national highways

# Lower Thames Crossing

## 9.63 Applicant's response to IP comments made on the draft DCO at Deadline 1

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# 1 Introduction

## 1.1 Introduction

1.1.1 A number of Interested Parties provided comments on the draft Development Consent Order (DCO) at Deadline 1. As these comments were provided in a number of different submissions including Written Representations, Local Impact Reports and Written Submissions in respect of Issue Specific Hearing 2, the Applicant has reviewed all the comments and provided a response to them in this document for ease of reference..

1.1.2 Interested Parties who provided comments were:

a. Cole Family within their Written Representation [REP1-316].

b. Environment Agency within their Wrtten Representation [REP1-225]

c. Gravesham Borough Council in two Post-Hearing Written Submissions [REP1-236 and REP1-238]

d. Holland Land and Property Ltd submission on Applicant's amended dDCO [REP1-360]

e. Kent County Council in their Written Representation [REP1-243].

f. London Borough of Havering within their Written Representation [REP1-251].

g. Port of London Authority within their Written Representation [REP1-269, REP1-270 and REP1-271]

h. Port of Tilbury within their Written Representation [REP1-274]

i. Shorne Parish Council within their Post-Hearing Written Submissions "Comments after ISH2 [REP1-410]

j. Transport for London in both their Written Representation [REP1-304] and Post-Hearing Written Submissions [REP1-303]

k. Thurrock Concil in both their Local Impact Report [REP1-281], Appendix I Draft DCO Order and Legal Obligations [REP1-290] and Post-Hearing Written Submissions [REP1-295]

# 2 Cole Family

## 2.1 Article 2(10)

2.1.1 The written representation [REP1-316] queries the 'materially new or materially different environmental effects' drafting in the draft DCO and 'the reasonableness of the ability to undertake approaches that emerge through 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.'

2.1.2 The drafting of the draft DCO would enable the Applicant and its appointed Contractors to reduce environmental impacts during the detailed design stage. The Applicant requires the ability to implement such approaches to enhance environmental outcomes on ecological compensation areas. No additional land would be required to implement this as it would only be undertaken on areas identified for permanent acquisition for the purposes of ecological compensation. This is further explained in the updated Explanatory Memorandum [**REP1-045**] and the Post-event submissions, including written submission of oral comments, for ISH2 [**REP1-184**].

## 2.2 Article 5 – Maintenance of drainage works

2.2.1 The written representation raises a concern about impact on land drainage, responsibility for remediation of impacted field drainage should be with the Applicant.

2.2.2 The purpose of Article 5 of the draft DCO [**REP1-042**] is to make it clear that any realignment of drainage or other works to them that are carried out as part of the Project do not affect the existing allocation of responsibility for maintenance of those drains, unless this is agreed between the Applicant and the responsible party. It is not intended to deal with issues relating to drainage outside of the Order Limits. The eventuality raised (i.e. '*Where an existing land drainage scheme is interrupted during the works or where a new connection is required because the undertaker's works have severed private drainage*') would be dealt with as a compensation matter pursuant to Article 35 (see, in particular, Article 35(6)).

## 2.3 Article 8 – Consent to transfer benefit of the Order

2.3.1 The written representation raises concern regarding cost and time burden on landowners for dealing with multiple Statutory Undertakers implementing works on land, and implications of telecommunications code powers.

2.3.2 The Project involves a number of different elements, including highways and utilities works. It is therefore inevitable that a number of parties will be involved in the delivery of the works. The Applicant will remain ultimately responsible for the delivery of the works, and even where a transfer of the benefit of the Order has taken place, the '*exercise by a person of any benefits or rights conferred in accordance with any transfer or grant under paragraph (1) is subject to the same restrictions, liabilities and obligations as would apply under this Order if those benefits or rights were exercised by the undertaker*' (as per Article 8(3) [**REP1-042**]). The Applicant considers that the costs implications associated

with the delivery of works are a compensation matter which will be managed in the implementation of the Project, should development consent be granted.

## 2.4 Article 13 – Use of private roads

2.4.1 The Written Representation requests that article 13 "should explicitly state that existing users with legal rights over private access routes will not be impeded or restricted in their use."

2.4.2 The Applicant requires the temporary use of private roads within the Order Limits. Nothing in this provision authorises the extinguishment of any other right to use a private road. As explained in the Explanatory Memorandum [**REP1-045**], the power is in fact an attempt to preserve the position of other users. In particular, Article 13 is distinguished from temporary possession under Article 35 because the Applicant does not require the exclusive use and possession of the private roads while exercising this power. The suggestion that the provision should reference 'other uses' is therefore unnecessary.

## 2.5 Article 27 – Time limit for exercise of Compulsory Acquisition (CA) powers

2.5.1 The Applicant considers the 8-year time limit to be necessary and proportionate taking into account the length of the construction programme, Project complexity, and extent of works required post main construction period. This, as well as why it is appropriate for the period to run from the end of a judicial review period, is further explained in the Statement of Reasons [**REP1-049**] paragraphs 5.3.16 – 5.3.20, the Post-event submissions, including written submission of oral comments, for ISH2 [**REP1-184**] and the updated Explanatory Memorandum [**REP1-045**] paragraphs 5.123 – 5.125.

## 2.6 Article 28 – Restrictive covenants and transfer

2.6.1 The Applicant does not agree that a 'general' explanation of the rights proposed to be acquired has been provided. The Statement of Reasons [**REP1-049**] sets out the particular purposes for which permanent rights and restrictive covenants can be acquired. The Applicant has provided as much information on the potential restrictive covenants and/or restrictions of use on land which is required for permanent rights for the installation of permanent utility diversions as it is possible to provide at this stage of the Project's design. For explanation and justification for the drafting of this Article see the Post-event submissions, including written submission of oral comments, for ISH2 [**REP1-184**].

## 2.7 Article 25 – 34 – Powers of acquisition and possession of land

2.7.1 The Applicant refers to its responses above in relation to Article 28.

2.7.2 The Applicant will continue to engage with landowners regarding the diversion of utilities during the detailed design stage and seek to mitigate impacts on retained land as far as reasonably possible within the constraints of the draft DCO.

2.7.3 The Applicant has, in limited circumstances, sought rights and restrictive covenants to enable statutory undertakers and utility network owners to have adequate land and rights in connection with temporary assets. The Applicant is aware there are concerns from affected landowners regarding those rights sought for temporary utility works that would enable the construction of the Project (Work Nos OHT1-OHT8 and MUT1-MUT32) and is considering its options and available mechanisms from which to provide comfort to landowners that these rights will be extinguished at the earliest opportunity unless otherwise agreed with the landowner.

## 2.8 Others comments

2.8.1 The Written Representation also raises concerns around articles 35, 36, and 40. These do not relate to the drafting of the dDCO and the Applicant's overarching position on these is set out above, or in the Post-event submissions, including written submission of oral comments, for ISH2 [**REP1-184**].

2.8.2 In relation to article 56, the written representation states "The protection of planning permissions on temporarily possessed land is questioned, particularly when the order causes the cessation of planning permissions." This comment is misplaced; article 56 only applies to the extent incompatible with the DCO and so would not apply or have effect outside of the temporary possession period.

# 3 Environment Agency

## 3.1 Protective Provisions

3.1.1 As explained, the Protective Provisions between the Parties are now agreed with the exception of the issue relating to existing environmental permits (in paragraph 116(5) of Schedule 14 to the dDCO). This sole outstanding issue is addressed below.

3.1.2 In response to paragraphs 1.10, 6.1 and 6.2, the Applicant's position can be found at matters 2.1.3 and 2.1.5 of the Environment Agency's SoCG [REP1-058].

3.1.3 The Applicant has provided drafting of protective provisions to the Environment Agency for review, with respect to the EPR 2016 as detailed in matter 2.1.7 of the Environment Agency's SoCG [REP1-058]. This provision is necessary is in relation to existing environmental permits held by third parties, where National Highways has no control over the permit or third-party operations, but the permit relates to land that is within the Project's Order Limits. The drafting is intended to afford National Highways and third parties protection against enforcement action in relation to any such existing environmental permits, in the event that construction operations for the Project do not align with activities authorised by an environmental permit held by a third party, but over which National Highways has no control.

3.1.4 To date, the Applicant has not received a detailed response on this permitting drafting in the Protective Provisions, with the text in the Environment Agency's latest representation being the most detailed response. The Applicant intends to meet with the Environment Agency to discuss these provisions in detail and will then update the Examining Authority. For the avoidance of doubt, section 150 of the Planning Act 2008 is not relevant to paragraph 116(5) of the Protective Provisions. This has been made clear to the EA in the past. The Applicant is instead exercising its powers under section 120 of the Planning Act 2008.

3.1.5 Section 120(3) of the Planning Act 2008 permits the Order to make provisions ancillary to the development:

*(3) An order granting development consent may make provision relating to, or to matters ancillary to, the development for which consent is granted.*

Section 120(5)(a) of the 2008 Act confirms that a DCO can "modify" any "statutory provision":

*(5) An order granting development consent may—*

*(a) apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order;*

3.1.6 These provisions permit the variation or suspension of a permit itself. The principle of section 120 extending to the variation of permissions, licences and consents under enactments has been approved in a number of decisions by the Secretary of State. For example, the Hinkley Nuclear Power Station Order 2013 suspends the application of a planning permission under the Town and Country Planning Act 1990; the Port of Tilbury (Expansion) Order 2019 extinguishes existing works licences under the Port of London Act 1968; the Riverside

Energy Development Consent Order 2020 suspends both planning permissions under the TCPA and consents under the Electricity Act 1989; and the A19 Downhill Lane Development Consent Order 2020 varies and amends the A19/A184 Testo's Junction Alteration Development Consent Order 2018.

3.1.7 A number of scenarios (where permits overlap with the Order limits) have been discussed in detailed in the permitting workshops with the Environment Agency and are presented in the Outline Environmental Permit Strategy which will be shared with the EA in due course) to describe some of the risks and permit challenges associated with existing environmental permits held by third parties. The OEPS will be shared with the Environment Agency as soon as possible. In response to paragraph 6.6 the Applicant considers one permit option for the construction of Tilbury Fields is to seek to transfer the extant permit from the current Operator to National Highways (or agent of) which may mitigate some of the technical permitting issues described in this paragraph.

3.1.8 The Applicant remains keen to discuss the issues associated with the permitting in the protective provisions with the Environment Agency.

## 3.2 Draft Development Consent Order Requirements

3.2.1 In response to paragraphs 7.1 – 7.6, the Applicant will consider the Environment Agency's requests for changes to Schedule 2 Requirements 6 and 8.. The Applicant intends to discuss these comments directly with the EA prior to responding in detail, as these comments had not been raised previously.

3.2.2 The Applicant's preliminary view is as follows:

## 3.3 Requirement 6 (contaminated land and groundwater)

3.3.1 The Applicant notes the EA consider that the draft DCO should refer to 'land contamination' rather than 'contaminated land'. The Applicant has adopted use of 'contaminated land' given its use in several other DCOs endorsed by the Secretary of State, including A303 Stonehenge Development Consent Order 2023 and M25 Junction 28 Development Consent Order 2022. Contaminated land is consistent with the wording used in the Environmental Protection Act 1990.

3.3.2 The Applicant also acknowledges the EA's request that the wording "Where the undertaker determines that remediation of the contaminated land is necessary…", be updated to "Where the risk assessment from (1) indicates that remediation of the contaminated land is necessary". The Applicant maintains that the remediation decision should lie with the undertaker in the interests of the expeditious delivery of this nationally significant infrastructure project, and in light of the additional controls relating to contaminated land in the REAC. The Applicant's approach has also been endorsed by the Secretary of State on several DCOs, such as A303 Stonehenge Development Consent Order 2023, and M25 Junction 28 Development Consent Order 2022.

3.3.3 The Applicant notes the EA's request that a new sub-paragraph (4) is added to this requirement, to require the undertaker to prepare and submit a Validation Report. This request will require further discussion with the EA to understand the justification for such a requirement, and the Applicant will respond following those further discussions. However, the Applicant notes that there a number of

controls in the REAC relating to contaminated land as well as the requirement in paragraph 4(2) which requires EMP2 to include plans for the management of contamination. The Applicant's drafting is in line with several other DCOs endorsed by the Secretary of State, including A303 Stonehenge Development Consent Order 2023 and M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022.

## 3.4 Requirement 8

3.4.1 The Applicant notes the EA's request to be included as a consultee on Requirement 8, due to their role in regulating drainage discharges. The Applicant will consider this point further and discuss with the EA before making a final determination.

## 3.5 Discharge Provisions

3.5.1 The Applicant notes that the EA consider that the discharge provisions at requirement 18(2) should be deemed refusal, not deemed consent. These provisions do not relate to the EA and instead apply to the Secretary of State. The Applicant considers that Paragraph 18 is appropriate. In circumstances where there is no consultee reporting that there are materially new or materially different effects, it is considered appropriate for the Applicant to proceed. Leaving asde this Project-specific justification, the Applicant maintains that the current drafting is acceptable in principle as it has already been endorsed by the Secretary of State on several other DCOs, for example A303 Stonehenge Development Consent Order 2023, or the A57 Link Roads Development Consent Order 2022.

# 4 Gravesham Borough Council

**Table 4.1 Table in response to Gravesham Borough Council's Post Hearing Submissions including written summary of Gravesham Borough Council's Oral Case for ISH2**

| Examining Authority's Agenda Item/ Question | Gravesham Borough Council's Response | The Applicant's Response |
|---|---|---|
| The Applicant will be asked to explain its approach to the drafting of the dDCO. | **GENERAL POINT: Gravesham Borough Council (GBC)** has yet to complete a detailed line by line review of the DCO and are likely to make detailed points on the draft at a later stage, with key topics of concern being addressed in the Local Impact Report (LIR). The points made at ISH2 and in this note are mainly general in nature but the comments in Annex A respond to the specific matters raised by the ExA in the Annex to the Agenda for ISH2. As the draft DCO evolves GBC will make further comments. | Noted |
| a) The structure of the dDCO | See agenda item 4 | See below. |
| b) The powers sought and their relationship to the project | See agenda item 4 | See below. |
| c) The relationship between the dDCO and plans securing the construction and operational performance of the proposed development<br>• the design principles document<br>• the environmental masterplan<br>• The Environmental Management Plan (EMP) and iterations<br>• The Landscape and Ecology Management Plan (LEMP) (outline and full) | See agenda item 4 | See below. |

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| • Any other relevant plans and documents | | |
| d) The discharging role of the Secretary of State and other local and public authorities | See agenda item 4 | See below. |
| e) Matters to be secured by alternative methods<br>• Planning obligations<br>• Other forms of agreements | | See below. |
| f) Ongoing work with implications for the dDCO<br>• The change application<br>• Any other intended changes to the dDCO | GBC has responded to the minor refinement consultation.<br>In relation to the proposal for a single tunnel boring machine option, GBC are most concerned that the DCO should secure that whichever option is adopted, all spoil and tunnel boring machine equipment and tunnel linings etc should be removed from or brought in through the northern portal. This could be achieved in the main body of the Order or as a Requirement. | This is proposed to be secured via the Code of Construction Practice (CoCP) of which Chapter 7 is the Register of Environmental Actions and Commitments (REAC). The commitment has the reference MW009. This has been submitted at Deadline 1, and is applicable whether one or two TBMS are utilised. The CoCP and REAC commitments are secured by Requirement 4 of the dDCO. The nature of the commitment means it is suitable for the CoCP, rather than as a bespoke Requirement in its own right. The Applicant considers that this provides an appropriate safeguard which GBC has requested. |
| a) The structure of the dDCO | GBC is generally content with the structure of the DCO, which reflects other precedents.<br>The list of works in Schedule 1 is unusual in the respect that there is no indication, as is normally the | Schedule 1 is not considered "unusual" in this respect (see, for example Schedule 1 to the A19 Downhill Lane Junction |

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| | case, of which local authority area each work is situated in. This is normally achieved by the use of sub-headings. Although it is possible to work out the location by reference to the Works Plan numbers, it would be better if sub-headings showing local authority areas were also included. | Development Consent Order 2020, the A585 Windy Harbour to Skippool Highway Development Consent Order 2020 and the A417 Missing Link Development Consent Order 2022).<br>Precedent reflects a range of approaches and there is no set rule or convention. In the case of the Project dDCO, the Applicant has not disaggregated the works in the schedule to aid understanding of the relevant works and local authority separation would make the Schedule difficult to understand given the integration of a number of works. The Applicant refers to the Works Plans, which include local authority boundaries. |
| b) The powers sought and their relationship to the project | Article 3 grants development consent for the "authorised development" which is defined in article 1 in standard terms as "the development described in Part 1 of Schedule 1 (authorised development) and any other development authorised by this Order, or any part of it, which is development within the meaning of section 32 (meaning of development) of the 2008 Act."<br>Part 1 of Schedule 1 includes a long list of "Ancillary works" which is authorised by article 3. Whilst it is noted that none of this development may give rise to any materially new or materially different environmental effects to those assessed in ES, GBC will be analysing the list in detail and may have comments later. At this | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] [AS-189] and its post-event submissions, including written submission of oral comments, for ISH2 [REP1-184].<br>In relation to the suggested words for the preamble of the ancillary works, the Applicant does not consider an amendment is necessary (see page 23 of |

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| | stage it is noted that paragraph (m) (construction compounds and working sites) includes a range of potentially significant development including "construction-related buildings".<br><br>GBC also notes that Article 2(10) seeks to limit what are "materially new or materially different environmental effects" so that they cannot include any measure concerned with "the avoidance, removal or reduction of an adverse environmental effect". GBC has some concerns about this approach, as currently drafted, because it is unclear whether the limitation would apply to an avoidance/removal/reduction measure in relation to one adverse environmental effect (for example reducing an adverse noise impact by installing an acoustic barrier or increasing the height of a proposed acoustic barrier) but which gave rise to separate environmental effects (for example landscape, heritage, or visual amenity). GBC considers that a holistic approach needs to be taken and that Article 2(10) as currently worded is too broad. So far as GBC is aware, the approach in Article 2(10) is not precedented.<br><br>GBC has a drafting point in the introductory words – to make it clearer that the ancillary works can only be carried out in the Order limits, the words "in the Order limits" could be better placed after "or related development".<br><br>The CPO powers, highways powers and other powers in the DCO appear to be in standard format for DCOs of this nature and all bear a relationship to the project. As mentioned, GBC may have detailed points on the drafting. | responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses). The Applicant notes that the Ancillary Works in Schedule 1 are limited (i.e., they only authorise works which do not entail a "materially new or materially different" environmental effect from that set out in the environmental statement). This provides appropriate control.<br><br>In relation to article 2(10), the Applicant's position is set out in the aforementioned documents, but would note that where a proposed element of the scheme gives "rise to separate [likely significant] environmental effects (for example landscape, heritage, or visual amenity)" that would itself be a materially new adverse impact and would therefore not be permitted. |

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| | Powers which could be said to be indirectly rather than directly related to "the project" are the powers to take and use land for eg nitrogen deposition and replacement open space. GBC is supportive of both being included in principle as mitigation, but may have comments on the detail.<br>**Post-ISH2 Note:** GBC welcomes Action Point 4 from ISH2 and is co-operating in the preparation of a Joint Note. | |
| c) The relationship between the dDCO and plans securing the construction and operational performance of the proposed development | The DCO (article 6) contains standard provisions which require the works listed in Schedule 1 to be constructed within lateral limits shown on the works plans and allows vertical deviation upwards and downwards from the levels shown on the engineering drawings and sections, up to certain identified limits.<br>Because of the complexity of the A122 LTC and A2 junction, the relevant volume of the Engineering Drawings and Sections (Volume D) is difficult to interpret.<br>At the very least, cross-sections of the vertical alignment of key parts of the junction and preferably a virtual or real 3-D model of the junction and/or pictorial representations of the junction would be helpful to understand the overall height.<br>In addition, GBC is concerned to ensure that, given that so much of the detail is not spelt out in the proposed Requirements but is left to be regulated by one of more of the control documents, the control documents that are to be secured by the Requirements need to include adequate arrangements for the monitoring of the provision/implementation of measures to deliver what is required by those control | The Applicant is preparing further cross sections to assist Interested Parties, and these have been submitted at Deadline 2.<br>In relation to the comments concerning monitoring, the Applicant considers that appropriate monitoring has been incorporated in the outline management plans themselves. In short, the Code of Construction Practice secures a Community Liaison Group, the outline Traffic Management Plan for Construction secures a Traffic Management Forum, the outline Landscape and Ecology Management Plan secures an Advisory Group, and further requirements require consultation and engagement with relevant local authorities. GBC is proposed to be a member of all these groups, and will be consulted further. Specific |

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| | documents, and that such monitoring is not merely reported to the Secretary of State but is reported to the relevant planning authorities so they are adequately informed of progress with the implementation of the measures for the purposes of being able to undertake their enforcement functions.<br>**Post-ISH2 Note:** GBC welcomes Action Point 2 from OFH2 and will respond further once it has seen and considered the requested vertical cross-sections of the A2/M2/LTC intersection. | provision is made for monitoring outputs to be shared. GBC is requested to particularise their concerns around monitoring following their review of the outline management plans. |
| d) The discharging role of the Secretary of State and other local and public authorities | As mentioned in its Principal Areas of Disagreement Summary (PADS), GBC is of the view that the relevant local planning authority should be the discharging authority rather than the Secretary of State.<br>The reasons for this include:<br>(a) the local planning authority has greater local knowledge and is therefore better placed to deal with requirements which relate to local issues<br>(b) GBC query whether it is appropriate for the Secretary of State to be the discharging authority in respect of applications made by own of its own agencies<br>(c) there is no right of appeal against the decisions of the Secretary of State<br>(d) consequential on that point, where the SoS fails to give a decision on an application within the given time, it is deemed to have been granted. In DCOs where the LPA is the discharging authority there would normally be a right of appeal for the applicant<br>(d) precedent: in most other DCOs, the discharging authority is the local planning authority, and this | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] but set out further comments where relevant below. The Applicant does not consider GBC have raised any issues with the proposed approach to discharging which are covered by those submissions, not any points which have not been considered in previous examinations of SRN DCOs.<br>The Applicant does not consider the limited examples raised by GBC are |

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| | includes some highways DCOs where the applicant is the local highway authority (see the Silvertown Tunnel Order 2018, the Great Yarmouth Third River Crossing Development Consent Order 2020; the Lake Lothing (Lowestoft) Third Crossing Order 2020). It is also noteworthy that the local planning authorities are the discharging authorities for some of the most complex, multi-jurisdictional DCO schemes, examples being the Southampton to London Pipeline Development Consent Order 2020 and the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014.<br>If the ExA were to recommend that the SoS remain as the discharging authority, with GBC as a consultee, GBC must be given sufficient time to consider the relevant documents properly and all its costs should be met by the Applicant.<br>GBC notes the justification provided by the Applicant in its Explanatory Memorandum which was summarised by the Applicant at ISH2. GBC is not persuaded by that justification and at ISH2 made the following over-arching submissions.<br>On the question of the appropriate discharging authority, first of all, section 120(2) of the Planning Act 2008 is very broad. It doesn't seek to reserve discharging of requirements to the Secretary of State. The discharging authority can be the Secretary of State (or indeed any other person) under subsection (2)(b) on matters so far as they are not falling within subsection (2)(a), and for subsection (2)(a), effectively, it says a requirement can do that which would otherwise be dealt with by a planning condition or similar condition of other regulatory consents. | comparable or relevant to the Project in this context. In particular:<br>• the Lake Lothing (Lowestoft) Third Crossing Order 2020 and the Great Yarmouth Third River Crossing Development Consent Order 2020 –precedents which are not appropriate because it involves a scheme which is promoted by a local authority, and does not traverse multiple local authorities, or pertain to the strategic road network. Unlike the Project, Reasons, 1, 2, 3, 4, 5, 8 and 9 set out in the EM do not apply to this DCO precedent.<br>• the Silvertown Tunnel Order 2018 whilst it is acknowledged this project traverses local authorities (albeit a more limited number compared with the Project), Reasons 2, 3, 4, 5, 8 and 9 set out in the EM do not apply to this precedent.<br>• Southampton to London Pipeline Development Consent Order 2020 and the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014 - ), Reasons 2, 3, 4, 5, 8 and 9 set out in the EM do not apply to |

