposing to use and in relation to which the lead in times for approvals were much longer than those specified in Requirement 20. However, Mr Latif-Aramesh stressed that this did not change the Applicant's view that the consultation timescales set out in Schedule 2 to the dDCO were appropriate and necessary to ensure that the scheme could proceed expeditiously.

- b. In response to related concerns raised by Gravesham Borough Council (GBC) regarding Requirement 20 of the dDCO, Mr Latif-Aramesh submitted that the Applicant did not agree with GBC's contention that paragraph 20 of Schedule 2 merely required the Applicant to read consultation responses and forward them to the Secretary of State as part of a submission for approval under the Requirements. Mr Latif-Aramesh noted that paragraph 20 specifically required the Applicant to provide a written account to the Secretary of State of how any representations received had been taken into account. The Applicant would therefore need to have due regard – a phrase that was used in the 2008 Act itself – to responses received.
- c. Transport for London (TfL) also raised the concern that the highway authority was not currently consulted under the Requirements in relation to matters which were relevant to assets which it would be responsible for maintaining. In response, Mr Latif-Aramesh referred to a number of control plans, including the CoCP, the Wider Network Impacts Management and Monitoring Plan [[APP-545](#)] and the outline Traffic Management Plan for Construction (oTMPfC) [[APP-547](#)], which secured the requirement for consultation with local highway authorities, including TfL, in relation to matters addressed by those plans. Mr Latif-Aramesh referred by way of example to Requirement 10(2), which required prior consultation on any traffic management plan with the bodies listed in Table 2.1 of the oTMPfC. Therefore, Mr Latif-Aramesh confirmed that, although TfL was not specifically named on the face of the dDCO, its interests were properly protected.
- d. In response to Thurrock Council's comments that the dDCO should make provision for management plans to be updated following the grant of consent, Mr Latif-Aramesh confirmed that this was already factored into the process, because they were outline management at this stage and then the approval which would be sought if the Order was granted related to a second iteration of the plan. This iterative process was designed to ensure that evolution in project design and construction programme was reflected through the management plans.

1.3.26 Mr Henderson also addressed further issues arising from the ExA and Interested Parties' submissions and questions under agenda items 4(c) and 4(d). In particular:

- a. In response to the ExA’s question whether, in addition to local authorities, the dDCO made appropriate provision for consultation with other statutory bodies, Mr Henderson confirmed that this was provided for in a number of instances. Mr Henderson referred, by way of example, to Requirement 7 of the dDCO, which contained a commitment to consult with Natural England. Mr Henderson also referred to the example given earlier by Mr Latif-Aramesh, namely the requirement to submit a traffic management plan for approval following consultation with the bodies set out in Table 2.1 of the oTMPfC.
- b. As regards comments made by GBC in relation to the clarity of the vertical alignments of the proposed highway structures at the A2 junction, Mr Henderson referred to the Engineering Drawings and Sections [[APP-033](#)], which shows the vertical alignments of carriageways through that junction, as well as the Photomontages [[APP-244](#)], the location of which were agreed with GBC in 2019. In addition, Mr Henderson noted that the Applicant had published a flythrough of the Project, the latest in January 2023. Mr Henderson confirmed that the Applicant was happy to engage further with GBC in relation to any question it had around the visual depiction of the proposed A2 junction.
- c. In relation to submissions made by Mr Holland on behalf of a number of landowners, Mr Henderson confirmed that the Applicant did not consider that it would be appropriate, as Mr Holland had suggested, for landowners to be consulted in relation to the discharge of Requirements, given the function which they were intended to perform. Mr Henderson explained that there was no precedent for this, as far as the Applicant was aware. Mr Henderson did however note that the CoCP, which was secured by Requirement 4, contained relevant commitments to engage with affected landowners, including through community liaison groups. Mr Henderson also noted that, where a landowner was directly affected by the implementation of the Project through temporary possession or compulsory acquisition, the Applicant would be engaging with landowners in the normal way in advance of exercising those powers.

Agenda item 4(e): tunnelling provisions

- 1.3.27 In response to comments made by the PLA regarding the upwards limits of deviation in relation to the tunnels and the impacts of these on the PLA’s dredging operations, Mr Latif-Aramesh confirmed that the Applicant had provided, and was still awaiting feedback from, the PLA on a provision which would ensure that dredging depths were maintained at the levels which the PLA had requested.
- 1.3.28 GBC also requested that the Applicant give consideration to a Requirement in the dDCO which gave effect to the Applicant’s proposals for the construction of the tunnels, specifically that material would arrive from the north and all slurry

and spoil would also exit from the north. Mr Latif-Aramesh confirmed that the Applicant would consider and respond to any drafting proposal which GBC submitted as part of its post-hearing submissions.

Agenda item 4(g): road charging provisions

- 1.3.29 Whilst noting that the topic of road charging would be addressed at further points in the examination, in response to submissions by the London Borough of Havering and GBC calling for changes to the road charging provisions proposed in the dDCO, Mr Latif-Aramesh confirmed that the Applicant had consulted with the DfT in its capacity as the proposed charging authority and that the DfT had confirmed that the proposed road user charging was aligned with Government policy. [**Post-hearing written submission:** this letter is included at Annex B to this summary of case.]