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| | The implication, albeit not spelt out explicitly in that subsection, is that discharge of such requirements should follow the same pattern as it would for a planning condition (or other regulatory consent), and, obviously, with a planning condition, the normal expectation would be it would be the local planning authority that would be the discharging body. So, with respect to some of the submissions made in the Applicant's explanatory memorandum, the statute doesn't give a clear steer that you should go in one direction or another. GBC's submission is that the answer is to do what is fit for purpose for the particular development consent order that the ExA are considering.<br><br>So far as then moving from the legislative framework position to the arguments that are made that for some reason highways orders, or this particular highways order, needs to have the Secretary of State for reasons of consistency and efficiency, first you will note that even on the applicant's approach in this draft DCO that is not universal. In relation to traffic regulation order matters, the applicant has recognised in Articles 10(1), 12(5), and 17(2) that there are matters that should fall within the remit of the local highway authorities or local traffic authorities for them to approve certain works or restrictions, it not being claimed that these are matters that can only be elevated up to the Secretary of State's decision level.<br><br>Secondly, there is a particular instance in the requirements – and this is Requirement 13. It's already been mentioned in relation to the replacement facility where Thurrock, the local planning authority, is brought to bear as the discharging authority. So there shouldn't | these precedents. The relevant Department does not have a case unit team.<br><br>The Applicant considers that these limited examples stand in contradistinction to the full set of SRN DCO precedents on this matter and which are outlined in [REP1-184]. It is indicative of GBC's approach that the precedents highlighted do not relate to the SRN. |

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| | really be any argument, in reality, about the principle that Requirements can be suitably discharged by someone other than the Secretary of State. The principle to apply should be that it should be what is fit for purpose for the particular requirements, meeting the particular order.<br>Then the applicant also makes reference to the Secretary of State's bespoke unit, and says, 'Well, there we are. We set up a unit, or the Secretary of State set up a unit, specifically in relation to highways orders, and there would be a wasteful duplication of resources if local authorities also had the same function.' Well, with respect, GBC don't share that view.<br>As a general point, GBC do have some concern about the question of independence. We note that it is the Secretary of State's unit and we don't, at the moment, have a sufficient confidence in the independence between the Secretary of State who regulates National Highways and has a role in this project as the approver of it and the bespoke unit, and what would give us assurance is this: if National Highways could give us some examples from other projects promoted by National Highways where it has been necessary for the bespoke unit to consider the discharge of requirements – if National Highways could give us some examples where the bespoke unit has rejected submissions that have been put forward by National Highways, with an example of what that was and why, that might give us some confidence that this isn't a process that simply involves, effectively, one part of government talking to | The Applicant notes GBC raise "the question of independence" of this unit. The Applicant set out its position on this in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. The Applicant finds it inappropriate to make an unsubstantiated assumption that the Secretary of State, as a public authority, would not discharge its functions lawfully and properly. The Applicant notes the absence of any evidence to support a proposition that the DfT is not independent on these matters, and the absence of any successful legal claim to that effect. The Applicant would note that the precedents cited by GBC (in particular, the Great Yarmouth Third River Crossing Development Consent Order 2020 and Lake Lothing (Lowestoft) Third Crossing Order 2020) are in fact precedents where the discharging authority has the same legal personality as the |

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| | another part of government, but does involve thorough scrutiny.<br>There is also the point that was made by the applicant, that because of the bespoke unit, it's wasteful of public resources for local authorities to double up by setting up their own regime for discharging requirements. That sounds superficially as though it might have something in it, but, with respect, it doesn't, because when you actually look at what is envisaged here, the local authorities have very important roles in the discharge of requirements. Firstly, they have an important role as is envisaged by Requirement 20, in terms of the consultation. So Requirement 20 is clearly viewed by everybody as important and obviously for consultation to be effective, the consultee has to adequately inform itself about the matters on which it is being consulted. So the local authorities are going to have to engage with the detail of the project in order to be able to make informed consultation responses under the applicant's proposals. The only thing that they're not being allowed to do is be the decision maker, but everything else they have to grapple with. So that's the first point. They will need to have the resources to be able to engage productively in the consultation process in any event.<br>The second point, which is allied to that – so far as, assuming that a particular requirement has been satisfactorily discharged by gaining an approval, as far as compliance with that discharge – that's to say the enforcement responsibility – that clearly rests with the relevant planning authorities, in terms of if there is a breach of any of the requirements, it's not the Secretary of State that comes running after National Highways. It is the relevant planning authority. Now, | promoter of those DCOs which, it is submitted, does not assist GBC's position on this matter. |

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| | the relevant planning authority is not going to be in a position to properly discharge its enforcing function, potentially including prosecution, under section 160 or 161 unless, again, it is all over the detail of what it is that is being the subject of the submission, what it is that is then required to be done, by whom and by when. So the local authorities are going to have to resource themselves, or be aided by the applicant to resource themselves, to deal with the discharge of requirements and to the policing of the enforcement of the discharge of requirements in any event, even under the applicant's proposals.<br>So the resource point is a non-point, because actually the local authorities will need to get into the detail in order to discharge those functions.<br>Then the next point is a separate point, and GBC echo absolutely the points made by Mr Edwards KC and by Mr Standing on behalf of Thurrock, that it's local authorities that do have detailed knowledge of their areas, and are aware of the interconnectivity between different issues, which may be community issues in relation to traffic or noise, may be issues in relation to cumulative effects of a number of things happening at the same time or in the same place, but that degree of local knowledge clearly doesn't rest with the bespoke unit, and so there is an efficiency in allowing the person with the most knowledge to make the decision.<br>The fifth point is that the problems with the applicant's approach are compounded by the weaknesses of Requirement 18. GBC recognise that's a separate requirement, but you do need to see these in the round. Requirement 18 has as a general default – in | The Applicant considers that Paragraph 18 is appropriate. In circumstances where there is no consultee reporting that there are materially new or materially different effects, it is considered appropriate for the Applicant to proceed.<br>Leaving aside that Project-specific justification, the Applicant would note that virtually every SRN DCOs includes this provision. GBC's comments would be applicable to any other such scheme, but the Secretary of State has deemed it acceptable. Whilst the Project dDCO needs to be appropriate |

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| | Requirement 18, paragraph (2) – that if the Secretary of State doesn't make a decision within time, there is a deemed approval. There is then a caveat for that in paragraph (3) in relation to where there are to be materially different environmental effects, but the basic point is that the Secretary of State – if he doesn't make decisions promptly – there are deemed approvals, and that is irrespective of whatever was said in the consultation responses and however vehemently consultees explained why whatever was being proposed was not acceptable.<br>We also note that the bespoke unit – is of course – as National Highways has said – responsible for a wide variety of highways projects, and there's no mechanism in what the applicant is putting forward as to project management together with other projects. So there is no way of knowing how many different highways projects will be submitting submissions for approval at the same time to the one bespoke unit, or indeed to what extent – even on an individual project – the particular promoter will be submitting a raft of submissions to the Secretary of State's bespoke unit for approval, all at the same time. So there's no mechanism in here for coordination or phasing or structuring.<br>So again, as we see it, this is an instance where the protections given are limited because of that default approval mechanism. So we don't see that as a check.<br>Then the sixth point. In terms of the issue about consultation and the applicant strongly emphasises to you 'we don't just have to consult; we have to give "due consideration" to the results of the consultation and we | justified (and the Applicant considers it has been), this comment is a question of principle and that principle has been accepted by the Secretary of State.<br>This provision (paragraph 20 of Schedule 2 to the dDCO) specifically requires 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. It is not considered that this is weak. The Applicant reiterates its comments about the specific parameters which Schedule 2 is dealing with (see paragraph |

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| | have to provide the consultation responses to the Secretary of State with effectively a consultation report'. But with respect – due consideration – first of all, clearly any lawful consultation has to give consideration to the results of the consultation, so that isn't offering us anything other than the bare legal minimum, but secondly, due consideration is a very low threshold. All it really means is that the applicant does not have to ignore – that's to say, not even read – the consultation responses. Provided the applicant reads the consultation responses, it will have given them due consideration. It is no safeguard to us that they will actually act on our representations.<br><br>In the event that GBC is not to be the discharging authority, GBC wishes to see a safeguard, whereby if the applicant is minded to make an application for discharge of a Requirement that is not in accordance with GBC's consultation response, that GBC is given advance notice of that intention, so giving GBC the opportunity to make either further representations to the applicant or to make direct representations to the discharging authority.<br><br>Examples of such an arrangement can be seen in the guidance on hazardous substances consent where the determining authority wishes not to follow the advice of the COMAH competent authority (see Planning Practice Guidance ID39-047-20161209), and by analogy in the terms of the Town & Country Planning (Development affecting Trunk Roads) Direction 2018 where the local planning authority does not intend to follow the advice of National Highways, and the matter is then to be referred to the Secretary of State, and by analogy in the terms of the Planning (Listed Buildings | 1.3.21 of responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses]. In those circumstances the suggestion from GBC that there should be another consultation is considered both disproportionate, and excessive, and to the Applicant's knowledge, highly novel in the DCO context (where the preliminary scheme design or the outline management plans are approved, but the details are left subject to further approvals). The Applicant is firmly of the view that the suggested approach would add delay, as well as cost, contrary to the public interest as well as Government policy on streamlining the delivery of nationally significant infrastructure projects. |

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| | and Conservation Areas) Regulations 1990, where (under Regulation 13) if a local planning authority wishes to authorise demolition or alteration of certain listed buildings contrary to the consultation response of Historic England the matter must be referred to the Secretary of State.<br>This safeguard could be achieved by revising Requirement 20(1) so as to<br>(a) delete "and" at the end of paragraph (a);<br>(b) insert a new paragraph (ba) as follows:<br>"(ba) where it intends to make an application which is not in accordance with the representations made by that authority or statutory body, give no less than 21 days notice to that authority or statutory body before submitting the application and give due consideration to any further representations received; and"<br>(c) insert "(including any further representations made under sub-paragraph (1)(ba))" after "the proposed application". | |
| e) Tunnelling provisions | GBC refers to its response to the Minor Refinement Consultation and in particular the proposal that there may be a single tunnel boring machine (TBM). GBC remains concerned that using one TBM might have a greater impact on Gravesham than using two (it is difficult to know in the absence of any proper assessment). It is important that whichever tunneling option is taken, there is no doubt that the spoil arising should be removed from the northern end and tunnelling materials, including the tunnel sections, should also be brought in from the northern end. GBC | Please see above in relation to the commitment relating to the tunnel boring machinery. |

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| | considers that there is justification for there to be a requirement to this effect in the DCO. Such a Requirement could be worded as follows:<br>"In carrying out Work No. 4, the undertaker shall ensure that all construction activity utilising one or more tunnel boring machines and the servicing or supplying of any such machines, including all provision of construction materials and all removal of spoil or other materials (but not including the transportation of personnel) is undertaken only via the north bank of the River Thames." | |
| f) Traffic regulation provisions | GBC has no comments at this stage | Noted |
| g) Road charging provisions | Schedule 12 to the DCO aligns charges and other details of the charging regime with those at the Dartford Crossing, such as hours in which the charges apply, discounts and exemptions. Paragraph 5 of Schedule 12 enables the Secretary of State for Transport to apply a local resident discount for charges imposed under the DCO to residents of Gravesham and Thurrock.<br>The current arrangements in relation to users of the existing Dartford Crossing are that, for the Dart charge, a discount is available to the residents on either side in Thurrock and in Dartford, but not to anybody else.<br>It's proposed, in relation to the Lower Thames Crossing, that the residents' discounts are available to residents of Thurrock and Gravesham as users of the Lower Thames Crossing, but not as users of the Dartford Crossing. Obviously, so far as a Thurrock resident is concerned, they already get the benefit of a discount if they use the Dartford Crossing, but for a | Government has previously taken a decision on the residents discount scheme for the Dartford Crossing and it is not for the Applicant to re-open that decision. A consistent approach to discounts has been applied, namely with reference to the local authority landing points of the two crossings. The charging authority for the Dartford Crossing is the Secretary of State, and it is not considered appropriate to vary the charges on that crossing as part of the Project dDCO. Without prejudice to the decision on the DCO, the DfT has endorsed the proposed charging regime, for which it will be charging authority (see Annex B of [REP1-184]). |

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| | Gravesham resident that isn't the case. Gravesham residents are only going to be given a discount for the use of one of these two crossings, but the reality is that the network works as a whole – there will be a myriad of origins and destinations of Gravesham residents, some of whom will be users of the Dartford Crossing.<br>There is no evidence that the traffic modelling has taken account of how Gravesham residents' decisions as to which crossing to use may be affected by the higher toll on the Dartford Crossing. We see the impacts on Gravesham as being sufficient in both magnitude and duration, both during the construction period and subsequently, that they certainly have a case for being given a discount in relation to the Dartford Crossing, in addition to the Lower Thames Crossing.<br>Obviously that will require some revision to the legislation which regulates the Dart charge, but that would be within the gift of this DCO, because it can disapply or amend any other legislation (as it does in Article 53), and so what we are proposing is that residents of Gravesham are given a resident's discount for using either crossing, and not merely for the LTC. This could be achieved by amending the definition of "local resident" in article 2 of the A282 Trunk Road (Dartford-Thurrock Crossing Charging Scheme) Order 2013. Because the impacts will be experienced by residents of Gravesham during the construction period, as well as thereafter, we are suggesting that the discount to Gravesham residents should be available in relation to the Dart crossing from the start of construction of the Lower Thames Crossing. Obviously it can't apply to the Lower Thames Crossing until it | |

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| | physically exists and is open to traffic, so that will be at a later stage, but that's our essential point.<br>GBC does not seek to comment on whether discounts should be offered to residents of other local authorities adversely affected by the LTC but it does see the unavoidable residual impacts within Gravesham as significant in their extent so as to justify a particular compensatory measure to offset those impacts. | |
| h) Protective provisions | GBC has no comments on the protective provisions in the DCO as none relate to it. GBC is not seeking any protective provisions for itself at this stage. | Noted, the Applicant welcomes this confirmation. |
| i) The Deemed Marine Licence | GBC has no comments | Noted, the Applicant welcomes this confirmation. |
| j) ExA observations on drafting (see Annex A) | See separate document with selected comments on the ExA observations in Annex A. | Please see the Applicant's response to this separate submission below. |
| k) Any other matters relating to the dDCO | GBC may have more detailed drafting points in due course but some which have arisen so far:<br>Precedents for article 23(2) (felling or lopping of trees and removal of hedgerows) often contain a requirement to take steps to avoid a breach of the provisions of the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2017 (for example article 42(2)(c) of the A1428 Black Cat to Caxton Gibbet Development Consent Order 2022). The Applicant should explain why it is not included in the dDCO.<br>Article 24(2)(b) (trees subject to tree preservation orders) disapplies the duty under s.206(1) (replacement of trees) of the Town and Country | In relation to article 23(2), the Applicant does not consider these suggested provisions necessary. There is a requirement to "carry out" landscaping works to a reasonable standard in accordance with the relevant recommendations of appropriate British Standards or other recognised codes of good practice (see Requirement 5).<br><br>In relation to article 24, replacement woodland and trees are secured via the Environmental Masterplan as |

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| | Planning Act 1990 to replace TPO trees if removed. There are three areas of woodland in Gravesham listed in Schedule 7 to the dDCO which are subject to article 24. In other highways DCOs (for example article 43(3)(b) of the A1428 Black Cat to Caxton Gibbet Development Consent Order 2022 this is accompanied by the words "although where possible the undertaker must seek to replace any trees which are removed". GBC considers it would be appropriate to include similar words in this case unless the Applicant can demonstrate that the trees are to be replaced due to some other provision in the draft dDCO and/or control documents. | well as the outline Landscape and Ecology Management Plan (under Requirement 5). Requirement 3 also secures the General Arrangements which shows ecological mitigation areas. No further amendment is therefore considered necessary. |
| | Article 58(2) (defence to proceedings for statutory nuisance) appears to be unprecedented in highways DCOs. It says that compliance with the controls and measures described in the Code of Construction Practice or any environmental management plan approved under paragraph 4 of Schedule 2 to the DCO will be sufficient, but not necessary, to show that an alleged nuisance could not reasonably be avoided. GBC thinks that this provision represents an unwelcome and unnecessary fettering of the discretion of the courts in dealing with statutory nuisance cases. So far as GBC know, it is precedented in only two other (non highways) DCOs and GBC are unaware of any particular local need for it. The Applicant should be put to strict proof as to why it is needed, giving examples of other made highway DCOs where it would have been necessary (not just convenient) to have had. | In relation to article 58(2), this provision is necessary to clarify the scope of the defence of statutory authority arising from the grant of the Order. The Code of Construction Practice and management plans will reflect the set of appropriate measures and controls endorsed by the Secretary of State (if consent is granted). In the case of the management plans, these would be subject to further approval by the Secretary of State. It is not reasonable or appropriate for there to be a claim of statutory nuisance circumstances where there is compliance with plans which have been approved, and are intended to manage matters related to statutory nuisances. This |

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| | GBC welcomes in principle the inclusion of article 61 (stakeholder actions and commitments register) which as the Applicant says, is unprecedented.<br>However GBC is concerned that the article says the Applicant will only "take all reasonable steps" to deliver the commitments in the register. GBC would welcome an explanation of why those words are used. It is particularly concerned to ensure that the words do not water down any commitments which appear in the register and which may, for example, impose on the Applicant a higher level of commitment than taking all reasonable steps.<br>GBC is also concerned about article 61(1)(b) which enables the undertaker to revoke, suspend or vary the application of a commitment on the register by applying to the Secretary of State (albeit after consultation with the beneficiary of the commitment). That beneficiary may not have been aware of the possibility of this happening when entering into the commitment. At the very least there should be a requirement that beneficiaries of commitments should be alerted to this possibility by the Applicant during the process of negotiating or offering the commitment. Also, there appears to be nothing in the article which requires the Secretary of State to even consider taking into account the written views of the beneficiary other than through the Applicant's report of the consultation, and there is no appeal mechanism.<br>Finally on article 61, paragraph (3) says that when an application has been made to vary, revoke or suspend a commitment, then the commitment is treated as being suspended until the Secretary of State has | provisions provides certainty for all parties and ensures clarity that measures approved in a management plan are comprehensive in controlling the impacts of the Project. As is noted by GBC, the provisions are necessary and stand for the proposition that there is no "in principle" objection to them.<br>In relation to article 61, the drafting of article 65(1) (and indeed, the underlying rationale) is based on the undertaking provided in the context of HS2 "Register of Undertakings and Assurances". The Secretary of State utilises that language in connection with those undertakings, which are of substantially similar nature, and it is considered appropriate in this context.<br>In relation to article 61(1)(b), the measures secured in the SAC-R are explained and discussed with interested parties and Article 61 clearly forms part of the examination. The Applicant notes that under article 61(1)(b) further consultation would be required where a measure is proposed to revoked or varied. A decision of the |

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| | determined the application. But that could result in permanent damage being done during the period of suspension, even if the Secretary of State ultimately decides that the application should be refused. There is no provision in article 61 for compensation in those circumstances (or at all) and GBC queries whether that is fair, and potentially raises article 1 protocol 1 ECHR issues.<br>In the ancillary works part of Schedule 1, GBC has already commented on the unusual new introductory words which enable works to take place anywhere outside the Order limits.<br>On the detailed design requirement (paragraph 3 of Schedule 2), GBC note the equivalent requirement in the Black Cat DCO included a requirement for a submission of a report to the Secretary of State demonstrating that there had been engagement with local stakeholders about detailed design. GBC would wish to explore the possibility of a similar provision in this case. This comment is without prejudice to GBC's point that the local planning authority should be the discharging authority for requirements and is subject to a more detailed analysis of the requirements. | Secretary of State can, further, be legally challenged.<br>In relation to article 61(3), the Applicant has removed the suspension of the measure in its dDCO at Deadline 2.<br>In relation to Schedule 1, this comment is addressed above.<br>In relation to Requirement 3, the Applicant would welcome a particularisation of the mischief which GBC is seeking to remedy in terms of detailed design to understand whether an amendment can be made. The Applicant has, unlike other precedents, provided a Design Principles document ensuring further engagement and consideration during the detailed design stage. |

## Table 4.2 Table in response to Annex A Observations [REP1-238]

| Examining Authority's Point (Annex A of Agenda for ISH2) | Gravesham Borough Council's Comment | Applicant's Response |
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| **1. Novel drafting** | | |
| 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.<br>The phrase "materially new or materially different environmental effects" is used several times in the DCO, including in the definition of maintain, the limits of deviation and requirements securing essential mitigation. The drafting here appears to provide that it is acceptable for work which has the effect of avoiding, reducing or removing an adverse effect to be undertaken without further scrutiny, even if the effect is materially different from that assessed in the ES. Views are sought on the degree to which that approach is being provided for here and, if it is, is acceptable?<br>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), | GBC agrees that the Applicant has taken a different course from that adopted on recent Highways DCOs by introducing paragraph 2(10) in version 2.0 of the draft DCO. Most recent highways DCOs do not include this paragraph, the effect of which is that references in the DCO to materially new or materially different environmental effects in comparison with those reported in the environmental statement shall not be construed so as to include the avoidance, removal or reduction of an adverse environmental effect that was reported in the environmental statement as a result of the authorised development<br>GBC are concerned about the potential for unintended consequences of excluding from the definition effects which would avoid, remove or reduce any adverse environmental effects. For example, if the Applicant were able to do something which it would otherwise have been prevented from doing without article 2(10), it could have a consequential adverse effect which may not be materially new or different but which nonetheless is of importance to those affected. An example where this might arise, mentioned by the ExA, is in relation to Ancillary works, described in Schedule 1 to the Order, and where the wording is used in the new preamble to the list of Ancillary works, and in paragraph (p) of the list.<br>GBC notes the explanation given by the Applicant for the inclusion of article 2(10) in its cover letter in response to section 51 advice [AS-001], and also in its | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. Please see further responses to GBC's ISH2 Post-Hearing Representations. A new likely significant effect would not be permitted, and therefore the concern that "a consequential adverse effect" could arise is unfounded. |

| Examining Authority's Point (Annex A of Agenda for ISH2) | Gravesham Borough Council's Comment | Applicant's Response |
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| ancillary works preamble and (p), In Requirements 3, 8, 18, and in the Protective provisions. | Annex A responses [AS-089]. In the latter, the Applicant says that for completeness, GBC's point is addressed by its responses, but GBC is unconvinced that it is. If the Applicant is to proceed with this drafting, then GBC suggests that the Applicant be requested to provide a detailed explanation as to why it considers that GBC's concerns about unintended consequences are unfounded.<br>GBC agrees with the ExA's suggestion (whether or not article 2(10) is retained) that the phraseology used for "materially new or materially different" should be consistent throughout the DCO, to avoid confusion. | |
| Article 27 – See comments in section 4 below re novel approach to start date and extent of time limits for Compulsory Acquisition (CA) | See later | See below. |
| 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 later | See below. |
| 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')<br>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 | GBC note the submissions provided by the Applicant in its Annex A responses on the implications of the Hillside case.<br>GBC suggested at the hearing that if the Applicant is able to identify and provide a list of which existing planning permissions are at issue, then GBC would be better able to say whether article 56(3) and (4) are acceptable to them. The Applicant has referred to Application Document APP-550, which lists a number of Interrelationships with other Nationally Significant Infrastructure Projects and Major Development Schemes in GBC's area. It is not comprehensive | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] and it is not considered that GBC has raised any new matters. For completeness, the Applicant notes that GBC wishes to "ensure that compliance with that condition was not affected by the DCO". The provision ensures that conditions |

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| understood by the ExA to be a statement of new law, then the rationale for the provisions drafted here is not understood.<br>The Applicant is requested to:<br>• 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<br>• provide details of any planning permissions within the order limits that this provision would apply to.<br>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.<br>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.<br>It is arguable that the proposed work is not a matter that a DCO may in principle provide | because it does not cover all existing planning permissions that come within the scope of the article.<br>The Gravesham example cited in the Applicant's response to the Annex, is also given in the Explanatory Memorandum. It is planning permission reference 20191217 which contains a condition requiring National Highways to restore land at Marling Close, which is included within the Order Limits and is required for use as a site compound during the construction phase, to its former condition by 9 July 2021. In fact, the PP referred to was followed up by a later one (20210675) which requires restoration by 31 December 2023.<br>GBC would wish to ensure that compliance with that condition was not affected by the DCO, so is supportive of article 56(3) and 56(4) so far as they would apply to that case. But as mentioned above, it would assist GBC greatly if a list of other relevant existing permissions were provided by the Applicant before providing a final view.<br>There are no points on Work No. 7R and Requirement 13 from GBC at this stage, given they relate to matters outside Gravesham.<br>Nonetheless, GBC have a potential interest in the subject matter because of the need to address the | which are inconsistent with the Order are not the subject of enforcement action, an outcome that would be wholly undesirable. The Applicant notes that this provision has been welcomed by the London Borough of Havering and Thurrock Council.<br>No travellers' site other than the Gammons Field Way Travellers' site is proposed to be relocated so it is not considered that this provision relates to any other travellers site. |

| Examining Authority's Point (Annex A of Agenda for ISH2) | Gravesham Borough Council's Comment | Applicant's Response |
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| for, having regard to PA2008 s120(3), (4) and Part 1 of Schedule 5.<br>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'.<br>The Applicant is requested to provide detailed legal submissions explaining the statutory basis upon which it is possible to include a provision in a DCO granting consent for change of use of land to a traveller site, with particular reference to whether it is considered to be 'related housing development', or associated development with a residential element. Consideration should be given to whether the provision of pitches and related facilities on a traveller site fall under the definition of a dwelling (which is expressly excluded from the definition of associated development).<br>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 | private traveller sites along the A226 that will be impacted by construction | |

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| 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.<br>Further consideration will also need to be given to the appropriateness of any such conditions being within a DCO (and thus only capable of being changed via a change to the DCO) or whether an alternative approach might be that the applicant submits an application for planning permission to the LPA (under the Town and Country Planning Act 1990) seeking approval before works can take place on the existing traveller site, or any CA of that land is authorised. The views of the local planning authority on applicable policy and process for such an approach will be sought, as will views on timing, certainty (or otherwise) of outcome and the effects of a refusal or delay on the deliverability of the dDCO proposed development overall. | | |
| 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 | GBC maintain their concern about the breadth of this provision. The Applicant can, of course, acquire land compulsorily, and the fact that the exercise of the powers must not give rise to materially new or materially different environmental effects does not mean that there will be no effect. It would be the usual | In relation to the preamble, there is no particularisation of GBC's position or response to the Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 |

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| 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.<br><br>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.<br><br>Observations on novel drafting in Article 2(10) above are relevant here.<br><br>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. | expectation in any planning application (and DCO) that the geographical extent of development would be subject to a "red line" of some sort, whereas the wording here could theoretically allow for development anywhere in Gravesham (or anywhere in England for that matter).<br><br>GBC are examining the DCO carefully and where necessary will seek clarity of what precisely is being permitted (along with mitigation and compensation) to ensure it is all appropriately controlled.<br><br>GBC are concerned to make sure that the definition of "preliminary works" is not too broad. GBC will continue to carefully consider it in detail, together with the contents of the preliminary works EMP.<br><br>The definition of "preliminary works" in the requirements is important because of the way it interlinks with the definition of "commence" – "Commence" means beginning to carry out any material operation .... Forming part of the authorised development other than preliminary works"<br><br>In turn, a number of the recommendations begin "No part of the authorised development is to commence until ...".<br><br>Paragraph 6.6 of the Explanatory Memorandum [APP-057] says: list of activities excluded from the definition of commencement closely follows the definition contained in the M42 Junction 6 Development Consent Order 2020, with the exception that (i) excluded utilities works would constitute commencement (which is defined); and (ii) site clearance and accesses is only permitted for advanced construction compounds (identified in the Code of Construction Practice)". | [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. The Applicant maintains its position on this issue for the reasons set out therein. GBC state that this provision would "could theoretically allow for development anywhere in Gravesham (or anywhere in England for that matter)" and also state the Applicant can "acquire land compulsorily". The Applicant considers this to be unfounded. The Applicant can only utilise the powers of acquisition under Part 5 of the DCO in relation to the Order limits. The controls on land acquisition (i.e., that it must be inside the Order limits), land use (e.g., the condition which it can take temporary possession), the preliminary scheme design (as per Requirement 3) and the proviso that no works can be carried out if they entail materially new or materially different effects provide appropriate controls.<br><br>In relation to the definition of "preliminary works", the Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 |

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| Submissions from hearing participants on the adequacy and appropriateness of provisions providing flexibility will be sought. | In addition to the identified exceptions, the draft Order departs from the precedent by allowing vegetation clearance as part of preconstruction ecological mitigation. GBC are considering the implications of this. | Discretionary Submission Annex A Responses] and [REP1-184]. |
| The intent of this article is to avoid inconsistency with other relevant statutory provisions applying in the vicinity and is precedented in highways made Orders. The drafting in its current form has the effect of a general disapplication of other statutory provisions applying to land, including land lying beyond the Order land. However, the proposed development in this instance and the extent of the Order land are very large and understood to be larger than the extent of Order. It follows that the potential effect of the disapplication sought could be very large.<br>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. | GBC are concerned about the geographical extent of the disapplication of legislation, and do not consider that the Applicant's response to the Annex [AS-089] meets its concerns. In particular the wording used is different from the usual precedents in that it refers to "adjoining or sharing common boundary" rather than "adjacent to". If there were a large plot of land outside the order limits and only a small part of its boundary shared a common boundary with the order land, then arguably the whole of the plot might fall within the article. | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. GBC states that "the wording [in article 3(3)] used is different from the usual precedents in that it refers to "adjoining or sharing common boundary" rather than "adjacent to"". This departure from the precedent was made at the request of the PLA, and follows the Silvertown Tunnel Order 2018. As set out in the Explanatory Memorandum, the Applicant does not consider this changes the legal effect of the provision. GBC's scenario would apply under either forms of drafting, and it is considered appropriate that any enactment takes effect subject to the DCO. If the plot was 'only a small part', then the extent any enactment would take 'subject to' the DCO would similarly be limited. |

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| 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).<br>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?<br>Having regard to the definition of a gas transporter pipeline NSIP in PA2008 s 20, is it clear that the proposed gas transporter pipeline works meet that definition? Is there any reason why alternatively the gas transporter pipeline works could not proceed as associated development (under PA2008 s 115) to the highway NSIP? | This point is being addressed in the joint legal note that is being produced by the applicant and local authorities.<br><br>See above for GBC's comments on the geographical scope of Ancillary Works, which the Applicant has addressed in this section. | A joint legal note was included in the Applicant's post-hearing submissions for Issue Specific Hearing 2 [REP1-184]. On the geographical scope of the ancillary works, see above. |
| 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).<br>The effect of the drafting discussed here will be tested in Compulsory Acquisition Hearing 1 (CAH1) and may be the subject of oral or written submissions by Affected Persons. The purpose of this hearing will be to | No comments at this stage. GBC does have land which is subject to compulsory acquisition and will raise any concerns later at the appropriate time. | Noted. |

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| examine the basis for the drafting approach taken.<br>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:<br>• 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);<br>• by excepting them from the definition of the Order land (if 'Order land' definition is not used for other purposes in the DCO); or<br>• by drafting the relevant compulsory acquisition article to expressly exclude them.<br>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.<br>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 | | |

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| 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.<br>In all respects (including in relation to the book of reference), the applicant should follow Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land published by DCLG (now MHCLG) in September 2013. | | |
| Article 27(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.<br>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 | GBC consider that the usual 5 years is ample time for the exercise of compulsory powers and submits that a longer period should only be allowed in exceptional circumstances, in order to avoid the further continuing uncertainty and continuing blight that landowners would face.<br>In its response to Annex A [AS-089], The Applicant cites the scale and complexity of the development as the reason for the 8 year period, and refers to Thames Tideway and the Hinkley Point C connection DCOs as precedents. These were exceptional cases, and GBC is not convinced that the scale of the works proposed for the LTC is any greater than some of the other DCOs that have been promoted by the Applicant, for example the A14, Black Cat and Stonehenge. The initial time limit for Phases One and Two of HS2 was 5 years and the power to extend has not been used. GBC considers that given the effects of ongoing blight, great care should be taken in allowing for an extension | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. The period of works for the Project is 6 years alone which is not comparable to the precedents cited by GBC. The Applicant further notes that the construction programmes for those precedents with longer compulsory acquisition periods is comparable to the Project's and in some cases longer. |

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| the Order. This amended definition of the start date could have the effect of significantly adding to the 8-year period within which persons with an interest in land will have their land burdened with the threat of CA before it is compulsorily acquired. This represents an additional interference with their rights (over and above those that normally arise from CA) which must be justified. The start date definition adds an additional element of uncertainty, as it is not possible to know how long any challenge may take to be finally determined – and it is not impossible that one running through an appeal to the Court of Appeal and thence to the Supreme Court might take a long time.<br>Are these approaches to drafting acceptable, considering their effect on the rights of persons with an interest in land and the possibility of blight? | to standard accepted time limits for compulsory acquisition, because to do otherwise may lead to it becoming the norm for NSIPs.<br>GBC understands that a time limit of more than 5 years is unprecedented for a highways DCO, some of which have involved lengthy linear projects with multiple junction arrangements.<br>GBC agrees with the concerns of ExA on the start date being tied to the date on which any legal challenge is finally determined, particularly as the date of ultimate disposal of a legal challenge can never be certain, and the combination of this with the proposed 8 year period would lead potentially to a period of uncertainty and blight being extended to over ten years from the date of the making of the DCO. The Applicant cites only one precedent (Manston). GBC is aware of no others, either in DCOs or other regimes which authorise compulsory purchase. | |
| 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 | GBC have sympathy with the concern of ExA as regards the scope of article 28(1) but are keen to ensure that the DCO includes sufficient powers to ensure that mitigation areas are properly managed in cases where they remain under the ownership and/or control of third parties. That could be achieved by the imposition of covenants. GBC would be keen to ensure that the Applicant has the ability to retain power to do so in cases where article 28 is intended to enable preservation of mitigation areas.<br>On the second point about consistency between article 8 and article 28, GBC agrees that if the principle is | The Applicant welcomes these submissions. |

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| article 2(1) in the absence of a specific and clear justification for conferring such a wide-ranging power in the circumstances of the proposed development and without an indication of how the power would be used" (paragraph 62).<br>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.<br>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.<br>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) | accepted that statutory undertakers should be able to exercise the powers to impose covenants, then ultimately the liability to pay compensation remains with the Applicant and GBC notes that the Applicant has agreed to address this. | |

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| 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.<br>If the DCO is to permit CA powers to be exercised by unknown individuals or statutory undertakers whose ability to meet CA costs has not been examined, there is potential for a power to acquire to be transferred to a person who is not 'good' for the related liability in compensation. Precision of intent and effect are very important here.<br>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". | | |
| 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. | No comment from GBC at this stage | Noted |

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| Notwithstanding other precedents, as much information as possible should be provided about land potentially capable of being subject to TP. Additional diligence on and justification for the extent of TP sought are required, as in general terms possession of land is a matter that is specifically examined, to avoid the possibility of inadvertent adverse effects. | | |
| Article 66 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.<br>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.<br>Are all such persons considered to be Category 3 Persons. Are they all identified in the Book of Reference at Part 2? | No comments from GBC at this stage | Noted |

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| If it is argued that Special Parliamentary Procedure (SPP) is not to apply (before authorising CA of land or rights in land being special category land), full details should be provided to support the application of the relevant subsections in PA2008 Sections 130, 131 or 132, for example (in relation to common, open space or fuel or field garden allotments):<br>• 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<br>• 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.<br>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 | Land designated by GBC as open space is subject to acquisition under the order (at Shorne Woods Country Park). Provision is made for replacement land under the Order. GBC is concerned to ensure that the replacement land is secured by the DCO and will be properly managed as open space thereafter.<br>In that regard, GBC notes the unusual wording of article 40(1), which requires the replacement land to have been "acquired in the undertaker's name or is otherwise in the name of the persons who owned the special category land" which appears to be unprecedented. GBC would welcome an explanation as to why this wording was used, particularly what the words "in the undertaker's name" contemplate and whether "otherwise in the name of the person" is intended to be "otherwise in the ownership of the person".<br>Also in the second part of the requirements in article 40(1) is that the Secretary of State merely needs to have certify that they have received (but not approved) a scheme for the provision of the replacement land. GBC considers that there ought to be a requirement for approval, even though there is a requirement that the scheme must not conflict with the outline LEMP. This is brought into focus by the requirement in article 40(1) for the local planning authority to be consulted. Given that there is no requirement for approval, it is not clear what the LPA would be consulted about.<br>GBC notes the Applicant's response to Annex A [AS-089] on the ExA's concerns that the scheme might not be implemented before the special category land vests. The Applicant says that there is no legislative provision | Article 40(1) requires the replacement land to have been "acquired in the undertaker's name or is otherwise in the name of the persons who owned the special category land". This is to ensure that the replacement land is in the ownership of the undertaker, or in name of the person who would then be responsible for the replacement land (i.e., the owner of the existing special category land) at the point acquisition of the special category land occurs. For the avoidance of doubt, article 40(3) then ensures that the land is vested in the appropriate owner in accordance with a certified scheme. For completeness, it is not correct to say that this drafting is unprecedented (see, for example, article 37 of Port of Tilbury (Expansion) Order 2019).<br>The Applicant does not consider that "certification" needs to be changed to "approval". Approval for the purposes of section 131/132 will be provided on the date of a decision on development consent (if granted). This is heavily precedented, and the provision ensures that the scheme includes "a timetable for the implementation |

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| 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)?<br>Although Article 40(3) provides that the applicant must implement the certified scheme, and that once it is implemented the replacement land must vest in the persons with an interest in the special category land, it would still appear to allow the undertaker to CA the special category land before the replacement land is available to use and without any particular security or limitation preventing or confining the prolongation of the time between the certification of a scheme and the completion of the transfer of the replacement land. If the undertaker did not then implement the scheme or delays implementing the scheme it could fall to the LPA to seek to enforce this provision, which could take a significant time, during which persons would be deprived of access to the special category land. This does not seem to align in spirit with the intention of the legislative provisions on special category land, which seek (amongst other provisions) its replacement without a period of delay.<br>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 | in sections 131/132 which requires the replacement land to be laid out prior to acquisition of the replacement land. That is true but those sections are not about setting requirements for what has to happen per se when special category land is proposed to be taken, instead they set out the requirements that must be met to avoid Special Parliamentary Procedure. It is open for the ExA to recommend that the scheme should be implemented before the special category land vests.<br>Article 40(1) also talks of rights "vesting" under the Order, which would suggest a reference to existing rights, not new ones, which are surely "acquired", if that is the intention. | of the scheme has been received from the undertaker". The local authority would be consulted on the contents of the scheme, and that timetable.<br>The Applicant considers that its acquisition of special category land, including prior to the laying out of replacement land, is compliant with policy and the legal requirements for s131/132 for the reasons set out in Appendix D to the Planning Statement [APP-495]. |

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| 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.<br>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". | | |
| Where a representation is made by a statutory undertaker (or some other person) that engages section 127(1) of the Planning Act 2008 and has not been withdrawn, the Secretary of State will be unable to authorise compulsory acquisition powers relating to that statutory undertaker land unless satisfied of specified matters set out in section 127. If the representation is not withdrawn by the end of the examination, the ExA will need to reach a conclusion whether or not to recommend that the relevant statutory test has been met in accordance with s.127. | No comments from GBC | Noted. |

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| 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. | | |
| 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. | As mentioned at the hearing, GBC are unclear at this stage whether some development that may follow as a consequence of the development will be brought forward under the powers of the DCO or later under a TCPA planning application,<br>The example given was public facilities that may be provided at the proposed Chalk Park. The Applicant has provided further details in its response to Annex A as to what is proposed for Chalk Park, which GBC will consider further, and will discuss any further similar points on other sites in its area with the Applicant. In the meantime, GBC reserves its position on this issue.<br>GBC acknowledges that obtaining an amendment to a DCO as a material or non-material change is not straightforward, but GBC is concerned that this article could give the Applicant reason for not dealing with some difficult issues, such as the two traveller sites affected in GBC's area. | The Applicant notes that GBC is reserving its position. In relation to the "the two traveller sites affected in GBC's area"; it is considered these are unaffected by the provision which merely seeks to ensure that inconsistencies between planning permissions and the DCO do not lead to enforcement action being taken. |
| 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 | No comment from GBC at this stage | Noted. |

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| 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. | | |
| 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.<br>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.<br>Article 14 relates to permanent stopping up of streets. Should 14(4)(e) be a new paragraph (5)? | No comment from GBC at this stage | Noted. |
| 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 | No comment from GBC at this stage | Noted. |

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| should be limited to identified streets, locations or in relation to specific Works. | | |
| The guidance in section 25 of Advice Note 15 should be followed and, if not already provided, additional information sought such as<br>• the purpose of the legislation/statutory provision ·<br>• the persons/body having the power being disapplied ·<br>• 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<br>• (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.<br>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.<br>Article 55 is headed the application of local legislation, but it is actually an article excluding the application of enactments, | GBC have not yet considered in detail the impact of the disapplication of the local enactments listed in article 55. GBC will examine:<br>Kent County Council Act 1981<br>Channel Tunnel Rail Link Act 1996<br>Thong Lane Sportsground Byelaws 1970 | Noted. |

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| orders and byelaws where they are inconsistent with the order. | | |
| The word "take" should be removed from this article. | No comment | Noted. |
| 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.<br>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? | GBC will want to make sure that all the relevant trees have been identified in the ES, and that proper investigations have been carried out in that regard.<br>Therefore, more research is to be done by GBC on the National Highways environmental surveys and whether it is sufficiently detailed and will liaise with Woodland Trust. | Noted. The Applicant notes that a number of documents show the relevant assets (see Hedgerow and Tree Preservation Order Plans [Application Documents APP-053 to APP-055], Existing Tree Constraints Plan which shows the trees subject to TPOs [REP1-147] and [REP1-149] and the Environmental Masterplan. |
| 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.<br>In the South Humber Energy Bank Centre DCO BEIS Secretary of State removed an article which sought to apply the s.78 and s.79 TCPA 1990 appeal provisions to the discharge of requirements and replaced it with a specific appeal procedure in the article itself. BEIS Secretary of State explained in their decision letter that the specific appeal procedure was the "preferred approach for appeals".<br>Advice Note 15 suggests that the specific appeal procedure should be included in a | There are no rights of appeal in relation to requirements in Schedule 2 part 2, either for the Applicant or for the local planning authority. The latter is one of the reasons GBC considers that the LPA should be the discharging authority.<br>More generally on discharge of requirements, the time limits for responding to consultations under paragraph 20 of Schedule 2 must be sufficient to allow GBC to consider and provide a proper response. It is likely that a number of applications will be made together or in short succession. Paragraph 20 gives 28 days at present with an ability for an agreement to be made to extend that period, agreement not to be unreasonably withheld. But of course there can be no guarantee of an agreement. GBC considers that the period should be extended to 42 days. | The Applicant's position on the discharging authority is set out above, and in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. It is not considered that 10 business days under the appeals provision is insufficient time in the specific context of the appeals process. At that stage, any appeal party would have had the benefit of the extensive engagement up until the end of the examination, it would have seen the relevant application (which would have been refused |

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| 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.<br>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.<br>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 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. | In a similar vein, in order to assist the process, GBC considers that the DCO should be amended, or a commitment given by the Applicant so that local planning authorities will be properly consulted in advance, and a running future timetable of applications and consultations is maintained so applications and consultations do not arrive without notice.<br>GBC notes the response of the Applicant to the ExA's query about article 65. GBC's main concern about article 65 is about paragraph (1)(d) which would replace the existing section 60 and 61 Control of Pollution Act appeals procedure (by which appeals could be made by the Applicant against the local authorities' decisions to the magistrates' court) with an appeal to the Secretary of State. This is another example where GBC considers that there are questions about the independence of the process being sought by the Applicant and, in this case, there appear to be very few precedents. Only two highways DCOs are mentioned by the Applicant in its response to Annex A [AS-089], and it is noted that the Secretary of State removed the provision in another case. The Applicant argues that an appeal process to the Secretary of State provides more certainty as regards timescales but provides no evidence of the magistrates' courts process having caused difficulties on other DCOs where it hasn't been disapplied, or of the local courts in this case being a cause for concern. The Applicant should be put to strict proof of the need for this provision. | and would be the subject of an appeal), and then provided with further time to consider the submissions from the Applicant. The same time frame of 10 days is given for counter-submissions and for the appointed person to make their decision. These timescales are precedented (see, for example, article 52 of the M25 Junction 28 Development Consent Order 2022).<br>In relation to the request for timetables, the Applicant notes that Schedule 2 requires a register to be maintained. In relation to article 65(1)(d), and the appeal to the Secretary of State in respect of the Control of Pollution Act 1974, the Applicant notes that there is a significant backlog in the Magistrates Court. The Law Society notes that In the Magistrates' Court, the situation continues to deteriorate. 1,666 cases were added to the backlog in February 2023, bringing the total to 343,519. It is not considered that a nationally significant infrastructure project should be subject to such delays. As is acknowledged by GBC, the ability to appeal to the Secretary of State in respect of the Control of Pollution Act 1974 is precedented. |

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| | | The provision is therefore considered necessary and justified. |
| 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.<br>See 23 below in relation to references to arbitration in this article. | GBC notes this point and its main concern would be to ensure that all the obligations on the Applicant (including obligations contained in documents other than the DCO), as well as the powers, where it is appropriate, would be transferred to the transferee. So for example, this might include obligations in a section 106 agreement. | The Applicant notes that the dDCO explicitly sets out that "the exercise by a person of any benefits or rights conferred in accordance with any transfer or grant under paragraph (1) is subject to the same restrictions, liabilities and obligations as would apply under this Order if those benefits or rights were exercised by the undertaker" (as per article 8(3)). |
| The applicant should be aware of and mindful of section 146 of the Planning Act 2008. | No comment from GBC at this stage | Noted. |
| Temporary possession is not itself compulsory acquisition.<br>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 | On the issue of notice, GBC notes that in other schemes, Promoters have agreed to longer than 28 days. On Phase 2a of HS2, for example (a scheme that is considerably more complex) the Promoter committed to a period of 3 months' notice (see paragraph 6.1.2 of the Phase 2a Farmers and Growers Guide). GBC sees no reason why the period should not be extended further in the case of the Lower | The Applicant's position is that in the case of the Project, there is no sound argument for an extension to 3 months for the temporary possession. In particular, the Applicant does not consider a 3 month notice period is appropriate or proportionate for the Project. The |

| Examining Authority's Point (Annex A of Agenda for ISH2) | Gravesham Borough Council's Comment | Applicant's Response |
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| which temporary possession may be taken for specific purposes listed in that Schedule. If they do, then the applicant should justify why those wider powers (which also allow temporary possession of land not listed in that Schedule) are necessary and appropriate and explain what steps they have taken to alert all landowners, occupiers, etc. within the Order limits to this possibility.<br><br>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.<br><br>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: ·<br><br>• The notice period that will be required under the NPA 2017 Act is 3 months, | Thames Crossing, particularly considering that the period for which land could be occupied could extend to a number of years. | Applicant notes that complex projects such as the A14 Cambridge to Huntingdon project have provided 14 days (which the dDCO exceeds by 100%). The 28 day period must be seen in the context that landowners and occupiers have been consulted on land use over numerous consultations; will have an opportunity to take part in the examination process; and the Applicant will be required to publish a notice under section 134 of the Planning Act 2008. A 28 day period is consistent with the government's desire to ensure nationally significant infrastructure projects can be expeditiously delivered. There are no SRN DCOs which have a 3 month period, and in light of the extensive engagement to date, it is not considered appropriate for that period to apply to the Project. |