Agenda item 4(h): protective provisions

- 1.3.30 Mr Henderson confirmed that the Applicant would be submitting updated statements of common ground at the next appropriate deadline, and these would address the status of progress in relation to protective provisions.
- 1.3.31 As regards submissions by London Borough of Havering that it should have the benefit of protective provisions on the face of the dDCO rather than a private agreement, Mr Henderson confirmed that the Applicant remained of the view that a side agreement was the appropriate way to proceed but continued to discuss this with the London Borough of Havering. Similarly, Mr Henderson confirmed that the Applicant reserved its position, at this stage, in relation to TfL's request for protective provisions within the dDCO.
- 1.3.32 In response to submissions by the Environment Agency (EA), Mr Latif-Aramesh confirmed that the Applicant had reached agreement with the EA in relation to all but one matter, which remained under discussion.

Agenda item 4(i): the Deemed Marine Licence

- 1.3.33 Mr Latif-Aramesh confirmed that the Applicant had received the latest draft deemed marine licence from the Marine Management Organisation (MMO) and would be responding shortly. Mr Latif-Aramesh confirmed that the Applicant expected that all matters would be agreed with the MMO before the end of the examination.

Agenda item 4(j): ExA observations on drafting

- 1.3.34 As noted, the Applicant has produced a note setting out responses to the ExA's observations on drafting at Annex A to the agenda for ISH2. Where relevant, that note also includes a response to specific points raised by Interested Parties on matters addressed in Annex A.
- 1.3.35 The following is a summary of points raised at ISH2 which are not addressed in the Applicant's detailed note:
- a. In response to submissions made on behalf of Kent County Council regarding the distinction between the terms 'begin' and 'commence' in Schedule 2 to the dDCO, Mr Latif-Aramesh confirmed that beginning the authorised development would be sufficient to discharge Requirement 2 of the dDCO. Mr Latif-Aramesh confirmed that this was deliberate and had

been included so that there is only a requirement to begin the development within the time period mentioned in Requirement 2. Mr Latif-Aramesh explained that Requirement 2 was distinct from the compulsory acquisition provisions, which had separate time periods attached to them that were not related to the commencement or beginning of development.

- b. Regarding comments made by the Port of Tilbury Limited (PoTL) about the impact of the Project on its interests and the need for an interface agreement, Mr Henderson noted that there had been positive engagement with PoTL and that the dDCO included protective provisions for the benefit of PoTL, which included a plan approval mechanism in favour of PoTL for certain specified works. Mr Henderson confirmed that these were submitted prior to the application but the Applicant had not received any comments to date from PoTL on the draft. Mr Henderson also highlighted a number of land agreements that the Applicant had already settled with PoTL.
- c. In relation to comments made by various Interested Parties in relation to the preliminary works, Mr Henderson confirmed that the Applicant had consulted on this approach (Community Impacts Consultation 2021), and in response to feedback received during the pre-application process, incorporated important additional safeguards which ensured that the carrying out of preliminary works was subject to appropriate controls. In particular, Mr Henderson explained that a preliminary works environmental management plan was created as a control document and some 28 preliminary works Register of Environmental Actions and Commitments (REAC) commitments were established. The requirement to comply with that plan and the REAC commitments which formed part of it was secured by Requirement 4(1) of the dDCO. Mr Henderson confirmed that this ensured that for works carried out prior to the discharge of Requirement 4(2), appropriate controls were in place at the point such preliminary works were proposed to be carried out.

1.3.36 Mr Henderson also explained that the purpose of the preliminary works process was to facilitate the expeditious delivery of the construction programme. These works have been assessed as having a negligible or relatively minor environmental impact. Mr Henderson confirmed that the only works which could be undertaken, and their specific locations, were listed in Table 1.1 of the Preliminary Works Environmental Management Plan [[APP-339](#)].

Annex A



Department
for Transport



Department for
Business, Energy
& Industrial Strategy

Your Ref: TR010044 & TR010032

DATE 30 July 2021

Sarah Richards
Chief Executive
Planning Inspectorate
Temple Quay House
2 The Square
Temple Quay
Bristol, BS1 6PN

Dear Ms Richards

TRANSPORT DEVELOPMENT CONSENT ORDERS THAT INCLUDE ENERGY ELEMENTS ABOVE THE PLANNING ACT 2008 THRESHOLD

We are writing to confirm the decision making process that has been agreed by our respective Secretaries of State, in relation to applications for Development Consent Orders under the Planning Act 2008, for schemes that include both transport and energy elements that are significant enough to be Nationally Significant Infrastructure Projects (NSIPs) in their own right. This covers applications where transport is the main NSIP but where energy diversions are proposed which meet the thresholds laid out in the Planning Act 2008 to also be an NSIP.

It has been agreed that for such applications, the Secretary of State for Transport will be the sole decision maker. The Secretary of State for Business, Energy and Industrial Strategy (BEIS) will however be consulted on the recommendations made by the Examining Authority in relation to the energy NSIP(s) and his comments will be taken into account when the Secretary of State for Transport takes the final decision. The purpose of this consultation will

be to ensure the decision on the energy NSIP(s) aligns with energy policy, as the Secretary of State for BEIS is best placed to advise on this.

Both Secretaries of State reserve the right to change this position in the future or become more or less involved in decisions as may be required to ensure applications are decided in an efficient and robust way.