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| 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? ·<br>• 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? ·<br>• 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?<br>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"? | | |
| Whilst arbitration provisions have been a dynamic field of practice in dDCO drafting, | GBC notes the Applicant's response to Annex A [AS-089] on this point and in particular the prospect that | The Applicant has adopted the amendment suggested by the |

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| recent decisions suggest that it is unlikely that a consenting Secretary of State will allow the arbitration provision wording to apply arbitration to decisions s/he, or, if relevant the Marine Management Organisation ('MMO') may have to make on future consents or approvals within their remit.<br>By way of example:<br>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:<br>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.<br>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 | unless there were an exclusion, then article 64 could apply to decisions of the Secretary of State, and in particular, 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. GBC have expressed concerns elsewhere about the lack of any appeal mechanism in Schedule 2, so would be averse to the arbitration provision being amended in the way proposed by the Applicant if to do so would close down a dispute mechanism for GBC in relation to discharge decisions (assuming that the DCO would continue to provide that the Secretary of State is the discharging authority).<br>No other comment from GBC at this stage | Examining Authority. The Applicant notes that the Secretary of State's decisions will be amenable to judicial review, but there is no reason to grant credence to an assumption that the Secretary of State would not act lawfully and properly. |

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| Thanet Extension, East Anglia ONE North and East Anglia TWO Examinations addressed similar considerations. Whilst these are all energy cases, the same point appears to apply, that an arbitration provisions should not apply to the exercise of decision-making powers by a duly constituted and authorised public authority or Minister of the Crown.<br>It should also be noted that the Secretary of State removed the following from the arbitration clause in both DCOs:<br>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. | | |
| 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. | GBC notes that recent highways DCOs (Black Cat, Wisley and Silvertown, for example) limit the scope to paragraph (g) only - noise from premises - and would like to know why in this case it is thought necessary to extend beyond that<br>The Applicant has included the following paragraphs of section 79(1) within the scope of article 58 and GBC considers that the Applicant should fully justify each, by reference to precedent and examples from any other schemes where not including them has caused difficulties:<br>(d) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance; | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. Article 38 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 references paragraphs (c), (d), (e), (fb), (g), (ga) and (h) of section 79(1) the Environmental Protection Act 1990 in the equivalent provision. Other DCOs contain references to a longer list of nuisances (e.g. article 39 of the |

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| | (e) any accumulation or deposit which is prejudicial to health or a nuisance;<br>(fb) artificial light emitted from premises so as to be prejudicial to health or a nuisance;]<br>(g) noise emitted from premises so as to be prejudicial to health or a nuisance;<br>(ga) noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street | Drax Power (Generating Stations) Order 2019) and others contain a shorter list (e.g., Cleve Hill Solar Park Development Consent Order 2020). In the case of the Order, the Applicant has narrowed the list of references to those nuisances which are considered to be potentially engaged. 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.<br>However, there is an important wider context to this question. Section 158 of the Planning Act 2008 provides statutory authority as a 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 |

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| | | 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 in respect of the matters in that article. 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. |
| [Deemed Marine Licence] | GBC has no comments on the DML. | Noted. |
| [Article 18] | GBC has no comments on this article. | Noted. |
| 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 | No comment from GBC at this stage on this particular provision. GBC makes separate representations on the question of a Gravesham residents discount for the existing Dartford Crossing. | Noted. On the local residents discount, please see the Applicant's responses to GBC's Written Representations. |

| Examining Authority's Point (Annex A of Agenda for ISH2) | Gravesham Borough Council's Comment | Applicant's Response |
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| undertaker? Or should 46(1) refer to the undertaker instead of the SoS? | | |
| 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 comments earlier in relation to point 2, flexibility of operation. | See above. |
| 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. | GBC also notes that any departure from the design principles scheme etc can only be made following consultation with the local planning authority. That provides some comfort but GBC agrees that there must be proper justification for any such departure. Some of the design principles conflict with one another (as would be expected for general ones) – for example, detailed design of Green Bridges where the best place for planting may not be optimum for ecology or the footpath link.<br>On a matter of detail, this provision and others refer to the "relevant planning authority" which is defined in article 2 as the planning authority for the area to which the provision relates. Whilst it may be said to be easy to imply that this should be GBC in its area, the point is that Kent County Council (KCC) are also a planning authority in respect of various functions, so the definition could be tighter. This point is dealt with in GBC's post-hearing written representations. | The Applicant will consider an amendment relating to the definition of "relevant planning authority" and, if considered necessary, update the dDCO as appropriate at Deadline 3. |
| The phrase "substantially in accordance with" is uncertain and imprecise. | GBC sympathises with the ExA's assessment and notes the Applicant's response [AS-089]. GBC understands the point made by the Applicant about the need to allow some differential between successive | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission |

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| | versions of a document and would be happy to explore alternative wording. The removal of the word "substantially" is one possibility. | Annex A Responses] and [REP1-184]. |
| The requirements permit discharge for part of the authorised development. Is it sufficiently clear what a "part" of the authorised development is? | GBC has no comments on this issue at this stage. | Noted. |
| Is the phrase "reflecting the relevant mitigation measures" sufficiently certain? | GBC has no comments at this stage but will continue to review this wording as the examination progresses. | Noted. |
| See comments above on Work 7R and questions regarding the acceptability of provision of the site via the DCO in principle.<br>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.<br>Should there also be a requirement to replace like for like the facilities and number of pitches on the existing site?<br>It also contains a deemed approval provision which seems unlikely to be appropriate when | The travellers' site is not in the area of GBC | Agreed. |

| Examining Authority's Point (Annex A of Agenda for ISH2) | Gravesham Borough Council's Comment | Applicant's Response |
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| the undertaker is in effect applying for approval of permission for a number of homes for travellers.<br>Should there be a further provision in the DCO granting a specific planning permission for use of works number 7R as a traveller site to ensure that it will remain as a traveller site in perpetuity and to ensure that it is controlled by the appropriate conditions. Or if this is not permissible (see comments above) then should there be a requirement to submit a planning permission application to the LPA? | | |
| [Requirement 15] | GBC has no comment on this Requirement | Noted. |
| Is it permissible or appropriate to have a deemed discharge provision relating to the discharge of requirements that secure essential mitigation?<br>Is it clear that the Secretary of State is content with the extent of the discharging powers provided to them by the Order?<br>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?<br>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? | On the first point (which refers to paragraph 18(2) of Schedule 2)), GBC acknowledges that there must be some provision in the DCO to cater for cases where no decision is made by the discharging within the relevant time frame set out in the DCO. In most DCOs, where the LPA is the discharging authority, there would be a right of appeal for the applicant. This is another reason for GBC's view that the LPA should be the discharging authority.<br>GBC has no comment on the second point: it is for the Secretary of State.<br>On the third point, GBC would suggest that if the SoS is to be the discharging authority then the SoS should be required to seek the views of the LPA if for example an application has been made for discharge which is not in accordance with the response given by the LPA in a consultation. Whilst this would not meet GBC's | The Applicant's position on the discharging authority is set out above, and in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. In relation to second point, noted. In relation to the third point, and in respect of paragraph 18, the Applicant reiterates its comments about the specific parameters which Schedule 2 is dealing with (see paragraph 1.3.21 of responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses]. In those circumstances the suggestion from |

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| | fundamental objection to the SoS being the LPA, it would provide some additional comfort.<br>GBC refers to its written submissions relating to ISH2 where this topic is covered. | GBC that there should be another consultation is considered both disproportionate, and excessive, and to the Applicant's knowledge, highly novel in the DCO context (where the preliminary scheme design or the outline management plans are approved, but the details are left subject to further approvals). The Applicant is firmly of the view that the suggested approach would add delay (effectively requiring two consultation exercises), as well as cost, contrary to the public interest as well as Government policy on streamlining the delivery of nationally significant infrastructure projects. |

# 5 Holland Land and Property

## 5.1 Article 2(10)

5.1.1 Article 2(10) – the written representation queries the "'materially new or materially different environmental effects"' drafting in the dDCO and the reasonableness of the ability to undertake approaches that emerge through 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.

5.1.2 The draft DCO would enable the Applicant and its appointed Contractors to reduce environmental impacts during the detailed design stage. The Applicant requires the ability to implement such approaches to enhance environmental outcomes on ecological compensation areas. No additional land would be required to implement this as it would only be undertaken on areas identified for permanent acquisition for the purposes of ecological compensation. This is further explained in the updated Explanatory Memorandum [**REP1-045**] and the Post-event submissions, including written submission of oral comments, for ISH2 [**REP1-184**]. For the avoidance of doubt, the land acquisition under Part 5 of the dDCO is limited to the Order limits and impacts on landowners is indeed the driver of seeking the flexibility to acquire rights and restrictive covenants rather than freehold acquisition.

## 5.2 Article 5 – Maintenance of drainage works

5.2.1 Article 5 – Maintenance of drainage works – concern about impact on land drainage, responsibility for remediation of impacted field drainage should be with the Applicant.

5.2.2 The purpose of Article 5 of the draft DCO is to make it clear that any realignment of drainage or other works to them that are carried out as part of the Project do not affect the existing allocation of responsibility for maintenance of those drains, unless this is agreed between the Applicant and the responsible party. It is not intended to deal with issues relating to drainage outside of the Order Limits. The eventuality raised (i.e. '*Where an existing land drainage scheme is interrupted during the works or where a new connection is required because the undertaker's works have severed private drainage*') would be dealt with as a compensation matter pursuant to Article 35 (see, in particular, Article 35(6)) [**REP1-042**].

## 5.3 Article 8 – Consent to transfer benefit of the Order

5.3.1 Article 8 – Consent to transfer benefit of the Order – concern regarding cost and time burden on landowners for dealing with multiple Statutory Undertakes implementing works on land, and implications of telecommunications code powers.

5.3.2 The Project involves a number of different elements, including highways and utilities works. It is therefore inevitable that a number of parties will be involved in the delivery of the works. The Applicant will remain ultimately responsible for the delivery of the works, and even where a transfer of the benefit of the Order has taken place, the '*exercise by a person of any benefits or rights conferred in*

*accordance with any transfer or grant under paragraph (1) is subject to the same restrictions, liabilities and obligations as would apply under this Order if those benefits or rights were exercised by the undertaker*' (as per Article 8(3) [**REP1-042**]). The Applicant considers that the costs implications associated with the delivery of works are a compensation matter which will be managed in the implementation of the Project, should development consent be granted.

5.3.3 The dDCO does not affect the operation or otherwise of the Digital Economy Act 2017.

## 5.4 Article 13 – Use of private roads

5.4.1 The Applicant requires the temporary use of private roads within the Order Limits. Nothing in this provision authorises the extinguishment of any other right to use a private road. As explained in the Explanatory Memorandum [**REP1-045**], the power is in fact an attempt to preserve the position of other users. In particular, Article 13 is distinguished from temporary possession under Article 35 because the Applicant does not require the exclusive use and possession of the private roads while exercising this power. The suggestion that the provision should reference 'other uses' is therefore unnecessary.

## 5.5 Article 27 -– Time Limit for Exercise of CA Powers

5.5.1 The Applicant considers the 8-year time limit to be necessary and proportionate taking into account the length of the construction programme, Project complexity, and extent of works required post main construction period. This, as well as why it is appropriate for the period to run from the end of a judicial review period, is further explained in the Statement of Reasons [**REP1-049**] paragraphs 5.3.16 – 5.3.20, the Post-event submissions, including written submission of oral comments, for ISH2 [**REP1-184**] and the updated Explanatory Memorandum [**REP1-045**] paragraphs 5.123 – 5.125.

## 5.6 Article 28 – Restrictive covenants and transfer

5.6.1 The Applicant does not agree that only a 'general' explanation of the rights proposed to be acquired has been provided. The Statement of Reasons [**REP1-049**] sets out the particular purposes for which permanent rights and restrictive covenants can be acquired. The Applicant has provided as much information on the potential restrictive covenants and/or restrictions of use on land which is required for permanent rights for the installation of permanent utility diversions as it is possible to provide at this stage of the Project's design. For explanation and justification for the drafting of this Article see the Post-event submissions, including written submission of oral comments, for ISH2 [**REP1-184**].

## 5.7 Article 25 – 34 – Powers of acquisition and possession of land

5.7.1 The Applicant refers to its responses above in relation to Article 28.

5.7.2 The Applicant will continue to engage with landowners regarding the diversion of utilities during the detailed design stage and seek to mitigate impacts on retained land as far as reasonably possible within the constraints of the draft DCO.

5.7.3 The Applicant has, in limited circumstances, sought rights and restrictive covenants to enable statutory undertakers to have adequate land and rights in connection with temporary assets. The Applicant is aware there are concerns from affected landowners regarding those rights sought for temporary utility works that would enable the construction of the Project (Work Nos OHT1–OHT8 and MUT1–MUT32) and is considering its options and available mechanisms from which to provide comfort to landowners that these rights will be extinguished at the earliest opportunity unless otherwise agreed with the landowner.

5.7.4 In relation to the proposed Linford water pipeline (Work No. MUT6) plot numbers 23-121, 23-139, 23-153 are listed in Schedule 8 of the draft DCO [**REP1-042**] which sets out the requirements for land within the Order Limits. Permanent rights are required for the installation and operation of the temporary water pipeline, which would be removed following construction.

## 5.8 Others comments

5.8.1 The Written Representation also raises concerns around articles 35, and 36. These do not relate to the drafting of the dDCO and the Applicant's overarching position on these is set out above, or in the Post-event submissions, including written submission of oral comments, for ISH2 [**REP1-184**].

5.8.2 In relation to article 40, for completeness, we note that the claim that "Sections 131(4) and 132(4) of the Planning Act 2008 provide for the giving of replacement land in exchange for the order right where the replacement land is land that is vested in the owner of the order land". This is not correct. The sections stipulates that "replacement land has been or will be given in exchange for the order land" and that "the replacement land has been or will be vested in the prospective seller and subject to the same rights, trusts and incidents as attach to the order land". The "prospective seller" is the owner of the existing site, not the owner of the replacement land. It is therefore permissible, contrary to the statement in the written representation, for "freehold land of a third-party landowner who has no freehold interest in the existing Tilbury Green common land" to be subject to the imposition of common land designation as part of the giving of replacement land. This position is explained in detail in Appendix D of the Planning Statement.

5.8.3 In relation to article 56, the written representation states "The protection of planning permissions on temporarily possessed land is questioned, particularly when the order causes the cessation of planning permissions." This comment is misplaced; article 56 only applies to the extent incompatible with the DCO and so would not apply or have effect outside of the temporary possession period.

# 6 Kent County Council

## 6.1 Article 2 (definitions)

6.1.1 The Applicant has inserted a definition of "relevant highway authority" and this is used article 6 as per KCC's request.

## 6.2 Article 10 (Construction and maintenance of new streets etc) and Article 15 (classification of roads):

6.2.1 KCC requests that commuted sums be secured under the Order or by agreement. The Applicant is a strategic highways company and is not responsible for the local highway network, which is the responsibility of the local highway authority. Under National Highway's licence issued by the Secretary of State, it has statutory responsibility for the strategic road network. In particular, in exercising its functions and duties in relation to the strategic road network, the Applicant must act in a manner which it considers is best calculated to ensure efficiency and value for money (paragraph 4.2(d)) and must demonstrate how it has achieved value for money (paragraph 5.12(c)). Accordingly, the Applicant does not consider it appropriate for a public sector body, delivering nationally significant infrastructure which will have significant economic benefits, to be liable for payment of commuted sums or ongoing maintenance costs.

6.2.2 The Applicant notes that funding for the operation and maintenance of the local road network is a matter which ordinarily forms part of DfT funding decisions. The Applicant considers it appropriate that the maintenance of roads which will form part of the local road network is a function which is proposed to be discharged by the local highway authority. The maintenance of both local highways and the strategic road network is funded by the Department for Transport. Local highway funding is mainly based on a formula linked to the total mileage of A roads, B and C roads, and unclassified roads in each area, together with the numbers of bridges, lighting columns, cycleways and footways. This funding is refreshed every few years to take account of changes in road length and number of highway structures. Accordingly, as local highway works are carried out under the DCO, the amount of funding that each local highway authority receives will be amended to recognise these additional responsibilities. Given that this process already exists, it is not appropriate to require the Applicant to provide funding for the maintenance of parts of the local network out of the money given to it to maintain the strategic road network. The Applicant notes that it is making a significant and substantial capital contribution to the delivery of these assets, and in light of the existing funding arrangements, it is not appropriate for the Applicant to have an ongoing and indeterminate responsibility.

6.2.3 The Applicant notes that this position has been endorsed, with limited and rare exceptions, on a number of transport DCOs (see, for example, article 14 of the M42 junction 6 Development Consent Order 2020, article 12 of the A428 Black Cat to Caxton Gibbet Development Consent Order 2022 and article 9 of the A303 (Amesbury to Berwick Down) Development Consent Order 2023).

6.2.4 Accordingly, insofar as the Project involves the Council incurring expense for the management of the local road network, this is matter between DfT and the Council, particularly in the context of the significant capital contribution from the Applicant in delivering new or altered assets. Introducing a new funding mechanism for the road network separate from these existing processes is not considered appropriate in the context of the Project.

## 6.3 Article 17 (traffic regulation – local roads):

6.3.1 The 28 day deemed consent period is considered appropriate. the Applicant considers this is to be appropriate for the following reasons:

a. The Road Investment Strategy, which sets out a statutory programme of road works across the country and time frame in which the Applicant's resources are to be used to ensure value for money. Prolonging the programme would have a detrimental effect on the delivery of this programme and risk the inefficient use of public funds for construction contractors to be put on standby whilst a consent is provided.

b. The Council, and other authorities will have had sufficient time during the consultation and examination of the Project, and beyond, to understand better (compared to any usual approval unrelated to a DCO) the particular impacts and proposals forming part of the DCO.

c. The fact that deemed consent provisions take effect in relation to a failure to reach a decision, not a failure to give consent, is also relevant. 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.

6.3.2 The concept of deemed consent is well precedented including on complex projects: see, for example, 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. The Council's position is an *in principle* objection which would equally apply to these projects mentioned, but the Secretary of State has nonetheless consented these provisions.

6.3.3 An eight week period for publicity in connection with such matters is entirely inappropriate in the context of the Project where a Traffic Management Plan will be consulted upon, and that management plan also secures a Traffic Management Forum which ensures ongoing engagement in connection with traffic regulation measures.

## 6.4 Article 21 (surveys and investigation of land):

6.4.1 KCC objects to deemed consent. For the reasons set out in relation to article 17, the Applicant considers this to be proportionate, necessary and in line with Government policy on ensuring the expeditious delivery of nationally significant infrastructure projects.

## 6.5 Requirements

### Requirement 1 (interpretation) and Requirement 2 (time limit):

6.5.1 The Applicant further refers to its response provided on article 6 and article 2(10) in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. Given the scale of activities involved in "beginning" the development, it is considered sufficient and adequate for this discharge the Time Limits requirements.

### Draft Requirement 3:

6.5.2 It is not clear which mitigation KCC believes needs to be subject to the preliminary scheme design. The applicant is therefore not proposing to amend Requirement 3. Appropriate mitigation (such as ecological mitigation) is secured under the terms of Requirement 3 as it has been emended in the design, and is shown in the General Arrangements.

### New Requirements – WNI – SRN, WNI – LRN, general monitoring and management:

6.5.3 The Applicant does not consider these Requirements to be necessary in light of its position on the Wider Network Impacts set out in its response to KCC on wider network impacts (as set out in its response to KCC's Written Representations).

### New Requirement – Public Transport and New Requirement – Active Travel Provision:

6.5.4 The Applicant does not consider these Requirements to be necessary in light of its position on public transport impacts set out above.

### New Requirement – Construction Impacts on the LRN:

6.5.5 The Applicant is in discussions with KCC on matters relates to highways but does not consider it appropriate or necessary to include these unprecedented provisions on the face of the Order.

# 7 London Borough of Havering

**Table 7.1 The Applicant's response to comments made by the London Borough of Havering on the draft DCO in [REP1-251].**

*Applicant's note: the London Borough of Havering also raised comments on the dDCO in [REP1-252] and [REP1-253] but these are addressed in the table below or* in the Applicant's Post-hearing submissions for ISH2 [REP1-184].

| Provision in DCO | Content | Comments of London Borough of Havering | Applicant's Response |
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| **i ARTICLES** | | | |
| Article 2 (10) | This provision states:<br><br>In this Order, references to materially new or materially different environmental effects in comparison with those reported in the environmental statement shall not be construed so as to include the avoidance, removal or reduction of an adverse environmental effect that was reported in the environmental statement as a result of the authorised development" | This overarching provision is intended to enable subsequent approval of details even though the likely consequential environmental effects are materially new or materially different from that which was assessed, if the difference is an avoidance, removal or reduction "of an adverse effect".<br><br>The concern with this provision is that the wording used may not encompass all of the consequences of the material change. Whilst "an adverse effect" might be avoided, removed or reduced that may in itself cause a different effect which has not been assessed and could be sanctioned by this provision.<br><br>It is suggested that the following wording be added to the end of the existing wording:<br><br>*"provided that there is no new or materially different adverse environmental effect in comparison with those identified in the environmental statement caused by the avoidance, removal or reduction of such adverse environmental effect"* | The Applicant's justification for this provision is included in the Explanatory Memorandum [REP1-045]. The purpose of the provision is to enable environmentally better outcomes which fall within the Applicant's environmental assessments. The amendment proposed by LBH would obviate the purpose of the interpretive provision. |

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| Article 5 (1) | Maintenance of drainage works | Part 3 of Schedule 14 contains Protective Provisions for the Protection of Drainage Authorities which contain provisions as to maintenance. It is suggested that the following words are inserted at the beginning of the article to acknowledge this and make it clear that the specific provisions of the protective provisions prevail, as is the case in the drafting of Article 18:<br>*"Subject to the provisions of Schedule 14 (protective provisions)"* | The Applicant is happy to make this amendment; and this has been implemented in the updated dDCO at Deadline 2. |
| Article 6 | Limits of Deviation | In Article 6 (3) a deviation from the LoD is permissible if it is demonstrated to the satisfaction of the Secretary of State, after consultation, that it would not give rise to a new or materially different environmental effect. There are the following concerns with this article:<br>• (1) The article is not clear as to whether the consultation will be undertaken by the Secretary of State or the undertaker. That is in contrast to other provisions (such as in the requirements in Sch 2) where the undertaker is identified as being responsible for carrying out the consultation. It would seem sensible to align this article with those other provisions and explicitly require consultation by the undertaker, by the insertion of the words "by the undertaker" after the words "following consultation". There is then no doubt that, Article 6(4) and paragraph 20 of Sch 2 will apply, and the undertaker will be obliged to apply the process in paragraph 20 to any submission to the Secretary of State under this article. | • The Applicant is happy to make an amendment clarifying consultation will be by the undertaker, and this has been implemented in the updated dDCO at Deadline 2.<br>• The Applicant is happy to insert a definition of "relevant local highway authority", and this has been implemented in the updated dDCO at Deadline 2. |

| Provision in DCO | Content | Comments of London Borough of Havering | Applicant's Response |
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| | | • (2) The requirement in Article 6 (3) is to consult with, inter alia, "the relevant local highway authority" and yet there is no definition of that term – in contrast to "the relevant planning authority" which is defined. If a definition of "relevant local highway authority" is included, it should refer to the authority in whose area those works are being carried out and also any adjacent highway authority whose highways may be impacted. | |
| Article 10 | Construction and maintenance of streets | As explained later, in section iv of this document, LBH wish to see the insertion of protective provisions for the protection of the local highway authority in relation to construction and maintenance of lengths of highway for which it is responsible. In the event of those protective provisions being included then this article should be expressed as being subject to those protective provisions. An update with regards to LBH and NH discussions on this matter is included in section iv.<br>This article uses the term "local highway authority" and also refers to "highway authority in whose area the street lies". The term "relevant local highway authority" is used in Article 6. It is suggested the drafting approach should be the same throughout the DCO unless there is intended to be a distinction. | The Applicant does not consider it appropriate to include protective provisions for highway authorities in the Order. This would be a highly novel approach for DCOs for the Strategic Road Network, and we are aware of only one precedent. Article 10 sets out that newly constructed or altered highways must be handed over to the reasonable satisfaction of the highway and it is considered this provides appropriate control to LBH. Nonetheless, the Applicant is engaging with LBH on further protections which can be provided.<br>The Applicant happy to insert a definition of relevant highway authority, and the references to "highway authority in whose area the highway lies" will be deleted and replaced with "relevant local highway authority." This has been implemented in the updated dDCO at Deadline 2. |

| Provision in DCO | Content | Comments of London Borough of Havering | Applicant's Response |
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| Article 11 | Access to works | This article is very broad and would, as drafted, allow interference with the part of the highway network the responsibility for which lies with LBH, without any prior knowledge of LBH.<br>Where the new or improved access affects highways for which LBH is responsible then LBH should be consulted in advance and the works should be subject to the protective provisions referred to in section iv of this document. | The Applicant considers the powers are necessary and proportionate. Indeed, the power is intended to put the Project on an equivalent footing with schemes authorised under the Highways Act 1980 which would benefit from the wide power contained in section 129 of that Act. This power is necessary because the location of all accesses has yet to be determined. Whilst every effort has been made to identify all accesses and all works required to those accesses, it is possible that unknown or informal accesses exist or the need to improve an access or lay out a further access will only come to light at the detailed design stage, once the full construction methodology has been determined. For example, the precise layout of accesses to construction compounds will need to take into account factors such as the swept path of the construction vehicles together with appropriate landscape mitigation which cannot be fixed at this stage. In addition, accesses may change because of developments which are themselves not yet consented or anticipated. The exercise of the power would be subject to the requirements, in particular |

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| | | | requirement 4 which secures compliance with the measures in the Code of Construction Practice, and (the updated) requirement 10 which requires compliance with the outline Traffic Management Plan for Construction. Accesses are indicatively shown in the latter document. The Council will be consulted on both the Traffic Management Plan submitted under requirement 10, and the Environmental Management Plan under requirement 4. The Secretary of State has confirmed that this is acceptable across a wider number of highway DCO projects akin to the Project (see article 15 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016, article 14 of the A19/A184 Testo's Junction Alteration Development Consent Order 2018, article 18 of the M42 Junction 6 Development Consent Order 2020, article 18 of the A19 Downhill Lane Junction Development Consent Order 2020, article 17 of the A1 Birtley to Coal House Development Consent Order 2021, article 17 of the A303 Sparkford to Ilchester Dualling Development Consent Order 2021). |

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| | | | National Highways sees no reason to depart from this practice. |
| Article 12 | Temp closure of streets etc. – deemed consent | This article provides for deemed consent of an application to a street authority for a closure, diversion etc if the street authority has not notified its decision "before the end of the period of 28 days beginning with the date on which the application was made". There are several concerns:<br>• The term "application was made" is vague and LBH suggest it is replaced by "application was received by the street authority" – as is the case with the deemed consent provisions in articles 17, 19 and 21.<br>• The period of 28 days is considered too short and LBH see no reason why the period of 42 days cannot be inserted instead, which has precedent in the recently approved M25 Junction 28 Development Consent Order 2022 SI No. 573, Article 13.<br>• If 42 days is considered too long, then LBH would wish the drafting of the article to be changed so that, for the deemed approval to apply, the deemed consent provisions need to be explicitly drawn to the attention of the street authority on submission of the application. That could be achieved by:<br>– inserting "then, if paragraph (9) applies" before "it is deemed to have granted consent" in paragraph (8); and<br>– inserting a new paragraph (9) stating "This paragraph applies to any application for | • The Applicant is happy to make this amendment and this has been made in the dDCO submitted at Deadline 2.<br>• The Applicant does not consider 42 days to be appropriate in the circumstances of the Project. The period must be seen in the context of the extensive engagement, as well as the extensive controls and ongoing engagement and involvement of the local authorities in the context of the design and construction phases of the Project (for example, the Traffic Management Forum secured via the outline Traffic Management Plan for Construction).<br>• The Applicant is happy to add a provision which requires drawing attention to the deemed consent provision. This has been implemented in the updated dDCO at Deadline 2.<br>On deemed consent generally, the Applicant's position is as follows. Deemed consent provisions are, in our submission, plainly reasonable and necessary, having regard to the significance of this Project and the far |

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| | | consent under paragraph (5) which is received by the street authority and is accompanied by a covering letter with the application, which includes a statement that deemed consent provisions under paragraph (8) apply to the application and that failing a response within 28 days of receipt of the application it will be deemed to have been consented"<br><br>Both (2) and (3) above are precedented in deemed approval provisions included in The West Midlands Rail Freight Interchange Order 2020 SI No. 511. In that DCO the deemed consent in the street works provision referred to a period of 42 days (Article 11). In the case of NH approvals in that DCO, in response to an objection from NH that 28 days was too short a period, a two-stage provision of 28 days plus a further 28 days before consent was deemed to have been given was included (Sch 13, Part 2, Paragraph 15). Alternatively, it would be possible to refer to a deemed refusal instead by replacing the words "granted consent" with "refused consent" at the end of Article 12 (8). The provisions of Article 65 (appeals to the Secretary of State) would then apply, and the undertaker would immediately have a route to a decision. | reaching consequences which a failure to reach a decision in an expeditious manner could have on its delivery. National Highways has proposed a reasonable period of time for the Council to determine such requests for approval (i.e., 28 days). The provision also needs to be seen in the context of:<br><br>• The Project is a nationally significant infrastructure project, and a Government project which will relieve the Dartford Crossing. Prolonging the programme would have a detrimental effect on the delivery of this programme and risk the inefficient and wasteful use of public funds for construction contractors to be put on standby whilst a consent is provided.<br><br>• 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. It is for this reason that the reference to the 3 months period for a new Traffic Regulation Order (at paragraph 31 of the October Report) is inappropriate. |

| Provision in DCO | Content | Comments of London Borough of Havering | Applicant's Response |
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| | | | • 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.<br>• The concept of deemed consent is well precedented including on complex projects: see, for example, 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. |
| Article 17,19,21 | Other deemed consents | The same changes are requested for these article as for Article 12. | As above. |
| Article 45 | Road User Charging | See comments in Section iii in respect of Schedule 12 below. | See below. |
| Article 53 | Disapplication of legislative provisions | Article 53(7) states that "Nothing in this Order is to prejudice the operation of, and the exercise of powers and duties of the undertaker, a statutory undertaker or the Secretary of State under the 1980 Act, the 1991 Act, the 2000 Act….".<br>It is not clear why statutory undertakers are in the list of those whose powers are not to be prejudiced and | Statutory undertakers are proposed to have the benefit of the Order transferred to them to carry out works. This is not intended for local highway authorities. No amendment is therefore considered necessary or appropriate. |

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| | | yet local highway authorities are not – who also have duties under the acts mentioned. In the absence of justification LBH would wish to see highway authorities added. | |
| Article 61 | Stakeholder action and commitments | It is not clear what the basis is for the inclusion of commitments in the "stakeholder actions and commitments register" (APP-554) rather than in requirements themselves or other documents referred to in the requirements, such as the Code of Construction Practice.<br>For example, why can the commitments in relation to construction not be included in the Code of Construction Practice, as is the REAC?<br>It seems unnecessarily confusing to have some commitments dealt with in an article and some, of a similar nature, dealt with in the requirements. LBH would like to understand the rationale. It is noted that the Explanatory Memorandum confirms that this is an article with no precedent, so it is important to understand the basis for it. The Explanatory Memorandum (APP-057), at page 63, states that the article is intended to cover commitments "which do not naturally sit within the outline management documents or other control documents secured under Schedule 2." However, there are only four commitments all of which appear to be commitments during construction. Why can these not be included as freestanding requirements or in the Code of Construction Practice?<br>It is noted that NH intends to add a further item to the stakeholder actions and commitments register in relation to a requirement that Ockendon Road be closed for a maximum of 10 months (See NH/LBH | The rationale for the Stakeholders Actions and Commitments Register [**REP1-176**] is provided in section 2.2 of the document itself. Further explanation is provided in section 5.253 to 5.255 of the Explanatory Memorandum [**REP1-045**].<br>The reason that commitments contained in the SAC-R could not be included in the REAC is that the latter reflects the commitments contained within and output of the Environmental Statement. The SAC-R, instead, reflects commitments made to individuals rather than essential mitigation required as part of the delivery of the Project. The reason why the Code of Construction Practice could not be utilised is that the Code of Construction Practice provides a framework on which EMP2 will be based, rather than specific commitments.<br>It is not the Applicant's experience that the provision of commitments in the SAC-R has confused interested parties; it has instead been welcomed as a useful tool to provide legally binding commitments without the time, cost and expense of negotiating individual legal |

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| | | SoCG to be submitted at D1 pp 64/65). It is not clear why that cannot be the subject of a requirement, directly or within the CoCP.<br>As regards the drafting of the article itself, the following comments are made:<br>• (1) LBH do not believe it appropriate to use the term "take all reasonable steps" when dealing with commitments. Commitments, the performance of is within the gift of NH, should be firm, unqualified, commitments. For example, the commitments dealing with accesses during construction (SACR-003 and SACR-004) are deliverable through the control NH has over its Main Works Contractor – there is no reason for them to be qualified.<br>• (2) In 61(3), if an undertaker submits an application to the Secretary of State to revoke, vary or suspend a commitment the commitment is suspended until that application is determined. It does not seem appropriate for the simple act of making an application to be sufficient to suspend the commitment – such a device could be abused. It is suggested that (3) (a) and (b) should be deleted. | agreements. It also provides the Examining Authority and the Secretary of State with visibility on these commitments. This tool is expected to be utilised throughout the examination as interested parties raise further requests for commitments. The Applicant notes that following Deadline 1, further commitments have been included in the SAC-R.<br>On the detailed comments:<br>• The drafting of article 65(1) (and indeed, the underlying rationale) is based on the undertaking provided in the context of HS2 "Register of Undertakings and Assurances" The wording mirrors that undertaking, and this is considered appropriate as it is intended to deal with substantially similar commitments. No amendment is considered necessary.<br>• We are happy to remove paragraph (3)(a), but not (b) and (c). We will modify paragraph (b) insofar as it relates to (a). Clearly, if the Secretary of State agrees to modify the commitment, it should be taken as being modified (which is the effect of (3)(b)). |
| Article 62 | Correction of Plans | This article includes a procedure, unsurprisingly not precedented in other DCO, which allows for changes | A correction order under the Planning Act 2008 is a correction to the made |

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| | | to plans to be agreed by justices rather than through the formal Correction Order (Sch 4 PA 2008) or the process of applying for a non-material or material amendment to the DCO (Sch 6 PA 2008).<br>Article 62 (4) applies this procedure to a plan which "is inaccurate" and Article 62(5) refers to a "wrong description" through "mistake or inadvertence". The way in which changes are to be considered is provided for in the PA2008, as indicated above. A wrong description or inaccuracy can be dealt with immediately after the approval of the Order as a correctable error or, if spotted later, can be dealt with by an application for a non-material amendment to the DCO.<br>The processes involved ensure that the local authorities are made aware of the request for a change and the views of any party that might contest the view that the change requested is merely an inaccuracy will be considered. That is the process intended to apply and it is not appropriate for a DCO to include its own bespoke process which avoids the processes prescribed by the PA 2008 specifically to deal with amendments.<br>The distinction between this provision and the amendments under Sch 4 and 6 referred to in the Explanatory Memorandum is not accepted. The process in Sch 6 is available to make any non-material amendment to a DCO and does not exclude errors arising by mistake or inadvertence.<br>If Article 62 (4) is to remain then it should be a requirement that the relevant authorities are consulted (as they would be for a correctable error under Sch 4) and their views submitted to the | Order, not to plans themselves. The nature of the corrections which could be made under the proposed provisions is therefore materially different. For that reason, it is not considered that these provisions conflict with the process for corrections. For the avoidance of doubt, the proposed provisions in the dDCO do not permit textual amendments to the Order (if made).<br>In relation to non-material and material amendments, these provisions do not circumvent or modify the application of Schedules 4 and 6 of the Planning Act 2008 as they relate to inadvertent errors, (material or non-material) amendments to the works authorised under the Order or anything authorised by the Order. They are therefore not "changes".<br>As noted in the Explanatory Memorandum [**REP1-045**], these provisions are included in section 52 of the Crossrail Act 2008. They also find precedent in section 54 of the High Speed Rail (West Midlands - Crewe) Act 2021, section 53 of the Channel Tunnel Rail Link Act 1996, and section 43 of the Dartford-Thurrock Crossing Act 1988. It is considered that the Project, being of a similar scale and complexity to those projects, should incorporate these provisions on a precautionary basis to minimise a potential delay to the delivery |

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| | | magistrates along with the application (similar to paragraph 20 in Sch 2 in relation to appeals to the Secretary of State). The relevant authorities and all affected persons should be informed of the progress of any application, including any hearings before the justices. | of the Project in the unanticipated event that there is an error. It is not relevant that the projects which have included these provisions to date have been promoted by Acts of Parliament; rather it is affirms the principle that it would be disproportionate to require subsequent instrument (be it an amendment Order or an Act of Parliament) to deal with manifest errors (as distinct from 'changes' to an application). It is the Applicant's view this provision is capable of being included in the dDCO under section 120(3) of the Planning Act 2008. The existing processes under the Planning Act 2008 are not intended to prevent the ability to ensure inadvertent errors or mistakes in certified plans delay a nationally significant infrastructure project.<br>The Applicant is happy to include a requirement to notify the local authority, and this is reflected in the dDCO submitted at Deadline 2. |
| Article 56 | Planning Permission Etc | LBH believe that provision of this nature is highly desirable.<br>• in order to remove any doubt as to the effect of the Hillside judgement; and<br>• to enable a planning permission, issued following the implementation, and in the knowledge, of the DCO, to be implemented without the risk of criminal liability under s.160 of the PA 2008. | The Applicant is grateful for this confirmation. |

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| | | Similar provisions have been commonly included in DCO. | |
| Article 65 | Appeals to the Secretary of State | There are several drafting difficulties with this article:<br>• Article 65(2) (b) refers to copies of appeal documentation being referred to "the local authority". There is also reference elsewhere in the article to the local authority. The local authority, however, is not the party responsible for all the refusals which may be subject to the process. For example, an appeal arising from a refusal under article 12 (5) involves the street authority and an appeal under article 17 (2), the traffic authority. It is therefore not sufficient to use that term as a generic term (which may, for example, not include the street authority in question).<br>• In article 65 (2)(c) and elsewhere in the article, the expression "the appeal parties" is used but is not defined.<br>• Article 65((2)(d) refers to "business days" which is not defined. That term is defined in provisions elsewhere within the DCO (e.g. Sch 2 Para 19 (5)) but expressly only for the purposes of that provision.<br>• In addition, Article 65 allows the undertaker 42 days in which to prepare and submit an appeal but provides the local authorities with only 10 business days within which to provide a response. This is insufficient time, and it is suggested that the period of 10 business days should be replaced with 20 business days in Article 65 (d) to | • We will amend this article to make clear that, for the purposes of this provision, "local authority" means a relevant planning authority, relevant local highway authority and street authority (where the latter is also a highway authority). This has been implemented in the dDCO submitted at Deadline 2.<br>• This term should be given its plain and ordinary meaning. This has posed no issue in the various precedents which utilise the same drafting as far as the Applicant is aware and therefore no amendment is proposed.<br>• The Applicant will insert a definition of business days in article 2.<br>• It is not considered that 10 business days is insufficient time in the specific context of the appeals process. At that stage, any appeal party would have had the benefit of the extensive engagement up until the end of the examination, it would have seen the application (which would have been refused), and then provided with further time to consider the submissions from the Applicant. For the avoidance of doubt, the |

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| | | ensure that not all relevant staff are absent for the entire period.<br>• Article 65 (13) allows the appointed person to make a direction on costs and paragraph (14) requires the appointed person to "have regard to" the guidance on costs. The concern is paragraph (13) does not explicitly confine an award of costs to circumstances of unreasonable behaviour. It should be clear that costs are not awarded except in the case of unreasonable behaviour as provided for in the guidance.<br>• The list in 65 (1) (a) should include a refusal of the LPA under para 9 (6) of Sch 2 regarding the LPA refusal to agree details in respect of the investigation and recording of archaeological remains. | Applicant has 42 days in which to make an appeal. These timescales are heavily precedented (see, for example, article 52 of the M25 Junction 28 Development Consent Order 2022).<br>• The Applicant has made the suggested amendment.<br>• The Applicant is happy to add this reference to Article 65. Please see related amendments to Requirement 9 below. |
| **ADDITIONAL ARTICLE** | Implementation Group | LBH feel that it would be appropriate for NH to establish a group equivalent to the Silvertown Tunnel Implementation Group which would include representatives of relevant public bodies and provide a structure for ongoing consultation and engagement. It would include engagement on the mitigation and monitoring strategy as suggested in the additional requirement in Schedule 2, requested below.<br>A provisional drafting for the new Article is set out in **Appendix A**. It is based on Article 66 (page 50) of the Silvertown Tunnel DCO. It will need further consideration to ensure it captures all the appropriate topics and is very much a starting point. It hoped that NH will see the benefits and include an article such as this in its draft DCO in due course. The article refers to a monitoring and mitigation strategy which it | The Applicant does not consider this suggestion to be appropriate for the Project. Control documents legally secured under the Requirements secure and require relevant forums, groups and working arrangements. Unlike the Silvertown Tunnel project, the interests of various parties differ depending on the subject matter of the relevant control. The Code of Construction Practice [**REP1-157**] secures a Community Liaison Group, the outline Traffic Management Plan for Construction [**REP1-174**] secures a Traffic Management Forum, the outline Landscape and Ecology Management |

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| | | is believed should be capable of being drafted based on the contents of the application documents submitted. | Plan [**REP1-173**] secures an Advisory Group, the Framework Construction Travel Plan [**APP-546**] secures the Travel Plan Liaison Group, and further requirements require consultation and engagement with relevant local authorities. LBH is proposed to be a member of all these groups, and will be consulted further.<br>The requirement for a further group is considered unnecessary, is likely to lead to duplication of work, further officer time and therefore not considered to be in the public interest of a good use of taxpayer funds. The Applicant further notes that there are mechanisms to ensure an 'overarching framework' is adequately provided for via the Joint Operations Framework and the requirement for the Traffic Management Manger to act as the interface between the Community Liaison Team and the Traffic Management Forum Group. |
| **ii SCHEDULE 2 - REQUIREMENTS** | | | |
| Para 1 | Interpretation | In respect of the definitions of "preliminary works" and the "preliminary works EMP" LBH are in the process of reviewing whether there are adequate safeguards in place for the entirety of the preliminary works, as defined, to proceed in advance of approvals. | Noted. |
| Para 2 | Time limits | The only time limit imposed by this requirement is a requirement to "begin" the development within 5 years of the date that the Order comes into force. | The rationale of this provision is to ensure that the DCO works are carried out, and not held in abeyance longer |

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| | | There is no definition of "begin" however it is understood from ISH2 that NH intend to insert one. This will presumably be based on s.155 of the PA which provides that development is taken to begin on the earliest date on which any material operation begins to be carried out. Material operation is defined in s.155 and, currently, includes any operation except for the marking out of a road. As identified in ISH2, the effect of having a separate commencement stage (which is defined) is that all that is required to be started within 5 years is the preliminary works. Accordingly beginning to carry out part of the preliminary works within five years will be sufficient to satisfy Requirement 2. The preliminary works need not be completed, nor do the remainder of the authorised works need to be commenced, within any time period.<br>The relevance, and rigour, of the environmental assessment to which the scheme has been subject will reduce the longer the gap between the baseline conditions, against which impact has been assessed, and the carrying out of the works. It is suggested there should be more rigour in Requirement 2 with it identifying the phases of works and in the event of those phases not having been commenced by a certain date, the undertaker being required to re-visit the environmental assessment, revise if necessary and identify and implement updated mitigation.<br>There is precedence for this approach in Requirement 2 (3) of The York Potash Harbour Facilities Order 2016 which, in the event of the second phase of development not being commenced within a certain period, required the undertaker to | than a standard 5 year period. The Applicant's position is that given the definition of preliminary works, it is appropriate for the Time Limits requirement to be discharged following the carrying out of the preliminary works. This is no different to the "spades in the ground" rule referred to by the Examining Authority at ISH1 which applies to any DCO or a conventional planning permission.<br>The controls suggested are unprecedented for a Strategic Road Network DCO. By contrast, the Applicant's approach is precedented (see the A428 Black Caxton to Gibbet Development Consent Order 2022). For completeness, the Applicant would note that a definition of "begin" was inserted into the dDCO at Deadline 1. |

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| | | reassess the baseline conditions and update the assessment and produce a further environmental report and agree any additional mitigation measures required. | |
| Para 3 | Detailed Design | See comments below in section iv with regard to the need for protective provisions which are relevant to the process of agreeing the detailed design.<br>The requirement to consult is limited to "the relevant local planning authority on matters related to its functions". That then excludes consultation on highway matters. The relevant local highway authority should also be consulted. | An amendment at Deadline 1 was made which addresses this issue. In particular, the dDCO requires consultation with the local highway authority on matters related to its functions. |
| Para 4 | Construction - EMP | With regard to (1) LBH are not content with the level of detail in the preliminary works EMP, in particular with regard to archaeological matters and compounds.<br>In paragraphs (5) – (7) reference is made to EMP3 being developed and completed which includes key long term commitments (sub - para (6)). In contrast to EMP2 this document is not required to be consulted upon or be approved by any party. This document must be subject to scrutiny and should be subject to the same processes as EMP2. | The Applicant's position on the preliminary works EMP is set out in Post-hearing submissions for ISH1 [**REP1-183**]. In particular, the preliminary works EMP has looked at preliminary activities, and identified relevant mitigation measures and controls which should apply to those provisions.<br>It is not appropriate for the EMP3 to be subject to consultation. The Applicant is a strategic highways authority appointed by the Secretary of State, and operational matters fall within its day to day operational matters. Insofar as the road is a local highway, this will be handed back to the relevant highway authority. The position adopted is consistent with a long line of precedents (see Requirement 4(6) of the M42 Junction 6 Development Consent Order 2020, Requirement 4(4) of the A63 |

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| | | | (Castle Street Improvement, Hull) Development Consent Order 2020, Requirement 4(5) of the A585 Windy Harbour to Skippool Highway Development Consent Order 2020, Requirment 4(16) of the A303 (Amesbury to Berwick Down) Development Consent Order 2023). The Project does not give rise to any material distinguishing features which justify departing from that approach. |
| Para 5 | Landscape and ecology - LEMP | Whilst the Explanatory Memorandum states that this is a standard provision it bears some consideration. Why is only a reasonable standard for the landscaping required, rather than, say, good? If the point of the article is to secure compliance with the British Standard, then that is what it should say and the words "to a reasonable standard" should be deleted. If the intention is to impose a standard on the quality of landscaping, then it should be "good" rather than "reasonable".<br>See also comments below, in respect of paragraph 10 with regard to the inclusion of the word "substantially" which equally apply here. | The requirement to "carry out" landscaping works to a reasonable standard in accordance with the relevant recommendations of appropriate British Standards or other recognised codes of good practice applies to the method of *carrying out* the works, not to the quality of the landscaping itself. The wording itself is considered appropriate in ensuring that good practice is followed, and the quality of the landscaping required is secured under Requirement 5(1). Leaving aside this Project-specific justification, the Applicant notes this provision is heavily precedented (see, for example, A428 Black Cat to Caxton Gibbet Development Consent Order 2022, A47/A11 Thickthorn Junction Development Consent Order 2022, M25 Junction 28 Development Consent Order 2022, A57 Link Roads Development Consent Order 2022, M42 |