Yours sincerely

Natasha Kopala

Natasha Kopala
Department for Transport

Gareth Leigh

Gareth Leigh
Department for Business, Energy &
Industrial Strategy

Annex B



Department
for Transport

Rosemary Hopkins
Deputy Director - Roads and
Projects Infrastructure Delivery
Directorate, DfT

Great Minster House
33 Horseferry Road
London
SW1P 4DR

Email:

[\[REDACTED\]@dft.gov.uk](mailto:[REDACTED]@dft.gov.uk)

[Web site: www.gov.uk/dft](http://www.gov.uk/dft)

Mark Bottomley
Development Director - Lower Thames Crossing
National Highways

08 November 2022

By email only to:

[\[REDACTED\]@lowerthamescrossing.co.uk](mailto:[REDACTED]@lowerthamescrossing.co.uk)

Dear Mark,

Lower Thames Crossing – Road User Charging Statement

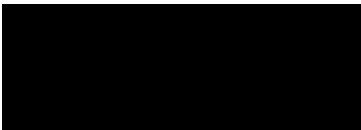
The Department for Transport noted the powers for road user charging that are to be sought in the Development Consent Order and the proposals, as detailed in the Road User Charging Statement, for their implementation at the Lower Thames Crossing. The Department has reviewed the proposals and supports the approach for the Development Consent Order to introduce powers to impose road user charges equal to, and aligned with, those at the Dartford Crossing.

In particular, the Department notes specifically that under the Development Consent Order, the Secretary of State would become the Charging Authority for the Lower

Thames Crossing, thereby achieving consistency in charging authority between LTC and the Dartford Crossing. It also notes that the DCO would allow the Secretary of State to introduce a Local Resident Discount Scheme (LRDS) for the Lower Thames Crossing. This would offer the same type of discount arrangements as are offered on the Dartford Crossing LRDS scheme. It would be aligned with the Dartford LRDS by being offered to residents of the boroughs in which the tunnel portals would be situated (Gravesham and Thurrock for LTC, Dartford and Thurrock for the Dartford Crossing).

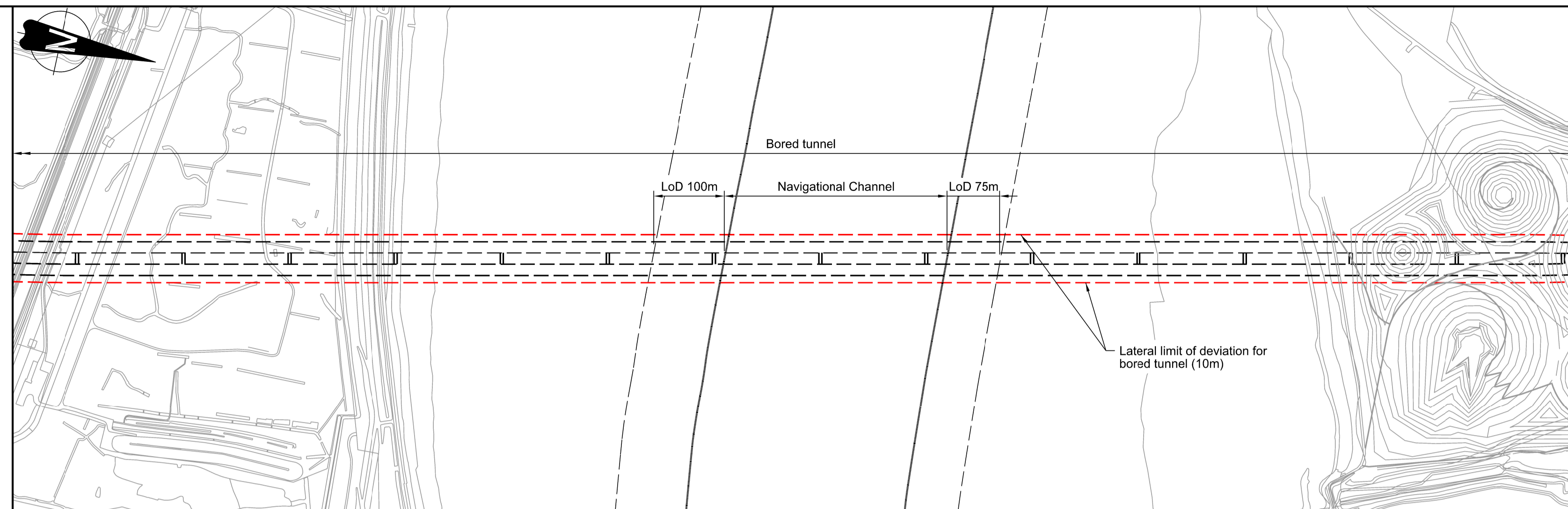
The Department agrees that as a matter of policy the Secretary of State's powers under the Transport Act 2000 should not be modified or prejudiced by the LTC DCO. Without prejudice to any decisions by the Secretary of State on the grant of the Development Consent Order, including on the scope of the road user charging powers, the Department for Transport has reviewed details of the proposed road user charging regime and underlying assumptions and powers to be sought and confirms that these are in line with government policy.

Yours sincerely

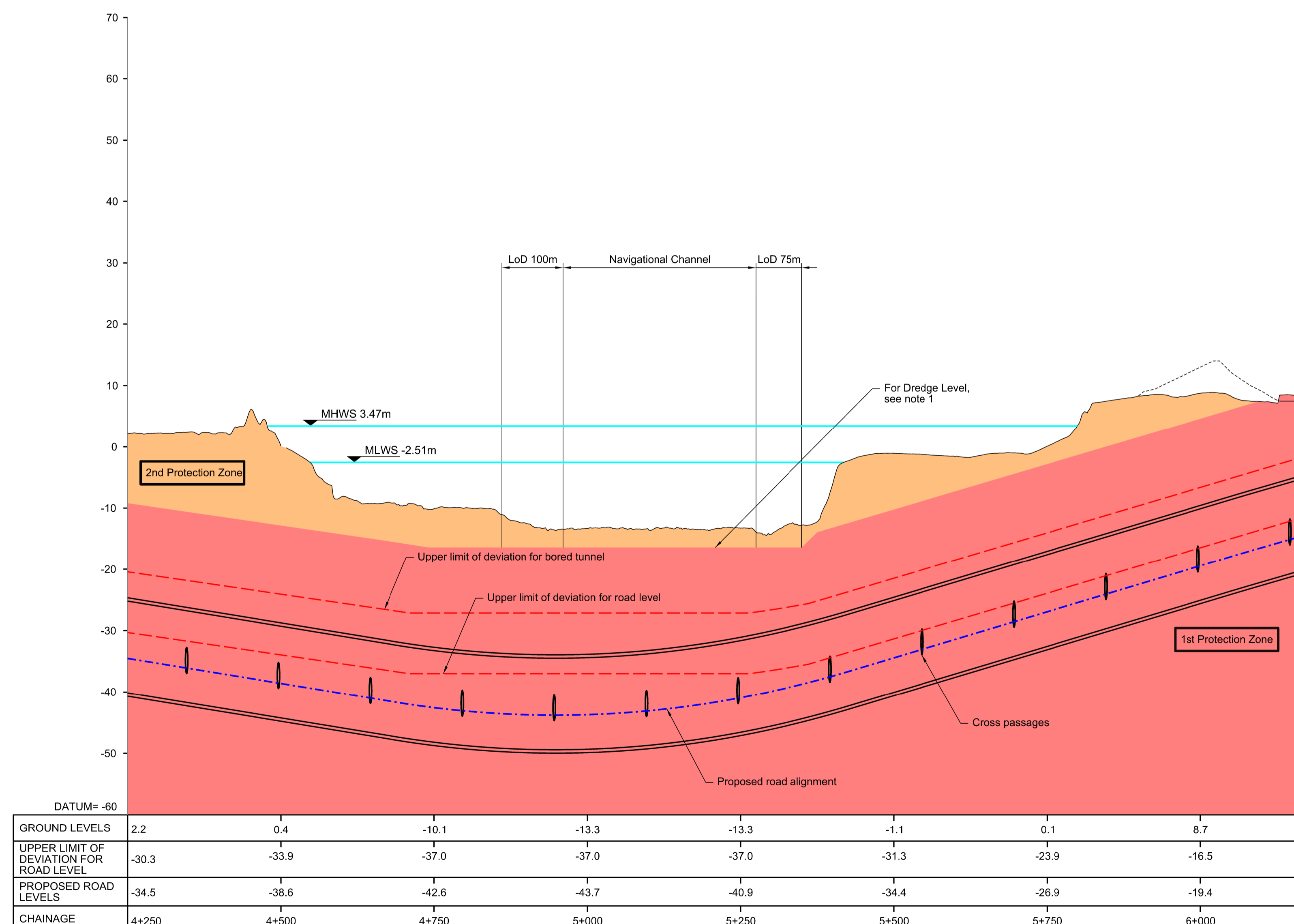


Rosemary Hopkins

Annex C



PLAN

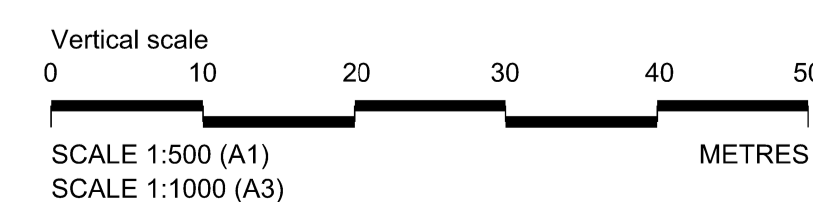


LONGITUDINAL SECTION

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1. Agreement through SoCG for PLA to dredge to the interface of the first and second protection zones across the width of the navigational channel to an absolute limit depth of -16.12m AOD, with an agreed dredge depth of -15.62m AOD (-12.5m CD plus an allowance of 0.5m for overredging).