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| | | | Junction 6 Development Consent Order 2020, A63 (Castle Street Improvement, Hull) Development Consent Order 2020, A585 Windy Harbour to Skippool Highway Development Consent Order 2020, A19/A184 Testo's Junction Alteration Development Consent Order 2018 amongst many others).<br>On the phrase "substantially in accordance with", see response to Requirement 10 below. |
| Para 6 | Contamination | Para 6(2) allows the undertaker alone to determine whether or not remediation of contaminated land not previously identified is required. Only if the undertaker decides unilaterally that remediation is necessary then is anyone else involved. Where such contamination is found the undertaker should compile a report stating its response in circumstances both where it considers remediation is not necessary and where it considers it is necessary. That report should be consulted upon and then be the subject of approval by the Secretary of State with paragraph 20 applying. | It is not considered appropriate to amend paragraph 6(2). The Applicant would emphasise that paragraph 6(2) must be seen in the context of paragraph 6(1) which requires "the undertaker must complete a risk assessment of the contamination in consultation with the relevant planning authority and the Environment Agency". In addition, this provision should not be read in isolation. Requirement 4(2) sets out a requirement for EMP2 to include plans for the management of contaminated land (which would be subject to consultation with local authorities). In addition, the REAC (which is secured under Requirement 4) includes measures related to contaminated land. By way of example, GS001 sets out that "If, during further intrusive ground investigations, drilling is required in areas underlain with |

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| | | | contaminated soils, drilling and excavation techniques in line with the latest versions of BS 5930:2015 Code of practice for ground investigations (British Standards Institution, 2020) and BS 10175:2011 Investigation of potentially contaminated sites – Code of Practice (British Standards Institution, 2017) (e.g. use of environmental seals) would be adopted to reduce the risk of creating pollutant pathways. The Contractors would provide ground investigation method statements for acceptance of National Highways in consultation with the Environment Agency and relevant Local Authorities prior to commencement of the works". Together, these controls are considered appropriate and proportionate and therefore no further amendment to Requirement 6 is considered necessary. |
| Para 7 | Protected Species | LBH would wish to be consulted in relation to any scheme and would therefore wish consultation with relevant local planning authority in additional to NE. | The dDCO has been amended with this suggestion. |
| Para 8 | Drainage | The requirement to consult is again limited to "the relevant local planning authority on matters related to its functions". In view of the topic the relevant local highway authority and Lead Local Flood Authority should also be consulted. | An amendment was made at Deadline 1 which includes the relevant highway authority. The Applicant has also added the LLFA in its updated dDCO submitted at Deadline 2. |
| Para 9 | Historic Environment | LBH are not content that there is an appropriate archaeological management strategy secured in the application documentation. There is insufficient detail in relation to assets likely to be impacted and | The Applicant does not agree that the archaeological management strategy is insufficient. This is a matter which is addressed in further detail in relation to |

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| | | mitigation. Commitments in this respect need to be added to the various control documents.<br>Para 9 (2) allows for an approved scheme to be amended or dispensed with by agreement with the Secretary of State without any consultation. The mechanism included in Paragraph 8(2) for consulting on amended provisions should apply.<br>Paragraph 9 (5) refers to the service of a notice under paragraph (4) however paragraph (4) does not require the service of any notice. It is suggested that paragraph (4) be amended by relacing "reported" with "notified". In paragraph (5) the words "any notice served" should be replaced by "notification".<br>It is also not appropriate for the pause provision in (5) to be simply set aside by the Secretary of State without consultation or process.<br>The 14 day period within (5) is insufficient and should be changed to 28 day to ensure the relevant personnel are available.<br>The provision in (6), whereby the requirement for local planning authority approval is given with one hand and taken away with the other, by the words "unless otherwise agreed by the Secretary of State", is unacceptable and those words should be deleted. The approval from the local planning authority, if not forthcoming, should be added to the provisions to which the appeal provisions in article 65 apply and therefore added to article 65 (1)(a). | LBH's comments in their Local Impact Report, where the Applicant makes clear that the draft AMS-OWSI [**APP-367**] will be updated in consultation with London Borough of Havering's archaeological advisors to set out appropriate mitigation prior to consent.<br>The Applicant will make the requested amendment to paragraph 9(5).<br>It is considered appropriate for the Secretary of State, who has competence in such matters, to agree to dispense with the prohibition. Similarly, the 14 day is considered appropriate given the discrete nature of the considerations involved and the need for the Project to be delivered expeditiously.<br>The Applicant will remove "unless otherwise agreed with the Secretary of State" from paragraph 9(6), and update the appeals provision to make reference to a refusal under paragraph 9(6).<br>The Applicant is considering whether the requested change to Requirement 9(2) should be made. |
| Para 10 | Traffic Management | LBH do not believe that the outline traffic management plan for construction is sufficient to appropriately govern the preliminary works or provides a sufficient framework for the subsequent traffic management plans. | The Applicant notes there is no particularisation of LBH's position, and considers the outline Traffic Management Plan for Construction appropriately controls the construction- |

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| | | As mentioned previously, despite the use of the term, there is no definition of relevant highway authority. LBH see no reason why, in sub para (2), the requirement to comply with the outline traffic management plan for construction should be qualified by the word "substantially". The inclusion of that word injects uncertainty and subjectivity into the application of what are supposed to be control documents. LBH would wish this DCO to follow the approach in The M25 Junction 28 Development Order 2022 SI No.573. In that DCO the use of the word substantially in a similar context was specifically considered and adjudicated upon by the Examining Authority and Secretary of State and found not to be appropriate and deleted. (See para 9.3.22 Examining Authority's report and paragraph 135 of the Secretary of State Decision Letter). | related traffic matters in regards to the Project. A definition of "relevant highway authority" will be inserted (as explained above). 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 form 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 phrase as "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 |

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| | | | considered that this represents the Secretary of State's current (and more well-established) view. |
| Para 11 | Construction Travel Plan | LBH do not believe that the framework construction travel plan provides a sufficient framework for the approval of subsequent travel plans.<br>The reference to the undefined term and objection to the insertion of the word "substantially" referred to in respect of paragraph 10 above applies equally to this requirement. | The Applicant notes there is no particularisation of LBH's position, and considers the Framework Construction Travel Plan appropriately controls the workforce travel arrangements in regards to the Project.<br>The Applicant's position on the phrase "substantially in accordance with" is provided above, and the Applicant does not consider it appropriate to fetter the Secretary of State's discretion in relation to this matter. |
| Para 12 | Fencing | The requirement to consult is limited to "the relevant local planning authority on matters related to its functions". That then excludes consultation on fencing which may affect and be relevant to the local highway therefore the relevant local highway authority should be consulted. | An amendment made to the dDCO at Deadline 1 now addresses this point. |
| Para 14 | Traffic Monitoring | LBH view the wider network impacts management and monitoring plan as wholly unsatisfactory in addressing impacts arising from the development given that it secures none of the mitigation that it may identify is needed.<br>Notwithstanding that general concern, there are several comments on the drafting of the requirement:<br>• The typographical error in line four needs to be corrected and it made clear which highway authority it is referring to – perhaps by use of a | The Applicant acknowledges that there will be increased traffic flows in some locations following the opening of the A122 Lower Thames Crossing, but considers this needs to be considered against the overall benefits resulting from the better connections and improved journey times resulting from the Project, as set out in 7.9 Transport Assessment Appendix F Wider Network Impacts Management and Monitoring Policy Compliance [**APP-535**]. |

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| | | defined term of "relevant highway authority", as mentioned above.<br>• The use of the word "substantially" is objected to for reasons previously mentioned in relation to paragraph 10.<br>• Sub-paragraph (1) only requires submission of an operational traffic impact monitoring scheme prior to the tunnel area being open for traffic. There is no requirement for it to be approved within a certain period or even implemented within a certain period. The requirement should be amended to provide for the scheme to be both approved and operational before the tunnel is open for traffic.<br>• The ability, in sub paragraph (3), for the Secretary of State to simply dispense with the implementation of the scheme at any time and for any reason is completely unacceptable. If such a tailpiece is to remain it should be accompanied by the additional wording in paragraph 8(2). | In response to the detailed drafting points:<br>• The Applicant will amend the provision to include reference to "the" highway authority. Please note that "relevant highway authority" has not be used as this provision cross-refers to the WNIMMP which sets out the relevant consultation bodies.<br>• The Applicant's position on the use of the phrase "substantially in accordance with" is set out above.<br>• No amendment is considered necessary as the Wider Network Impacts Management and Monitoring strategy [APP-545] sets out that "In order to establish a baseline, data collection would be undertaken at least one year prior to the opening of the Project (mainline). This period would align with the last year of construction." It further provides that "the pre-opening traffic monitoring would be realigned to be collected across the last full year of construction" where the opening year changes. This document is, in turn, secured under Requirement 14(1).<br>• The Applicant proposes to amend the provision so that before a dispensation is provided, consultation with the relevant |

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| | | | authorities is carried out. It is not appropriate to replicate requirement 8(2) as the monitoring itself does not give rise to environmental effects. |
| **Additional Requirement** | Monitoring and Mitigation Strategy | LBH has set out in its written representation its concerns regarding the lack of mitigation in respect of impacts on the wider road network. LBH would wish consideration to be given to the inclusion of a requirement imposing an effective monitoring and mitigation regime and would refer to requirement 7 of The Silvertown Tunnel Order 2018 SI No. 574 as an appropriate approach. That requirement is set out on page 65 of the approved DCO and in **Appendix B** to this document.<br>That requirement makes reference to a monitoring and mitigation strategy which could be prepared on the basis of the information available with the application. The requirement then sets out the process for determining whether mitigation needs to be delivered after appropriate monitoring and how it is then to be delivered – both in respect of pre-opening and post opening. A draft requirement, based on requirement 7 of The Silvertown Tunnel DCO, should be included in the DCO. | The Applicant does not consider this is an appropriate provision to include in the Project dDCO. The circumstances of the Silvertown Tunnel, a scheme delivered by Transport for London, which is not subject to the same processes for the development of road schemes on the Strategic Road Network. The Applicant acknowledges that there will be increased traffic flows in some locations following the opening of the A122 Lower Thames Crossing, but considers this needs to be considered against the overall benefits resulting from the better connections and improved journey times resulting from the Project, as set out in 7.9 Transport Assessment Appendix F Wider Network Impacts Management and Monitoring Policy Compliance [**APP-535**] |

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| Para 18 | Applications to the Secretary of State | Under 18 (3) a deemed refusal applies where the Secretary of State does not determine an application within 8 weeks and the application was accompanied by a report from a consultee to the effect that, if approved, the application would give rise to a materially new or different environmental effect. However, otherwise, under 18(2), if there is no decision within 8 weeks, the Secretary of State is deemed to have granted/approved that application. That would include in circumstances where consultees have objected but without explicitly stating that the application would result in new or materially different environmental effects. Accordingly, there should be another pre-condition to deemed approval with the following added to (3):<br>*(d) the consultees required to be consulted by the undertaker under the requirement were informed in writing when consulted that if they consider 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, in order to prevent the possibility of a deemed consent under this paragraph, they must say so in their consultation response.* | The Applicant will make an amendment which has an equivalent effect to the amendment proposed by LBH. In particular, paragraph 20(1) of Schedule 2 to the dDCO will be amended so that it states that the undertaker must "(a) notify the authority or statutory body of the effect of paragraph 18(3) of this Schedule" |
| Para 20 | Details of Consultation | This provision provides for a minimum consultation period of 28 days. In 20 (1)(a) it should be made clear that the 28 day consultation should expire prior to the submission of any application. That is implied by 20 (1) (b) but not required. | No amendment is considered necessary. The Requirements make clear that the applications must follow consultation, and the requirement to include consultation responses makes any other result non-compliant. |

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| **iii SCHEDULE 12** | | | |
| Para 1. | Definition of "local resident" | LBH is concerned as to the area to which the local residents discount scheme applies, as is expanded upon in the LBH LIR. The rationale for the identification of the local residents to benefit from a discount scheme is set out in paragraph 2.2.5 of the Road User Charging Statement (APP-517). The justification is simply based on replicating the Dartford situation whereby it applies only to the residents of boroughs within which the tunnel portals are situated.<br>Whilst LBH in general terms advocate equivalence with the Dartford Crossing charging provisions, it is not logical in the case of the Lower Thames Crossing to confine the discount scheme to residents of the boroughs within which the tunnel portals sit. The works for the Dartford Crossing were confined to the boroughs within which the tunnel portals sit. That is not the case here.<br>At the moment the definition of "local resident" (who are the persons eligible for the local residents' discount scheme) is "a person who permanently resides in the borough of Gravesham or Thurrock". Eligibility is therefore irrespective of proximity to the tunnels or the impacts of the scheme. There are residents of Thurrock who live further away from the tunnel portals than residents of the London Borough of Havering.<br>The definition of "local residents" should therefore be changed to add the London Borough of Havering and other host authorities with similar extent of scheme within their area. | The Applicant welcomes that LBH states it is in "general terms [an] advocate equivalence with the Dartford Crossing charging provisions. The Applicant is confident that in replicating the regime at the Dartford Crossing reflects Government policy as set out in its [Post-hearing submissions in relation to ISH1]. That submission contained a letter from the Department for Transport confirming that the Applicant's approach to discounts reflected government policy.<br>It is not considered appropriate to extend the discount to residents of LBH as the purpose of alignment is to ensure that road users utilise the crossing which is most suitable for their journey. This matter is addressed in further detail in response to LBH's Local Impact Report. |

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| **iv SCHEDULE 14 – ADDITIONAL PROTECTIVE PROVISIONS** | | | |
| | | There are extensive interfaces between the authorised works and the local highway network, the latter being the responsibility of LBH as local highway authority. Currently the protection of those assets is wholly inadequate in the DCO. As with other assets owned by bodies with statutory duties LBH would wish its highway assets to be protected by the inclusion of protective provisions which ensure that the local highway network is appropriately considered and protected.<br>There is precedence for such protective provisions, such as those included in The A303 Sparkford to Ilchester Dualling Development Consent Order 2021. That is a DCO applied for by NH which included protective provisions in favour of the local highway authority (Somerset County Council) both in respect of vehicular and non-vehicular highways.<br>A side agreement has been the subject of discussion with NH which contains some of the protective provisions required but not all of them.<br>In LBH's written summary of oral comments made at ISH 1 and 2, submitted at D1, LBH has reported that discussions with NH on protected provisions are ongoing, with further discussions taking place in late July 2023. Subject to these discussions, it is LBH's intention to submit draft protected provisions to the Examining Authority at D2 on the 3rd August 2023. | The Applicant does not consider it necessary to include protective provisions for the benefit of LBH. It is not a standard practice to have protective provisions for the benefit of relevant highways authorities (LHAs) in DCOs. Such protective provisions have rarely been included in either recent National Highways DCOs or non-National Highways DCOs; the A303 Sparkford to Ilchester Dualling Development Consent Order 2021 being an exception rather than the rule.<br>The proposed DCO already provides protection for LHAs, including the LBH, by incorporating approval powers and maintenance functions directly within the works powers – for example, see Articles 9 and 10 of the dDCO. These provisions make a discrete set of protective measures unnecessary. Statutory undertakers do not have those protections directly built into the order powers, so they do need separate protection. The dDCO enables National Highways and the LHAs to enter into agreements fleshing out the protections within the Order. Therefore, a side agreement is a more appropriate and suitable instrument and the best place to address the specifics and deal with different LHAs' circumstances. |

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| | | | The Applicant considers that the proposed side agreement provides sufficient and appropriate protection for the local highway network. The Applicant will continue to engage with LBH regarding the proposed side agreement in an attempt to resolve any outstanding concerns |

# 8 Natural England

## 8.1 Disapplication of legislative provisions

8.1.1 In response to **paragraphs 2.1.1 – 2.1.10,** the Applicant's position can be found at matter 2.1.3 and Appendix C.6 of Natural England's SoCG [Document Reference 5.4.1.6 (2)].

8.1.2 In relation to the disapplications of the Wildlife and Countryside Act 1981, The disapplication of sections 28E and 28H of the Wildlife and Countryside Act 1981 confirms that approvals and notifications under those provisions are not required to be obtained or given; these are not provisions which require the relevant body (Natural England, in this case) to consent to their inclusion, under section 150 of the 2008 Act in England; and the disapplication of section 28E in particular is precedented (e.g. article 3 of the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022).

8.1.3 Section 28P of the 1981 Act confirms that there is no contravention of sections 28E and 28H by carrying out operations in a SSSI where there was a reasonable excuse for not complying with those sections. There is a reasonable excuse where the operation in question was authorised by a section 28G authority (for example, the Secretary of State where it grants a DCO) following the process set out in section 28I (this provides that the section 28G authority must give notice to NE of the proposed operations and provide NE the opportunity to advise upon those operations). NE has previously confirmed that it considers the provisions of section 28I to be met in relation to DCO applications, therefore the defence in section 28P would in principle be available to the Applicant in relation to existing SSSIs. The disapplication for existing sites therefore merely confirms the existing position.

8.1.4 In addition, in the Applicant's view, the development of NSIPs should not be frustrated or delayed by potential SSSI designations over land for which development consent has been granted, noting that the land in question will have been considered, and any features or assets would be assessed and mitigation provided. The Applicant considers that it is clearly preferable for the dDCO to disapply these provisions rather than require the application of the statutory defence to be considered on a case by case basis, thus failing to provide legal certainty. The Applicant acknowledges the A417 Missing Link decision, but is asking the Secretary of State to consider the position in the case of the Project.

## 8.2 Securing Mechanisms

8.2.1 In response to **paragraphs 3.1.1 – 3.1.24,** this can be found at matter 2.1.102 of Natural England's SoCG [Document Reference 5.4.1.6 (2)]. As detailed in [**REP1-183**] the Applicant considers that the control documents are sufficient to secure the objectives of ecological mitigation. The dDCO further and explicitly states that the authorised development must be designed in detail and carried out in accordance with the Design Principles document and the preliminary scheme design,. The wording maintains a degree of flexibility for the detailed design and delivery to respond to practical design considerations. However, the

Design Principles would ensure that the underlying requirements of each principle are met,

8.2.2 As explained at Issue Specific Hearing 2, the Applicant considers the phrase "substantially in accordance" with to be appropriate, and its removal would fetter the discretion of the Secretary of State.

8.2.3 In response to **paragraphs 3.1.6 and 3.1.22**, the Applicant has followed the avoid, mitigate, compensate hierarchy, as detailed in matter 2.1.18 of Natural England's SoCG [Document Reference 5.4.1.6 (2)].

# 9 Port of London Authority

## 9.1 Depth of the tunnel / dredging depths

9.1.1 In response to section 4 and 5 of the PLA's Written Representations, the Applicant has agreed and accommodated the future dredge levels within their River Restrictions Plan [**REP1-041**] based on consultation with the PLA and their reasonable best estimate of potential future shipping draught. At detailed design the contractor is required to comply with the DCO which the River Restrictions is part of.

9.1.2 The tunnel alignment to ensure the PLA has the future ability to dredge (WR 5.5) to -12.5m (plus 0.5m) chart datum is secured through the DCO in both ether River Restrictions Plans (APP-045) and Paragraph 99 (1) of Schedule 14 clearly outlines the requirement to conform with the agreed dredged levels with any proposed alignment inside the available limits of deviation (LODs). The concerns by the PLA are therefore unfounded as the limits of deviation take effect subject to the agreed dredging depths. The Applicant notes that the Port of Tilbury London Limited's Written Representation suggests two alternatives to resolving this issue and the Applicant had already adopted one of these in the draft DCO submitted at Deadline 1.

9.1.3 The PLA continues to request a modification to the Tunnels Limits of Deviation Plan. The Applicant does not consider this necessary given the limits of deviation take effect subject to the agreed depths, and the flexibility (which could be met without affecting those depths) is required. In particular, the Applicant notes that there may be changes to construction methodology or design which would enable the utilisation of the limits of deviation without affecting the agreed and legally binding tunnelling depths. This protection is further reinforced because under the PLA's protective provisions, approval will have to be provided in connection with specified works (which includes the tunnelling works).

9.1.4 The depth of the tunnel and limits of deviation (WR 5.6, 5.7, 5.8) are discussed in the Statement of Common Ground with the Port of London Authority (SoCG) [**APP-100**] at item 2.1.12 (Article 6 - Limits of Deviation (LOD) (DCO)), 2.1.31(Compulsory Acquisition powers in favour of National Highways), 2.1.34 (Route alignment, tunnel depth and tunnel protection zones), 2.1.40 (Scour Protection). The river restriction plans and tunnel limits of deviation plans clearly set out the level of protection required for the tunnel.

9.1.5 The tunnel limits of deviation are shown in [**APP-046**] and these represent the horizontal and upper vertical limits of the final constructed tunnel position. The upper vertical LOD provides flexibility to the contractor to develop the tunnel detailed design at a shallower depth than the current reference design to give long term environmental and safety benefits during operation of the tunnel whilst also ensuring the most viable asset is constructed.

9.1.6 As stated at paragraph 99 of Schedule 14 (Protective Provisions) to the draft DCO [**REP1-042**], the constructed tunnel needs to "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 "ensure that that channel depth can be maintained where scour protection is required." This is a matter under discussion in the Port of London Authority's SoCG as detailed above and will be discussed further at a meeting with the Port of London Authority on 8th August 2023.

9.1.7 Paragraph 99 of Schedule 14 (Protective Provisions) to the draft DCO [**REP1-042**],was agreed and added at deadline one to add surety over the use of the limits of deviation and river restrictions as combined requirements. The limits of deviation (WR 5.6) are restricted by the river restrictions plans agreed with the PLA. Any utilisation of them requires the Applicant's contractor to demonstrate that the agreed dredge level is not impacted.

9.1.8 This matter is explained in further detail in the Applicant's response to the PLA's Written Representation (submitted at Deadline 2).

## 9.2 Art. 2 dDCO – Definition of "authorised development"

9.2.1 This issue is addressed in the SoCG [**APP-100**] at item 3.1.21 (Definition of authorised development in DCO) and is related to item 2.1.22 (Definition of "specified work" and use of the term "authorised development") both are Matters Not Agreed. The Applicant has used this definition of "authorised development" because the development authorised entails development outside of Schedule 1 (e.g., the power to carry out protective works under article 20). It is therefore simply reflective of that fact. The Applicant understands that the WR has provided alternate wording to restrict the definition. The Applicant does not agree that the definition of authorised development should be restricted in this way. The existing drafting is precedented and well endorsed by the Secretary of State.

9.2.2 The PLA states that these precedents are not relevant where there are port or harbour authorities involved (which is in any event incorrect, see for example, Great Yarmouth Third River Crossing Development Consent Order 2020). In truth, the drafting of this provision has no relevance to existence of a port or harbour facility, but as mentioned, reflects that the "development" which is "authorised" extends beyond Schedule 1 to the dDCO. Amending the definition would have unintended consequence (e.g., reducing the Applicant's ability to carry out maintenance activities). The Applicant notes that so far as a work is a "specified work", or a "specified function" (which is defined broadly) under the terms of the PLA's Protective Provisions, the PLA would have an approval function. Appropriate controls are therefore in place.

## 9.3 Art. 8 dDCO – Transfer of undertaking (WR 8)

9.3.1 This issue is addressed in the SoCG [**APP-100**] at item 2.1.24 and is a Matter Not Agreed. The Applicant considers this concern is misconceived; the transfer is strictly and explicitly related to the undertaking of the bodies referenced in article 8(5). In addition, The PLA's interests continue to be protected by robust protective provisions. National Highways do not consider any amendment necessary.

## 9.4 Art. 18 dDCO – Interference with the river (WR 9)

9.4.1 This issue is addressed in the SoCG [**APP-100**] at item 2.1.13 (Interpretation of Article 18 DCO on powers in relation to relevant navigations or watercourses). The suggested amendments have in part been accommodated in the dDCO submitted at Deadline 2. In particular, the Applicant has removed "may appear to it", and substituted "reasonably convenient" with "reasonably necessary". The Applicant notes that the powers under this provision which fall within the definition of "specified function" under the PLA's Protective Provisions, and the PLA therefore has an approval function in connection with this power. The Applicant therefore considers that the provision is appropriately drafted, and subject to proportionate controls.