- LEGEND:
- - - LIMIT OF DEVIATION
 - - - PROPOSED ROAD ALIGNMENT
 - FIRST PROTECTION ZONE
 - SECOND PROTECTION ZONE
 - MHWS MEAN HIGH WATER SPRINGS
 - MLWS MEAN LOW WATER SPRINGS



Client
 Horizontal scale
 Project
LOWER THAMES CROSSING

Tunnel Limits of Deviation and Tunnel Protection Zones

HE540039-CJV-GEN-SZP_GN000000_Z-SK-CX-10047

Rev	Status	Rev. Date	Purpose of revision	Drawn	Check'd	Appr'd

Annex D

ANNEX D

NOTE ON OVERLAP BETWEEN NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECTS
AND ASSOCIATED DEVELOPMENT UNDER THE PLANNING ACT 2008

LOWER THAMES CROSSING

1 BACKGROUND

- 1.1 During the course of Issue Specific Hearing 2, relating to the application for development consent for the Lower Thames Crossing (the **Project**) promoted by National Highways (the **Applicant**), the Examining Authority (the **ExA**) noted that there was a “question about whether it was ever possible that anything that was capable of satisfying the statutory definition of a nationally significant infrastructure project (**NSIP**) in its own right was something that could be associated development in relation to another primary NSIP”.
- 1.2 This note has been prepared by BDB Pitmans LLP, Andrew Tait KC and Isabella Tafur (on behalf of the Applicant), and shared with Michael Bedford KC (acting for Gravesham Borough Council), Michael Humphries KC (acting for Kent County Council), Douglas Edwards KC and George Mackenzie (acting for Thurrock Council) who have endorsed its contents.

2 STATUTORY FRAMEWORK

- 2.1 Under section 115(1) of the Planning Act 2008 (the **2008 Act**), development consent may be granted for:
- (a) *development for which development consent is required, or*
 - (b) *associated development; or*
 - (c) *related housing development.*¹
- 2.2 Under section 14 of the 2008 Act², a nationally significant infrastructure project is defined as a project which falls within subsection (1)(a) to (q). Those lettered sub-paragraphs then cross refer to development which is the subject of the various NSIP thresholds and tests contained in sections 15 to 30.
- 2.3 The phrase “development for which development consent is required” in section 115(1)(a) of the 2008 Act must be read in line with section 31 of the 2008 Act³ which states that development consent “*is required for development to the extent that the development is or forms part of a*

¹ <https://www.legislation.gov.uk/ukpga/2008/29/section/115>

² <https://www.legislation.gov.uk/ukpga/2008/29/section/14>

³ <https://www.legislation.gov.uk/ukpga/2008/29/section/31>

nationally significant infrastructure project” (i.e., it ties the *requirement* for development consent to development projects meeting the relevant tests in sections 15 to 30 of the 2008 Act).

- 2.4 Associated development is defined in the 2008 Act as development which is associated with the NSIP development (i.e. associated with the “development for which development consent is required”). Section 115(2) to (4) of the 2008 Act set out other requirements relating to associated development.

3 ANALYSIS

- 3.1 There are a number of utilities works that are necessary to deliver the Lower Thames Crossing highway, which themselves satisfy the thresholds and definitions in section 16⁴ (electric lines) and section 20 (gas transporter pipe-lines) of the 2008 Act.⁵ Given that they satisfy the requirements in those sections, those utility works themselves constitute NSIPs (i.e. “development for which development consent is required”). Accordingly the Project has been presented as including three gas pipeline NSIPs, and one electric line NSIP, in addition to the highways NSIP. These works are identified in the Explanatory Memorandum [APP-057].

- 3.2 As a matter of law it is not possible, *additionally or alternatively*, to give development consent for NSIP development as associated development. This position is based on:

- 3.2.1 **Section 115:** Section 115 of the 2008 Act sets out the development which can be consented pursuant to the 2008 Act and includes “development for which development consent is required” as an alternative to “associated development” (via the use of the word “or” at the end of the former in section 115(1)(a), rather than “and”). From the context it is clear that “or” is being used in the disjunctive (and not conjunctive) sense in section 115(1)(a). The 2008 Act therefore draws a clear distinction between an NSIP for which development consent is required, and associated development that may be included in a development consent order but does not have to be. Section 115 recognises that these are two elements of development are distinct, one from another, whilst at the same time making clear that a development consent order may be granted in respect of both.

In the case of the Project, there are multiple nationally significant infrastructure projects. This is unremarkable. Guidance issued by the Department for Communities and Local Government recognises that a single application can cover more than one project requiring development consent and encourages applicants to make a single application where such developments are clearly linked.⁶ The plain terms of section 115 support the distinction between NSIP and associated development in that they are identified separately, as alternatives, and s.115(2) includes the stipulation that

⁴ <https://www.legislation.gov.uk/ukpga/2008/29/section/16>

⁵ <https://www.legislation.gov.uk/ukpga/2008/29/section/20>

⁶ Guidance on associated development applications for major infrastructure projects, paragraph 9

associated development must be “associated with the development within subsection (1)(a)”. It would be difficult to understand this statement if the development in question could be both an NSIP and associated development.

- 3.2.2 **No NSIP “opt out”** – if development meets the relevant thresholds and tests in sections 15-30 of the 2008 Act it automatically qualifies as a NSIP and must be treated as such under the 2008 Act. There is no mechanism in the 2008 Act, express or implied, by which a developer can elect to proceed on the basis that qualifying development is not to be treated as a NSIP. If Parliament had intended such an “opt out” route to exist, it could have legislated for it.
- 3.2.3 **Welsh position** – that NSIPs and associated development are distinct and mutually exclusive categories can be seen by the historic position in Wales which was that a DCO cannot authorise associated development.⁷ This supports the position that a project which constitutes a NSIP cannot also be treated as associated development.
- 3.2.4 **Aquind Interconnector Decision Letter:** whilst the Aquind Interconnector DCO project was refused (and it is now being re-determined after a successful legal challenge), the decision grappled with the question of whether a specific element of the project was “associated development” or part of the project of national significance brought into the 2008 Act regime under a direction under section 35. The quashing of the decision did not turn on this issue so it is considered to be helpful in this context.
- 3.2.5 The Examining Authority’s Recommendation Report sets out:

“...the ExA considers there to be a distinction between the development which is described in the s35 Direction request (which is development for which development consent is required, as the Direction causes it to fall within s115(1)(a) of the PA2008), and the Associated Development proposed as part of the application and set out in Schedule 1(2) of the Applicant’s draft DCO”

The Secretary of State’s decision letter disagreed with the ExA’s conclusion that the relevant part of the development was to be classed under section 115(1)(a) (i.e., as part of the NSIP), but it is implicit in the Secretary of State’s reasoning (in common with the Recommendation Report) that the same works cannot comprise both an NSIP and associated development:

⁷ Section 43 of the Wales Act 2017 resolves the previous anomaly in the consenting process around associated development. The anomaly resulted from section 115 of the Planning Act 2008 regime which excluded approval for associated development for projects in Wales. This meant that, previously, for large energy projects in Wales where the consenting process for the main project was via the NSIP process, the associated development was decided by the relevant Welsh local planning authority. This has now changed with the commencement of section 43 of the Wales Act 2017 on 31 March 2017, aligning the responsibility for granting consent for associated development for energy projects with the responsibility for granting consent for the main project.

“At the section 35 direction stage, the precise parameters of every aspect of the proposed project were not known, and it was therefore not possible for the Secretary of State to take a decision as to whether aspects of the proposed development fell to be considered as part of the ‘main’ development or associated development under sections 115(1)(a) or 115(1)(b) respectively. In addition, the Secretary of State is of the view that a section 35 direction cannot be construed to direct that development which does not meet the necessary section 35 criteria itself (the telecommunications equipment does not fall within the included ‘fields’ of development) be treated as development for which development consent is required. This does not mean, however, that such development cannot be associated development and thus be consented through a development consent order.”

Notwithstanding the project was directed into the 2008 Act regime under section 35, these statements support the proposition that there is a clear distinction between development comprising nationally significant infrastructure projects consented under section 115(1)(a) and associated development consented under section 115(1)(b).

4 CONCLUSION

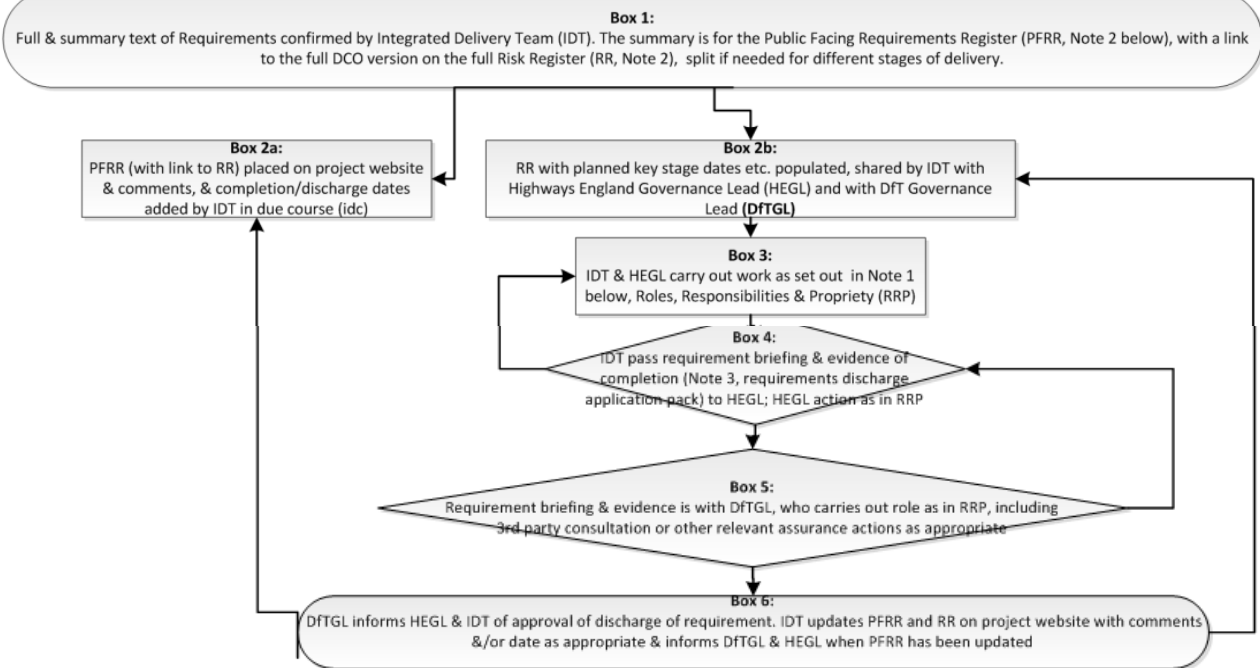
- 4.1 Those utility works which themselves constitute NSIPs cannot also be associated development to the highway NSIP. The position adopted in the application documents is to treat those utility works that satisfy the criteria in sections 16 and 20 of the 2008 as NSIPs rather than associated development.