## 9.5 Art. 28 dDCO – Land over which rights may be acquired for permanent outfall (WR 10)

9.5.1 The Applicant will submit updated information on the temporary outfall at a later deadline but the Applicant can confirm that the rights proposed to be acquired in connection with the permanent outfall will be limited to the coordinates as set out in the DML. These changes have the reference "EA03" in the Applicant's Second Notification of Change (Application Doc 10.2).

## 9.6 Art. 35 and Sch. 11 dDCO –Temporary possession of land (WR 11)

9.6.1 This issue is addressed in the SoCG [APP-**100**] at item 2.1.17 (Article 35 – temp use of land – navigation and riverbed). The PLA raises a concern that "could result in the riverbed being temporarily possessed, but if the works are not completed as provided for in the dDCO, the practical effect would be that the land may be occupied indefinitely". This concern is unfounded; the Applicant would not increase its liability to pay compensation in this manner in light of its licence requirements to ensure proper use of public funds, and would not as a reasonable public authority seek to take possession of the river bed longer than necessary.

9.6.2 The Applicant wishes to highlight two further matters. First, the Applicant inserted a provision in the PLA's Protective Provision at Deadline 1 which explicitly sets out that "*The undertaker's powers of temporary possession and compulsory acquisition of rights and imposition of restrictive covenants under this Order above the river bed of the river Thames in connection with the temporary outfall, permanent outfall, the new water inlet with self-regulating valve and ground investigation works is limited to what is reasonably necessary for the undertaker safely to construct the authorised development*."

9.6.3 Second, the Applicant wishes to emphasise that, unlike other river crossing projects, the Applicant's interference in the navigable channel is limited. The Applicant draws the Examining Authority's attention to article 35(11) which restricts temporary possession of the surface of river Thames plots. With the exception of outfalls, a self-regulating valve, and ground investigations, the Applicant is not proposing works on the river bed. Approvals from the PLA are required in connection with "specified works" and "specified functions" under the

proposed Protective Provisions. The Applicant therefore considers the provisions necessary and justified whilst providing appropriate controls.

9.6.4 In relation to the issue of the definition of 'commence', the Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184].

## 9.7 Art. 35 and Art. 36 dDCO – Compulsory acquisition and temporary works (WR 12) & Art. 37 – Statutory undertakers (WR 13) & Art. 44 dDCO – Apparatus in the tunnel (WR 14)

9.7.1 This issue is generally addressed in the SoCG [APP-**100**] at item 2.1.24 (Interpretation of Article 8 DCO on transfer of powers) Matter Not Agreed, 2.1.31 (Compulsory Acquisition powers in favour of National Highways) Matter Not Agreed.

9.7.2 The provisions of article 35(5)(a) to (g) are reasonable and justified in the Explanatory Memorandum. Detail of specific temporary works is a matter for detailed design, however the PLA have available to them the details of works in Schedule 1 to the dDCO. The Applicant believes the PLA's interests continue to be protected by robust protective provisions. The Applicant is considering the proposed amendment to the Protective Provisions raised by the PLA and will provide an update at Deadline 3.

## 9.8 Art. 37 dDCO – statutory undertakers

9.8.1 The Applicant notes that the PLA consider this drafting wide. The Applicant strongly disagrees with this contention. The drafting in the dDCO is proportionate and well precedented. In the case of the Project dDCO, it must be seen in the context of the works authorised and particularised in Schedule 1. As the PLA notes, the effect of this article is that it is "subject to" the provisions of article 28 which provide further controls. In any event, the Applicant inserted a provision in the PLA's Protective Provision at Deadline 1 which explicitly sets out that "*The undertaker's powers of temporary possession and compulsory acquisition of rights and imposition of restrictive covenants under this Order above the river bed of the river Thames in connection with the temporary outfall, permanent outfall, the new water inlet with self-regulating valve and ground investigation works is limited to what is reasonably necessary for the undertaker safely to construct the authorised development*." Second, the Applicant wishes to emphasise that unlike other river crossing projects, the Applicant's interference in the navigable channel is limited. Details of SU apparatus are set out in the Book of Reference and adequate protective provisions are in place to protect SUs, including the PLA.

9.8.2 The Applicant understands that the PLA's concern is rooted in a desire to charge third parties for erecting apparatus in the tunnel. The Applicant does not consider this is a matter for the dDCO to either protect, nor affect (except in relation to the Applicant's role as the prospective owner and operator of the tunnel area). The Applicant amended article 44(1) to address the PLA's concern so that it is limited to the functions of the undertaker in its capacity as a highway authority. The PLA has raised a related concern that article 53(4) should also be

so limited. Whilst the Applicant does not consider this necessary, the Applicant has made this amendment in the dDCO submitted at Deadline 2 and therefore considers this matter to be closed.

9.8.3 For completeness, the Applicants refers to paragraph 113 of the PLA's protective provisions which is still subject to agreement between the parties but would include an obligation on the Applicant to notify third parties of the "possibility" of a licence being required.

## 9.9 Art. 48 dDCO – Acquisition of rights over the riverbed and second protection zone (WR 15)

9.9.1 This issue is addressed in the SoCG [APP-100] at item 2.1.6 (Right of National Highways to discharge and deemed consent provisions in Protective Provisions), 2.1.41 (Works within the river) and is a Matter Under Discussion. As stated in the SoCG item 2.1.41 "National Highways accepted all of the amendments proposed by the PLA to the last version of article 48 and it remains unclear why the PLA would still be unable to carry out business as usual." The Applicant considers this matter closed noting that the PLA states that "If this amendment is made, the PLA's concern on this point would be resolved."

## 9.10 Art. 48 dDCO – Explosives anchorage (WR 16)

9.10.1 This issue is addressed in the SoCG [APP-100] at item 2.1.20 (Disapplication of explosives licence at Higham Bight anchorage). The Applicant notes that the body which granted the explosive licence has agreed with its disapplication. The PLA has provided a proposal for a consultant to further investigate a possible licence at an alternative location. The Applicant will work with the PLA to further assess the needs and timing of a licence as the consultant reports. In terms of timing, the Applicant has proposed an amendment in the dDCO at Deadline 2 so the disapplication is triggered at the point works relating to the tunnel area begin. Noting that the discharging body has consented to the disapplication, the Applicant does not consider the disapplication should be triggered at the point that a new explosive licence (which may or may not be granted) is granted. Such a trigger would hold to ransom the delivery of this nationally significant infrastructure project, or worse still put the Applicant's contractors or users of the tunnel at risk.

## 9.11 Sch. 2 dDCO – Approval of documents (WR 17)

9.11.1 Generally, the Applicant notes the PLA's comments on seeking consultation role over certain requirements. The Applicant will review and discuss with the PLA further before responding.

9.11.2 In relation to the Draft Archaeological Mitigation Strategy and Outline Written Scheme of Investigation, please see the responses to the PLA's Written Representations.

9.11.3 In relation to the marine biodiversity security plan, the PLA's comments are misconceived. The REAC measure cited requires the production of a marine biodiversity plan, and the EMP2 – under requirement 4(2) – must reflect the mitigation measures in the REAC.

9.11.4 In relation to lighting, the Applicant considers the PLA's position to be disproportionate in light of the assessed impacts and controls provides. In particular, as noted by the PLA, the EMP2 will be required to secure a River Safety Lighting Management Plan (RSLMP). It is not correct to say that the Contractors will unilaterally decide whether a RSLMP is required. First, the CoCP explicitly sets out that "The RSLMP must be the subject of engagement with Port of London Authority, and Thurrock Council. The Contractor must have due regard to representations made by the Port of London Authority and Thurrock Council, including any substituted or new guidance or standards relating to river safety lighting" (as per paragraph 6.86). Second, the suggestion that the Applicant and its contractors will not have the requisite knowledge is unsubstantiated.

9.11.5 In relation to the construction logistics plan, the Applicant notes that EMP2 will require its production and set out the related parameters. The Applicant considers no further amendment is necessary in light of the fact that EMP2 will be the subject of consultation in accordance with Requirement 4(2) (including with the PLA), and that the Secretary of State will approve that plan. The Applicant draws attention to paragraph 20 of Schedule 2 which sets out that any responses provided by the PLA will be provided to the Secretary of State. The Secretary of State (for Transport) has competence in respect of such matters.

## 9.12 Sch. 14 Protective provisions – ground investigation works (WR 18)

9.12.1 The Applicant considers the PLA's concerns are unfounded, and run the risk of introducing "for the avoidance of doubt" drafting. For context, the dDCO as submitted applied to a specified function which the PLA has approval in respect of. Specified function extends to ground investigation. Whilst the Applicant consider no further amendment to be necessary, and would be contrary to guidance on only including provisions which are necessary, the Applicant's dDCO submitted at Deadline 1 nonetheless explicitly included a definition of "begin" in the PLA's protective provisions which expressly incorporate "and any ground investigations in the river Thames". The Applicant therefore considers this matter closed.

9.12.2 The Applicant will however consider the PLA's comments on whether the definition of "pNRA" needs refinement and will provide an update at Deadline 3. The Applicant would note that the pNRA sets out (at paragraph 2.2.6) that "*A NRA (Highways England, 2019) undertaken for in-river SI in 2019 (NRA for SI survey) and the risk controls agreed in that document (See Appendix F). Further site investigations over the tunnel route in the River Thames should use the NRA for SI survey, developed for previous site investigations, as the basis for a final NRA, including all the risk controls as previously established and agreed*." In the Applicant's view this secures the NRA in connection with Site Investigations but it is nonetheless open to considering this matter.

## 9.13 Sch. 14 Protective provisions – requests for design information (WR 19)

9.13.1 The Applicant notes the PLA's comments and will consider the protective provisions drafting to see if they can be further updated. The Applicant notes

that the protective provisions mirror those of the Silvertown DCO and Thames Tideway Tunnel DCO which the PLA accepted and the Secretary of State endorsed.

## 9.14 Sch. 14 Protective provisions – general (WR 20)

9.14.1 The draft protective provisions accord with those from the Silvertown Tunnel DCO and the Thames Tideway Tunnel DCO (which the Applicant understands the PLA accepted).. Given that the Applicant's works on, and interference with the river Thames are substantially less than those schemes, the Applicant considers the current wording robust and proportionate.

## 9.15 Sch. 15 dDCO – Lighting (WR 21).

9.15.1 This issue is addressed in the SoCG [APP-**100**] at item 2.1.56 (River Safety Lighting Management Plan). The Applicant was under the assumption that the PLA's comments on the issue had been accommodated. The Applicant draws the Examining Authority's attention to paras 109 and 110 of the protective provisions which the Applicant considers adequately dealt with lighting concerns from the PLA. Please also see comments on the RSLMP above.

# 10 Port of Tilbury

## 10.1 PoTLL's response to the drafting matters in Annex A to the agenda to ISH2

**Table 10.1 Comments on draft DCO provisions set out in Annex A to the Agenda for Issue Specific Hearing 2**

| | Matter / Provision | PoTLL Comments | The Applicant's Response |
|---|---|---|---|
| 1 | Article 2(10) – definition of 'materially new or materially different environmental effects' | No comments on this provision specifically, but please see comments in respect of the environmental management plan at Row 6 of Table 2 in Appendix 5. | The Applicant welcomes PoTTL having no comments on the provision. Please see the Applicant's responses to the Port of Tilbury on the non-dDCO matters raised herein. |
| 2 | Article 27 – time limits for compulsory acquisition | PoTLL currently does not benefit from any protection from the exercise of compulsory acquisition (CA) powers within the protective provisions in the dDCO and such protection is required to avoid serious detriment to PoTLL's undertaking. Further commentary on the protective provisions is provided at Row 15 of Table 1, and revised protective provisions are provided in Appendix 9.<br>In the absence of protective provisions, the extended time limit (8 years, when the convention is for a 5 year limit) for the exercise of compulsory acquisition and temporary possession powers conferred by the dDCO would extend the period of uncertainty arising from the existence of such powers over the Port. Such uncertainty would disincentivise further investment in the Port. | The Applicant is reviewing the Protective Provisions for the benefit of the Port of Tilbury London Limited following their provision of PoTTL's preferred set at Deadline 1, and will provide an updated iteration at Deadline 3.<br>The Applicant would highlight, as confirmed in PoTTL's written submission, PoTLL has entered into leases and an agreement with the Applicant for four areas of land to be used for Work Nos. CA5/CA5A. These works contain the predominant use of PoTTL's land in connection with the Project. |
| 3 | Article 28 – extent of imposition of transfer of | The area of Tilbury2 is crossed by numerous utilities and any new easements have the potential to sterilise development land. PoTLL is seeking a provision to require its consent to the utilisation of article 28 by any | The Applicant is reviewing the Protective Provisions for the benefit of the Port of Tilbury London Limited following their provision of PoTTL's |

| | Matter / Provision | PoTLL Comments | The Applicant's Response |
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| | compulsory acquisition powers without consent | party over land held by PoTLL for the purpose of its undertaking, or where the exercise of this article would impact upon that land. This is set out in paragraph 136 of the revised protective provisions in Appendix 9.<br>Article 28, in paragraph (3), enables any statutory undertaker to exercise the powers for the compulsory acquisition of rights and imposition of restrictive covenants. This is not restricted only to listed undertakers. There does not appear to be any restriction on the circumstances when a statutory undertaker may 'piggy back' on the broad CA powers in the dDCO in order to obtain rights and place restrictions on land. This increases the uncertainty of how and when CA powers may be exercised, and by whom.<br>In view of the potential for land to be sterilised from standard provisions of easements such as stand-off distances, affecting long-term Port development, PoTLL seeks to ensure that this power cannot be used in respect of Port land without consent from PoTLL, the party best placed to manage the impacts of utilities on its land and to avoid serious detriment to the Port undertaking. | preferred set at Deadline 1, and will provide an updated iteration at Deadline 3.<br>The Applicant does not agree that article 28(3) would allow "piggy-backing"; the purposes for which rights can be acquired is, in the case of "blue land", limited to the purposes set out in Schedule 8 to the dDCO. The Applicant would note that the ability for permanent rights to be acquired by statutory undertakers is not unprecedented (see, for example, article 22 of the A303 (Amesbury to Berwick Down) Development Consent Order 2023). |
| 4 | Article 56(3), (4) – planning permission | No comments. | Noted. |
| 5 | Work No. 7R – Traveller site & Requirement 13 | No comments. | Noted. |
| 6 | Articles 2, 4, 5, 7 and generally – definitions, maintenance and limits of deviation. | PoTLL has no general comments on these matters, but has commented on specific limits of deviation under article 6 in Row 1 of Table 2 in Appendix 5. | Please refer to our response in respect of Article 6 below. |

| | Matter / Provision | PoTLL Comments | The Applicant's Response |
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| | Requirement 4(1) – 'carve out' for preliminary works (The Preliminary Works EMP) | | |
| 7 | Article 3(3) – General disapplication of provisions applying to land | As currently drafted, the effect of this provision is to make all operations of PoTLL as harbour authority subject to a highways DCO. This is an unacceptable restriction on PoTLL's duties as harbour authority, for the reasons set out above. Revised drafting is proposed to manage the interaction of this dDCO with the enactments underpinning PoTLL's functions. The revised protective provisions found in Appendix 9 include further provisions dealing with the impact of this drafting. PoTLL is mindful, however, that both drafting changes are required as inclusion of updated protective provisions without also amending article 3(3) would see this article taking priority over the protections.<br>The drafting of article 3(3) is taken directly from the Silvertown Tunnel Order 2018, article 4(2). The drafting is read in parallel with article 53 (disapplication of legislative provisions, etc.) and article 55 (application of local legislation) of the dDCO, and serves as a backstop provision whereby any local Act not explicitly disapplied or excluded under those articles is rendered subordinate to the dDCO.<br>The reason for this inclusion in the Silvertown Tunnel Order was to ensure that there was no unidentified local legislation that could constitute an impediment to the implementation of that scheme. The provision is included in order to sweep up any historical legislation that remains in force, but which was not identified during a local legislation search. Simply, it is not intended to apply | The Applicant responded to these comments in the context of its submissions of Issue Specific Hearing 1.<br>The Applicant is happy to accept the proposed amendment suggested by PoTTL subject to the proviso 'Except as provided in article 53 (Disapplication of legislation etc.) and article 55 (Application of local legislation).' The Applicant therefore considers this matter to be closed. |

| | Matter / Provision | PoTLL Comments | The Applicant's Response |
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| | | to known local legislation, as demonstrated by the specific management of identified legislation in articles 53 and 55 of the dDCO.<br>The Port of Tilbury (including Tilbury2) is constituted and governed by local enactments and this is the source of PoTLL's authority as statutory harbour authority - specifically The Port of Tilbury Transfer Scheme 1991 (applying, with modifications, parts of the Port of London Act 1968) given effect by The Port of Tilbury Transfer Scheme 1991 Confirmation Order 1992, and The Port of Tilbury (Expansion) Order 2019.<br>The effect of article 3(3), in the absence of any express exclusion, is to render the entire authority of PoTLL within the boundary of the Port, being variously within, adjoining or sharing a common boundary with the Order limits, wholly subject to the provisions of the dDCO.<br>It is not acceptable to subjugate all operations of the Port to a highway scheme; simply, this cannot have been the will of Parliament when drafting s120(5) of the Planning Act 2008. That section requires either alternative provision to be made in the dDCO (s120(5)(a)) or for it to be 'necessary or expedient' to make the amendment, repeal, revocation or inclusion of provisions (s120(5)(b) and (c)). The Applicant has not demonstrated that it is necessary, expedient, or convenient, beyond the limited perspective of the Applicant itself, to render all harbour authority functions secondary to the dDCO.<br>As set out fully in Row 15, the protective provisions included within dDCO are wholly insufficient to protect PoTLL's statutory undertaking, are extremely narrow in scope, and do not consider the impact of article 3(3) in any respect. | |

| | Matter / Provision | PoTLL Comments | The Applicant's Response |
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| | | The practical effect of article 3(3) would be to erode the security of the Port and risk the customs barrier, as the Port byelaws could not be enforced against any person acting on behalf of the undertaker for the purposes of the LTC Scheme. This is extremely likely to occur where the Applicant intends to use the Tilbury2 infrastructure corridor and Substation Road, within the secure boundary of Tilbury2, as its main construction route.<br>Simply, this provision, unfettered, would entitle the Applicant to interfere with the operation of the Port, and mean that any attempt to utilise statutory powers to undertake any Port operation would first need to be checked against the dDCO to identify if PoTLL is able to take that action.<br>Suggested revised drafting is included below, with amendments shown in blue text, aiming to balance the desire to avoid unknown local Acts from impeding the implementation of the Scheme, with the traditional approach of agreeing terms with statutory undertakers by way of protective provisions in order to avoid undue interference with their statutory undertaking:<br>Article 3(3):<br>Subject to paragraph (4), any enactment applying to land within, adjoining or sharing a common boundary with the Order limits (other than land comprising part of the river Thames outside of the Order limits) has effect subject to the provisions of this Order.<br>New article 3(4):<br>Paragraph (3) does not apply to The Port of London Act 1968, The Port of Tilbury Transfer Scheme 1991, The Port of Tilbury Transfer Scheme 1991 Confirmation Order 1992 and The Port of Tilbury (Expansion) Order 2019 or | |

| | Matter / Provision | PoTLL Comments | The Applicant's Response |
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| | | any byelaws, general directions or specific directions having effect, made or given under those enactments.<br>As mentioned above, revised protective provisions that further manage the interaction of the dDCO with the enactments underpinning the Port are included in Appendix 9. | |
| 8 | Schedule 1 – Authorised Development Part 1 – Authorised Works | No comments. | Noted. |
| 9 | Compulsory acquisition and extinguishment of rights - Articles 25-34; Articles 35-36; Article 66 | PoTLL is seeking protections to ensure that all compulsory acquisition powers within the dDCO can only be exercised in respect of land held by PoTLL with PoTLL's agreement. PoTLL also seeks to be a party to any agreement entered into in respect of easements, wayleaves, utility diversions, etc., that will be on or affect operational land and land held for the purposes of PoTLL's statutory undertaking. Further commentary on the need for revised protective provisions is set out in Row 15 of Table 1. Revised protective provisions have been included in Appendix 9. | The Applicant is reviewing the Protective Provisions for the benefit of the Port of Tilbury London Limited following their provision of PoTTL's preferred set at Deadline 1, and will provide an updated iteration at Deadline 3. |
| 10 | Article 27 – time limit for the exercise of CA powers | See above at row 2. | See above. |
| 11 | Article 28 – restrictive covenants and transfer | See above at row 3. | See above. |
| 12 | Articles 35 & 36 – Temporary possession | PoTLL is seeking improved and alternative protective provisions to protect it from the use of temporary possession powers in respect of its operational land and land held for the purpose of its statutory undertaking without PoTLL's consent. Revised protective provisions have been included in Appendix 9. | The Applicant is reviewing the Protective Provisions for the benefit of the Port of Tilbury London Limited following their provision of PoTTL's preferred set at Deadline 1, and will |

| | Matter / Provision | PoTLL Comments | The Applicant's Response |
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| | | | provide an updated iteration at Deadline 3. |
| 13 | Article 66 – Power to override easements etc. | PoTLL is seeking protective provisions (revised protective provisions are included in Appendix 9) to ensure that this article (and article 34 (rights under or over streets)) does not apply to PoTLL's land given the presence of a number of easements on its land that are necessary for Port operations and key third parties such as NGET and Cadent. Please also refer to Row 3 above for discussion around the complexity of utilities over the Tilbury2 area. | The Applicant is reviewing the Protective Provisions for the benefit of the Port of Tilbury London Limited following their provision of PoTTL's preferred set at Deadline 1, and will provide an updated iteration at Deadline 3. |
| 14 | Article 40 (Special category land) | No comments. | Noted. |
| 15 | Articles 37 & 38 – Statutory undertakers and apparatus | PoTLL is seeking appropriate protective provisions for its benefit in the dDCO, to be supplemented by agreements. Revised protective provisions have been included in Appendix 9, and an overview of the agreements being sought is set out in Appendix 7. Both documents set out the protection required by PoTLL, in the absence of greater clarity as to the extent of the interaction with the Port, in order for it to be satisfied that there will not be significant detriment to its undertaking.<br>For the avoidance of doubt, PoTLL does not consider the protective provisions contained in Part 10 of Schedule 14 to the dDCO to be sufficient. PoTLL considers that the protective provisions for its benefit in the dDCO appear to be drafted without consideration of its status as a statutory undertaker, as they omit numerous standard provisions that are contained in the protections for other statutory undertakers, for example in relation to the specified functions of the undertaker, protection from the | The Applicant is reviewing the Protective Provisions for the benefit of the Port of Tilbury London Limited following their provision of PoTTL's preferred set at Deadline 1, and will provide an updated iteration at Deadline 3. |

| | Matter / Provision | PoTLL Comments | The Applicant's Response |
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| | | use of compulsory acquisition powers, and specific consideration of the likely types of interaction between the LTC Scheme and the specific statutory undertaking.<br>In its comments on Annex A to the Agenda to ISH2 [AS-089], the Applicant has relied upon the protections afforded within the current protective provisions for PoTLL, in respect of both the impacts of article 3(3) and the impacts of article 18. As currently drafted, the protective provisions are extremely narrow in scope, referring only to seven numbered works, each of which is a utility diversion. The protections are narrow in scope, only requiring plans for approval for those works. No consideration has been given to the protections required for the Port for the operational interactions between the Scheme during construction and the operational Port, and no protection is afforded in respect of the impact of article 3(3) (although see PoTLL's comments in relation to article 3(3), as set out in Row 7 above).<br>PoTLL has provided revised protective provisions in Appendix 9. These protective provisions seek to protect PoTLL's statutory undertaking from serious detriment from the following provisions:<br>• the carrying out of works authorised by the dDCO on Port land (until plans are provided to PoTLL for its approval, subject to reasonable conditions);<br>• streets powers under articles 12, 16 and 17, etc. (as they affect the road connection to the Port and may therefore impact the operation of the Port);<br>• traffic management measures (as imposed within the boundary of the Port);<br>• the use of compulsory acquisition and temporary possession powers, under articles 25, 28 and 35, etc. | |