18 July 2023

**Andrew Tait KC
Isabella Tafur
BDB Pitmans LLP
On behalf of the Applicant**

Annex E

DCO requirements fulfilment process



Note 1:
Roles, Responsibilities, & Propriety (RRP):

- The IDT, including "embedded" Professional & Technical Solutions Directorate (PTSD) internal project support & assurance, will ensure Requirements are carried out, keep HEGL informed of progress if submission delays are foreseen or of any other significant change likely to affect discharge. The IDT will carry out relevant 3rd party consultation, provision of briefing & evidence to enable non-IDT decision makers to judge discharge, & ensure full public visibility of discharge.
- HEGL is The Chief Highways Engineer's delegate for this process. He will examine briefing & evidence supplied, & supporting material, carry out independent 3rd party consultation if needed & either sign-off as "fit-for purpose", & ready for onward transmission to DfT or reject & return to IDT for more work/information; HEGL will keep DfTGL of progress as needed prior to submission, & provide covering advice as needed.
- DfTGL's role is to examine briefing & evidence, carry out independent 3rd party consultation if needed, approve discharge of requirement, & notify HEGL accordingly or reject & return to HEGL for further work.
- The individuals within DfT & Highways England identified as GLs will not be involved in project delivery.
 For further details see "Propriety Guidance".

Note 2:
Requirements Register, RR :
technical tracker designed for Highways England & DfT use, but publically available via a link & on request

- IDT hold pen unless stated
- Sets out DCO Requirement Number, full & summary description; key documents/deliverables; named key consultees & other information as needed
- Sets out forecast & achieved dates for task completion & provision of briefing & evidence pack/docs passed to HEGL, with comments & link to pack
- HEGL has 4 working weeks to either sign off as fit for purpose & pass to DfTGL or to return to IDT for more work. HEGL holds pen
- DfTGL, within 4 working weeks, either returns to HEGL (& IDT) as not discharged & in need of more work/ alternative, or confirms discharged. DfTGL holds pen & adds comments as needed
- PFRR updated

Public Facing Requirement Register", PFRR:
 Simple, accessible 3 column register listing Requirement numbers, summary descriptions & approval dates, with comments as needed, and with links to full RR

Note 3:
The requirements discharge application pack
 A standard pro-forma will be provided. The pack will be as succinct as possible, with briefing preferably 1 side A4 bullet points, including a schedule of key documents, links to same & hard copy as appropriate.

Glossary

Term	Abbreviation	Explanation
A122		The new A122 trunk road to be constructed as part of the Lower Thames Crossing project, including links, as defined in Part 2, Schedule 5 (Classification of Roads) in the draft DCO [Additional Submission AS-038]
A122 Lower Thames Crossing	Project	A proposed new crossing of the Thames Estuary linking the county of Kent with the county of Essex, at or east of the existing Dartford Crossing.
A122 Lower Thames Crossing/M25 junction		New junction with north-facing slip roads on the M25 between M25 junctions 29 and 30, near North Ockendon.
A13/A1089/A122 Lower Thames Crossing junction		Alteration of the existing junction between the A13 and the A1089, and construction of a new junction between the A122 Lower Thames Crossing and the A13 and A1089, comprising the following link roads: <ul style="list-style-type: none"> • Improved A13 westbound to A122 Lower Thames Crossing southbound • Improved A13 westbound to A122 Lower Thames Crossing northbound • Improved A13 westbound to A1089 southbound • A122 Lower Thames Crossing southbound to improved A13 eastbound and Orsett Cock roundabout • A122 Lower Thames Crossing northbound to improved A13 eastbound and Orsett Cock roundabout • Orsett Cock roundabout to the improved A13 westbound • Improved A13 eastbound to Orsett Cock roundabout • Improved A1089 northbound to A122 Lower Thames Crossing northbound • Improved A1089 northbound to A122 Lower Thames Crossing southbound
A2		A major road in south-east England, connecting London with the English Channel port of Dover in Kent.
Application Document		In the context of the Project, a document submitted to the Planning Inspectorate as part of the application for development consent.
Construction		Activity on and/or offsite required to implement the Project. The construction phase is considered to commence with the first activity on site (e.g. creation of site access), and ends with demobilisation.
Code of Construction Practice	CoCP	Contains control measures and standards to be implemented by the Project, including those to avoid or reduce environmental effects.
Department for Transport	DfT	The government department responsible for the English transport network and a limited number of transport matters in Scotland, Wales and Northern Ireland that have not been devolved.

Term	Abbreviation	Explanation
Design Manual for Roads and Bridges	DMRB	A comprehensive manual containing requirements, advice and other published documents relating to works on motorway and all-purpose trunk roads for which one of the Overseeing Organisations (National Highways, Transport Scotland, the Welsh Government or the Department for Regional Development (Northern Ireland)) is highway authority. For the A122 Lower Thames Crossing the Overseeing Organisation is National Highways.
Development Consent Order	DCO	Means of obtaining permission for developments categorised as Nationally Significant Infrastructure Projects (NSIP) under the Planning Act 2008.
Development Consent Order application	DCO application	The Project Application Documents, collectively known as the 'DCO application'.
Environment Agency	EA	A non-departmental public body of Defra, established under the Environment Act 1995. It is the leading public body for protecting and improving the environment in England and Wales. The organisation is responsible for wide-ranging matters, including the management of all forms of flood risk, water resources, water quality, waste regulation, pollution control, inland fisheries, recreation, conservation and navigation of inland waterways.
Environmental Management Plan	EMP	For the Project, a plan setting out the conclusions and actions needed to manage environmental effects as defined by the Design Manual for Roads and Bridges standard LA 120. The CoCP is the equivalent of the first iteration of the EMP (EMP1). The contractor's EMP would be EMP2 and the end of construction EMP would be EMP3.
Environmental Statement	ES	A document produced to support an application for development consent that is subject to Environmental Impact Assessment (EIA), which sets out the likely impacts on the environment arising from the proposed development.
Examining Authority	ExA	–
Explanatory Memorandum	EM	–
Gravesham Borough Council	GBC	–
Highways England		Former name of National Highways.
Issue Specific Hearing 2	ISH2	–
M2 junction 1		The M2 will be widened from three lanes to four in both directions through M2 junction 1.
M2/A2/A122 Lower Thames Crossing junction		New junction proposed as part of the Project to the east of Gravesend between the A2 and the new A122 Lower Thames Crossing with connections to the M2.
M25 junction 29		Improvement works to M25 junction 29 and to the M25 north of junction 29. The M25 through junction 29 will be widened from three lanes to four in both directions with hard shoulders.

Term	Abbreviation	Explanation
Marine Management Organisation	MMO	An executive non-departmental public body in the UK established under the Marine and Coastal Access Act 2009. The MMO exists to make a significant contribution to sustainable development in the marine area, and to promote the UK Government's vision for clean, healthy, safe, productive and biologically diverse oceans and seas.
National Highways		A UK government-owned company with responsibility for managing the motorways and major roads in England. Formerly known as Highways England.
National Planning Policy Framework	NPPF	A framework published in March 2012 by the UK's Department of Communities and Local Government, consolidating previously issued documents called Planning Policy Statements (PPS) and Planning Practice Guidance Notes (PPG) for use in England. The NPPF was updated in February 2019 and again in July 2021 by the Ministry of Housing, Communities and Local Government.
National Policy Statement	NPS	There are 12 designated National Policy Statements (NPSs), setting out government policy on different types of national infrastructure development, including energy, transport, water and waste. NPSs provide the framework within which Examining Authorities make their recommendations to the Secretary of State.
National Policy Statement for National Networks	NPSNN	Sets out the need for, and Government's policies to deliver, development of Nationally Significant Infrastructure Projects (NSIPs) on the national road and rail networks in England. It provides planning guidance for promoters of NSIPs on the road and rail networks, and the basis for the examination by the Examining Authority and decisions by the Secretary of State.
Nationally Significant Infrastructure Project	NSIP	Major infrastructure developments in England and Wales, such as proposals for power plants, large renewable energy projects, new airports and airport extensions, major road projects, etc. that require a development consent under the Planning Act 2008.
North Portal		The North Portal (northern tunnel entrance) would be located to the west of East Tilbury. Emergency access and vehicle turn-around facilities would be provided at the tunnel portal. The tunnel portal structures would accommodate service buildings for control operations, mechanical and electrical equipment, drainage and maintenance operations.
Operation		Describes the operational phase of a completed development and is considered to commence at the end of the construction phase, after demobilisation.
Order Limits		The outermost extent of the Project, indicated on the Plans by a red line. This is the Limit of Land to be Acquired or Used (LLAU) by the Project. This is the area in which the DCO would apply.
Planning Act 2008		The primary legislation that establishes the legal framework for applying for, examining and determining Development Consent Order applications for Nationally Significant Infrastructure Projects.
Port of London Authority	PLA	A self-funding public trust established by The Port of London Act 1908 to govern the Port of London. Its responsibility extends over the Tideway of the River Thames and its continuation (the Kent/Essex strait). It maintains and supervises navigation, and protects the river's environment.

Term	Abbreviation	Explanation
Port of Tilbury Limited	PoTL	–
Project road		The new A122 trunk road, the improved A2 trunk road, and the improved M25 and M2 special roads, as defined in Parts 1 and 2, Schedule 5 (Classification of Roads) in the draft DCO (Application Document 3.1).
Project route		The horizontal and vertical alignment taken by the Project road.
Register of Environmental Actions and Commitments	REAC	The REAC identifies the environmental commitments that would be implemented during the construction and operational phases of the Project if the Development Consent Order is granted, and forms part of the Code of Construction Practice [Application Document APP-336].
South Portal		The South Portal of the Project (southern tunnel entrance) would be located to the south-east of the village of Chalk. Emergency access and vehicle turn-around facilities would be provided at the tunnel portal. The tunnel portal structures would accommodate service buildings for control operations, mechanical and electrical equipment, drainage and maintenance operations.
The tunnel		Proposed 4.25km (2.5 miles) road tunnel beneath the River Thames, comprising two bores, one for northbound traffic and one for southbound traffic. Cross-passages connecting each bore would be provided for emergency incident response and tunnel user evacuation. Tunnel portal structures would accommodate service buildings for control operations, mechanical and electrical equipment, drainage and maintenance operations. Emergency access and vehicle turn-around facilities would also be provided at the tunnel portals.
Traffic Management Plan for Construction	TMP	A plan setting out the strategy and measures to be adopted with respect to highway and transportation issues for the Project. The TMP supports the DCO application and would be embedded within the eventual construction contractor documentation and will form an overarching and comprehensive management procedure for the Contractor to adhere to.
Transport for London	TfL	The integrated body responsible for London's transport system.

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