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| | | (as they relate to the Port, without PoTLL's consent); and<br>• the application for permits that apply to activities within the Port.<br>The protective provisions also seek to manage:<br>• the operation of article 18, generally;<br>• erosion or accumulation of the river within the Port;<br>• emergency procedures, including closure of the Port in an emergency;<br>• interaction with the Port of Tilbury (Expansion) Order 2019; and<br>• safeguarding of priority access to the port by rail.<br>PoTLL notes that the efficacy of any protective provisions in its favour are tied to the drafting in article 3(3), for the reasons set out in row 7, above. PoTLL is also seeking to address impacts caused by matters beyond the boundary of the Port in control documents, such as the Construction Traffic Management Protocol provided in Appendix 8.<br>Until adequate protective provisions that accord with those set out in Appendix 9 have been agreed and included in the dDCO, PoTLL strongly disagrees with the Applicant's submission that the tests in sections 127(3) and 127(6) of the Planning Act 2008 have been satisfied. | |
| 16 | Article 56 – Planning permission | PoTLL's concern with this article is that it is seeking through the dDCO a number of important protections for its undertaking, which could be circumvented by the Applicant simply seeking planning permission for all aspects of the LTC Scheme that are Associated Development. For example, operations carried out | The Applicant is reviewing the Protective Provisions for the benefit of the Port of Tilbury London Limited following their provision of PoTTL's preferred set at Deadline 1, and will provide an updated iteration at |

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| | | pursuant to a separate planning permission would not come under the ambit of article 55(5) (which deems that works authorised under the dDCO do not give rise to a breach of the terms of the Port of Tilbury (Expansion) Order 2019) and so could put PoTLL back in breach of its DCO (noting that ecological mitigation and landscaping is associated development). Furthermore, PoTLL would not be able to approve the details of those works, even if they would fall under the definition of 'specified works' in its protective provisions were they carried out under the dDCO.<br>PoTLL has included drafting to address this issue within the revised protective provisions in Appendix 9, however its preference is that this forms part of the proposed framework agreement, being the most suitable place to accommodate a coherent regime to ensure protections apply to any work by the Applicant, however authorised. This would be able to accommodate the potentially complex interaction with planning permissions and development consent orders. | Deadline 3. However, to address the specific concern highlighted in connection with article 55(5), the Applicant would propose an amendment which add "or works carried out in connection with the authorised development" so that the protection extends in the unanticipated event a planning permission which has the benefit of article 56 is made. |
| 17 | Articles 15, 16 and 17 – classification of roads; clearways, prohibitions and restrictions; speed restrictions | PoTLL considers that the dDCO should be amended to ensure that it is 'Tilbury Link Road' ('TLR') ready; that is to say, that the Applicant should ensure that its LTC Scheme is not incompatible with the TLR and would not constitute an impediment to the TLR being brought forward in the future. An appropriate approach to ensure this has been set out at paragraph 5.5 of the main body of this Written Representation. | Please see the Applicant's response to the Port of Tilbury's Written Representation which addresses the Tilbury Link Road. This scheme is progressing outside of the Project as a RIS3 pipeline scheme, and it is not considered appropriate or necessary to include provisions in connection with the Tilbury Link Road in the dDCO. |

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| 18 | Articles 12 & 13; Article 14 - Temporary stopping up and restriction of use of streets | **Article 13 (private roads)**<br>PoTLL notes that the use of private roads under article 13 is not time limited in any way, as maintenance of the Proposed Development is itself not time limited. If included in the dDCO in this form, it would effectively grant the Applicant an enduring statutory right to use private roads within the Order limits for the purposes of construction or maintenance of the authorised development. Maintenance in this context does not appear to be equated with the five year 'maintenance period' referred to in article 36(13) and so must be construed consistently with the power to maintain under article 4. While paragraph (3) makes provision for compensation for repairs there are two key flaws with this approach. This is particularly of concern to PoTLL given that Substation Road situated within Tilbury2 is within the Order limits and is a private road owned by PoTLL.<br>First, the way that the provision is drafted ensures that the owner of the private road is put at a significant evidential disadvantage in pursuing a claim for compensation in relation to the repair of the private road. This is because the power is exercisable without notice or other reference to the owner of the private road. This deprives the owner of the opportunity of taking sensible steps, such as undertaking a condition survey prior to the private road being used in order to show that damage has been occasioned by the exercise of the power. The lack of notice poses further issues in that the owner is not even required to be made aware of the fact the road is to be so used by National Highways pursuant to this power. A prudent owner would therefore be required to undertake an enhanced maintenance and monitoring regime (which would come at a cost which the drafting of | The Applicant has removed the ability to use this power in connection with the maintenance of the authorised development in the dDCO submitted at Deadline 2 and considers this resolves the concern raised by the Port of Tilbury London Limited.<br>The Applicant considers that the power is appropriately and proportionately defined. The Applicant notes that this provision is precedented (as noted in the Explanatory Memorandum). |

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| | | the article does not make any provision for in terms of compensation) to safeguard its position in case the power is exercised.<br>Secondly, in effect the statutory power envisaged by this article would not be functionally different to the Applicant acquiring compulsorily a private right over the private road. However, put in this form as a statutory right with a provision to claim compensation after each compensation event, rather than as the compulsory acquisition of a private right, it deprives the affected person of seeking compensation for that right and any diminution in the value of the retained land associated with it. Instead its land is burdened by this uncertain statutory power with an administrative burden of seeking compensation for the costs or repairs where it is not even given notice of an intention to use the road in this way.<br>If the Applicant seeks a permanent private right to use private roads, it ought to have made that provision rather than dress up the acquisition of private rights in the clothing of ongoing statutory powers.<br>PoTLL is also seeking protection from the exercise of this power within its revised protective provisions, set out in Appendix 9. | |
| 19 | Articles 53 & 55 – Disapplication or amendment of legislation / statutory provisions | Article 53<br>PoTLL notes that paragraph (4) of article 53 disapplies the requirement under the Port of London Act 1968 for the undertaker to have a licence to do anything to any structure forming part of the authorised development in connection with its operation or maintenance. PoTLL is concerned that this will have the effect of enabling the undertaker to apply scour protection to the tunnel without requiring a licence. The requirement for a licence is an | The Applicant is continuing to engage with the PLA on article 53. On the specific issue raised, National Highways do not intend to carry out any activities that will cause scour above the tunnel in the navigable channel. The Project design does not include the requirement for scour protection. |

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| | | important provision that protects the efficiency and effectiveness of the river Thames navigation. This is particularly the case as it is not clear that such works by the undertaker, such as applying scour protection, would be covered by the PLA's protective provisions, e.g., whether such measures would count as a 'specified function' given long term maintenance is specifically excluded from the definition of 'construction' in the protective provisions for the benefit of the PLA.<br>Accordingly PoTLL supports the PLA's position and whilst PoTLL does not object to the replacement of the licensing regime with the bespoke provisions for the PLA on terms agreed with the PLA, these must be future-proofed to ensure that both the LTC Scheme and the Port can operate freely in the future.<br>Article 55(5)<br>This paragraph appears to be intended to address the risk of the exercise by the undertaker of the powers conferred by the dDCO of putting PoTLL or the undertaker in breach of the Port of Tilbury (Expansion) Order<br>2019 (the 2019 Order). The intent behind the drafting of the article is welcomed. However, it does not go far enough. Article 55(5) applies to "any inconsistency or conflict between any works authorised under this Order" and resolves conflicts with "any of the requirements " of the 2019 Order. It does not address the potential for the exercise of the other powers conferred on the undertaker by the dDCO that fall short of "works" that may nonetheless place PoTLL in breach of the 2019 Order. For example, if the power to fell or lop trees conferred by article 23 of the dDCO was exercised by the Applicant | The Applicant is content to make the requested amendments to article 55(5) and considers this matter to be resolved. |

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| | | over land PoTLL is required to maintain under the 2019 Order for the purposes of environmental mitigation, such felling may not constitute "works" and so would not enjoy the protection of article 55(5). Similarly, the drafting only protects from any breach of the requirements of the 2019 Order. It does not protect against any conflict or inconsistency arising with other provisions of the 2019 Order, for example, the protective provisions contained in Schedule 10 to the 2019 Order or in relation to any exercise by PoTLL of its functions in the remainder of the 2019 Order.<br>PoTLL therefore suggests that article 55(5) is amended as follows:<br>"Without prejudice to Part 910 of Schedule 14 (protective provisions), to the extent that there is any inconsistency or conflict between any works authorised under this Order or the exercise by the undertaker of the functions conferred by this Order, and all or any of the requirements provisions of the Port of Tilbury (Expansion) Order 2019 ("the 2019 Order") then, in respect of such inconsistency or conflict, there is deemed to be no breach, or non-compliance, of any provision or requirement of the 2019 Order by the Port of Tilbury London Limited or the undertaker and any such inconsistency or conflict is to be disregarded for the purposes of Part 8 of the 2008 Act."<br>PoTLL remains concerned that provisions of the 2019 Order are there for good reasons and that any inconsistency or conflict with them would need to be resolved. To avoid reliance on this provision, and to ensure that where it is relied upon the underlying conflict or inconsistency is resolved, PoTLL seek to reach | |

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| | | agreement with the Applicant on a wide range of issues as outlined in Appendix 7. | |
| 20 | Article 43 - Crown rights | No comments. | Noted. |
| 21 | Articles 23 & 24 – felling or lopping of trees and removal of hedgerows; trees subject to tree preservation orders | No comments. | Noted. |
| 22 | Article 65, Schedule 2 Part 2 – Procedure for discharge of requirements | No comments. | Noted. |
| 23 | Article 7 – Benefit of the Order and Article 8 – Consent to transfer benefit of the Order | PoTLL considers that it should be included amongst those authorities listed. Article 8 sets out, at paragraph (5), a list of bodies to whom the benefit of part or all of the dDCO may be transferred "in respect of works relating to their undertaking".<br>PoTLL is seeking to be included in this list of statutory undertakers in view of the extensive physical interaction between the proposals during construction and the Port. There are a number of works that may make more sense for PoTLL to carry out, due to their location on operational Port land and subject to appropriate agreements being reached with the Applicant. This may include the installation of MU27 beneath Substation Road, due to the constraints in this location, or works to repair the roads within the Port. Furthermore, as much of the land in and around the north portal compound is within the Freeport designation and is owned by PoTLL as part of its statutory undertaking, it is possible that future activities for the LTC Scheme may form part of PoTLL's undertaking, for example the movement of | The Applicant is content to add PoTTL to the list of undertakers listed in Article 8(5). In light of the notices, and other approvals required under the dDCO, the Applicant does not consider it necessary it necessary to make any further amendments to Article 8. |

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| | | materials within the boundary, given that is a frequent existing Port occurrence.<br>At paragraph 5.5 of this written representation PoTLL has set out a proposed approach in relation to ensuring that the LTC Scheme is not incompatible with the Tilbury Link Road and it would be appropriate for PoTLL to be named as an undertaker who may benefit from development consent and in relation to whom functions under the dDCO may be transferred without requiring the consent of the Secretary of State.<br>In addition, given the quantity of works that are proposed to take place within land held for PoTLL's statutory undertaking, it is considered that PoTLL should be notified of any transfer (whether Secretary of State consent is required or not) of benefit which takes place pursuant to this article that relates to land held by PoTLL for the purposes of its statutory undertaking. This is so PoTLL can be certain that those persons purporting to exercise functions under the dDCO are entitled to do so. | |
| 24 | Article 19 – Discharge of water | No comments. | Noted. |
| 25 | Articles 35 & 36 – Temporary possession | PoTLL has provided revised protective provisions in Appendix 9 that will protect its undertaking from serious detriment caused by the exercise of temporary possession powers over its operational land held for the purpose of its statutory undertaking, without PoTLL's consent. | The Applicant is reviewing the Protective Provisions for the benefit of the Port of Tilbury London Limited following their provision of PoTTL's preferred set at Deadline 1, and will provide an updated iteration at Deadline 3. |
| 26 | Article 64 – arbitration | No comments. | Noted. |

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| 27 | Article 58 – defence to proceedings in respect of statutory nuisance | No comments. | Noted. |
| 28 | Article 60; Schedule 15 – Deemed Marine Licences | No comments. | Noted. |
| 29 | Article 18 – Powers in relation to relevant navigation and watercourses | Article 18 provides the undertaker with extremely broad powers to interfere with navigation, moorings and infrastructure in the river Thames, subject to a threshold of it being 'reasonably convenient'. The only geographical restriction on this power is to the river Thames, and the only other limit on the exercise of this power is contained in paragraph 104 of the protective provisions in favour of the PLA.<br>Paragraph 104 of the protective provisions for the PLA stipulates that article 18(1)(e) may only be exercised in connection with Work Nos. 5A and 5X, ground investigation works, and 'any other activity approved in writing by the PLA'. Article 18(1)(e) is specifically the interference with the navigation of the river Thames. The use of article 18 is therefore tempered only in respect of navigation, and only for the protection of the PLA. PoTLL receives no such consideration in the protective provisions proposed by the Applicant.<br>Further commentary on the need for improved protective provisions is set out in Row 15 above, and revised protective provisions that include protection from the use of this power for the Port is found in Appendix 9. | The Applicant does not agree that the power is 'extremely broad' as it is restricted 'for the purpose of or in connection with the carrying out and maintenance of the authorised development' which is necessarily geographically and spatially limited. The Applicant notes that the protections in the PLA's protective provisions extend to "specified functions" (which includes all elements of Article 18) and in respect of which appropriate controls are provided.<br>Whilst the Applicant is considering PoTTL's preferred protective provisions (provided at Deadline 1), the Applicant will amend Article 18 so that it allows the exercise of the powers under paragraph (1) only where it is "reasonably necessary", rather than reasonably convenient. |
| 30 | Article 46 – Suspension of road user charging | No comments. | Noted. |

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| 31 | Requirement 1 – Preliminary works | No comments. | Noted. |
| 32 | Requirement 3 – Detailed design | No comments. | Noted. |
| 33 | Requirements 4, 5, 10, 11 | No comments. | Noted. |
| 34 | Requirements 7, 8, 9, 10, 11, 16 | No comments. | Noted. |
| 35 | Requirement 9 | No comments. | Noted. |
| 36 | Requirement 13 – Travellers' site | No comments. | Noted. |
| 37 | Requirement 15 – Thurrock Flexible Generation Plant | No comments. | Noted. |
| 38 | Schedule 2 Part 2 – discharge of requirements – Requirement 18 | No comments. | Noted. |

**Table 10.2 Further provisions of the draft DCO subject to commentary by PoTLL**

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| 39 | Article 6 | **Tunnelling Limits**<br>Sub-paragraph (2)(p) relates to the vertical upwards limit of deviation for the tunnel, by reference to the tunnel limits of deviation plan. In its response to Annex A of the Agenda for ISH2 [AS-089], the Applicant has included revised drafting of the PLA protective provisions in respect of the dredging depth. Notably, however, article 6 and the power to deviate is not made subject to the protective provisions for the benefit of the PLA. There is | The Applicant has substituted paragraph 99(1)-(2) with a provision which secured the depths of the tunnel requested by the PLA at Deadline 1. Please see above the response provided to the PLA on this issue. Happily, the Applicant notes that the request to amend article 6 so that it takes effect subject to |

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| | | therefore a potential for confusion as to what the upper limit of the tunnel is, in particular considering that the current iteration of the tunnel limits of deviation plan does not show adequate dredging depth.<br>To ensure that the dredging depth protections within the PLA's protective provisions are given full effect, PoTLL considers that a drafting change is required, either within article 6 or within the protective provisions for the PLA, in order to properly secure this provision and to ensure that it is clear that the tunnel may not deviate upwards so as to adversely impact upon the ability of the PLA to dredge the navigation to an appropriate depth.<br>The clearest solution would be for the Applicant to re-issue the 'tunnel limits of deviations plans' (as defined in article 2(1) of the dDCO), so that the maximum depth upwards is shown clearly taking into account the PLA's dredging requirements. However, failing that, article 6(2)(p) ought to be amended so as to make it clear that the upward limit of deviation is subject to the PLA's protective provisions. It would also assist in avoiding ambiguity if the PLA's protective provisions, paragraph 99(1) (as amended), are expressed in terms such that it is clear that they would prevail over article 6(2)(p), for example by adding "Notwithstanding article 6(2)(p),...".<br>**Request for Clarification**<br>Sub-paragraphs (2)(h) and (2)(i) appear to be drafted identically and apply to many of the same works, including MUT works on PoTLL's land. It is not clear why these two sub-paragraphs have not been consolidated into a single sub-paragraph if the same limits of deviation are intended to apply to each of them. It would be helpful if the Applicant would review and clarify its intention. | paragraph 99(1) was also made at Deadline 1. The Applicant's view is therefore that the only tunnel design which can be delivered is one which ensures those agreed dredging depth protections.<br>The Applicant does not consider it appropriate nor necessary to amend the Tunnels Limits of Deviation Plans given the legally binding commitment (which takes precedence over the upward limits of deviations). The Applicant further notes that there may be changes to construction methodology or design which would enable the utilisation of the limits of deviation without affecting the agreed and legally binding tunnelling depths. This protection is further reinforced because under the PLA's protective provisions, approval will have to be provided in connection with specified works (which includes the tunnelling works).<br>**Response to request for clarification**<br>The Applicant can confirm the limits in (h) and (i) are identical. The disaggregation in paragraphs (h) and (i) reflects the difference in permanent and temporary works (i.e., MU vs. MUT works) and is intended |

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| | | | to assist interested parties in identifying the relevant works. |
| 40 | Article 12 – Temporary closure, alteration, diversion and restriction of use of streets | Article 12(7) states that, where a temporary diversion under paragraph (4) is provided, it "is not required to be of a higher standard than the temporarily closed, altered, diverted or restricted street or private means of access specified" in Schedule 3. This does not provide comfort to PoTLL as the alternative accesses to the Port are on country roads, wholly unsuited to HGV traffic.<br>As a minimum, in respect of traffic measures to the A1089 and to Fort Road (Infrastructure Corridor) (but noting that this issue may be present in other areas), the alternative route must be of at least the same general quality, i.e. suitable for HGVs.<br>In more general terms and as set out in Row 15 in Table 1, PoTLL is seeking protection from the use of street powers where their exercise would cause serious detriment to the operation of the Port. In addition to drafting in the revised protective provisions in Appendix 9, PoTLL has included a draft Construction Traffic Management Protocol in Appendix 8. This protocol sets out the extent of agreement, and those matters still in discussion, that will manage the impacts of traffic management measures under article 12 on the Port. The protocol addresses a number of concerns that PoTLL has with the current traffic management plans, including the absence of an urgent escalation process in the event issues are caused by traffic management measures.<br>The Applicant therefore seeks this change to article 12(7):<br>(7) Where the undertaker provides a temporary diversion under paragraph (4), the new or temporary alternative | Article 12(7) ensures that the re-provided road is able to be of the same standard. The limitation is, explicitly, about ensuring that no "higher" standard is provided. Nonetheless, the Applicant is happy to make the amendment which confirms that 'it must be suitable for use by the same type of traffic as that street or private means of access.'<br>The Applicant is reviewing the Protective Provisions for the benefit of PoTTL, and will provide an updated iteration of them at Deadline 3. |

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| | | route is not required to be of a higher standard than the temporarily closed, altered, diverted or restricted street or private means of access specified in column (2) of Schedule 3 but it must be at least as suitable for use by the same volume and type of traffic as that street or private means of access. | |
| 41 | Article 17 – Traffic regulation – local roads | PoTLL is mindful of the breadth of this power, and that it is subject to a 'deemed consent' provision. PoTLL is acutely aware (from its implementation of the Port of Tilbury (Expansion) Order 2019) of the potential for traffic regulation measures to cause congestion that is so severe as to have significant detrimental impacts on the Port.<br>PoTLL has provided a Construction Traffic Management Protocol in Appendix 8, demonstrating areas of agreement and matters still under discussion, that PoTLL believes will address its concerns in respect of traffic regulation on local roads. The revised protective provisions in Appendix 9 also include protections in respect of roads within the Port.<br>PoTLL also refers the ExA to section 5.5 of this Written Representation, which provides detail of how traffic regulation orders may be used to facilitate the Tilbury Link Road. | Please see the Applicant's response to the Port of Tilbury's Written Representations which addresses construction traffic related matters. |
| 42 | Article 21 – Authority to survey and investigate the land | Article 21 provides protection for street and highway authorities from boreholes being dug without consent in streets and highways. Specific protection from the exercise of this power over land that is held for PoTLL's undertaking is included in the revised protective provisions in Appendix 9. | The Applicant is reviewing the Protective Provisions provided by PoTTL at Deadline 1, and will provide an updated iteration of them at Deadline 3. |

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| 43 | Article 61 | The Applicant has indicated that its intention is to make commitments and record these in the stakeholder actions and commitments register (SACR). During a tripartite meeting between PoTLL, the PLA and the Applicant on 15 March 2023, it was suggested that this would be the appropriate place to record the commitment to ensuring the minimum dredging depth is secured.<br>PoTLL and the PLA both rejected this suggestion, given the importance of the dredging depth, indicating that this should be secured on the face of the dDCO pursuant to article 6 and the PLA's protective provisions.<br>Reviewing the drafting of article 61, this only requires the undertaker to "take all reasonable steps" to deliver the measures in the SACR.<br>In short, the SACR cannot be relied upon for any material commitment. PoTLL is concerned that the Applicant is seeking to make commitments and record these only in the SACR, enabling it to make commitments that are potentially impossible to keep, whilst misleading the beneficiaries that they are securing a remedy to their concern.<br>Article 61 should be amended to require the Applicant absolutely to deliver all measures contained in the SACR, whilst retaining the same ability to vary the commitments by agreement or by reference to the Secretary of State. This would provide much greater certainty to all parties whilst also ensuring that, should a commitment be found to be impossible due to matters that could not have been foreseen when the commitment was given, it would not bind the Applicant unduly. | Please see response above in connection with Article 6. The commitment on river dredging depths is secured via Article 6 and Paragraph 99(1) of Schedule 14 to the dDCO. For the avoidance of doubt, the dDCO as submitted included a form of this commitment and it has never been the Applicant's intent to secure it via the SAC-R in isolation. |
| 44 | Schedule 2 – Requirements Paragraph 2 – Time limits | Requirement 2 sets out that the authorised development must 'begin' no later than 5 years from the date the | The Applicant is grateful for these comments. The Applicant does not |

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| | Paragraph 7 – Protected species | dDCO comes into force. As explained during Issue Specific Hearing 2, and confirmed by the Applicant in its response to Annex A of the ISH2 Agenda [AS-089], this is intentional drafting and, whilst 'begin' is not yet defined, we understand that it will be included in the next iteration of the dDCO and will include the carrying out of preliminary works.<br>While PoTLL awaits the Applicant's clarification, it is noted that if the threshold for the operations required to satisfy this requirement is set low then it may cause unforeseen issues. For example, Requirement 7 states that no part of the authorised development may begin until, for that part, final pre-construction survey work has been carried out. Given that the definition of 'begin', confirmed by the Applicant, includes 'preliminary works', this would appear to be impossible to comply with. The carrying out of the survey work itself constitutes a preliminary work that would constitute an operation that would constitute 'begin'.<br>PoTLL urges the Applicant to carefully review its proposed definitions for the terms 'begin', 'commence' and 'preliminary works' to ensure that its mitigation proposals will operate effectively. | agree the Order would be plausibly construed in that manner, which would clearly be unintended, but proposes an amendment into Requirement 7 which confirms that survey work itself would not be prevented under the terms of that provision. That change has been made in the dDCO submitted at Deadline 2. |
| 45 | Requirements – Management plans generally | Multiple Requirements refer to management plans, the final versions of which are to be substantially in accordance with the certified outline version.<br>However, as a general theme, these management plans lack 'teeth'. There are no firm commitments to use infrastructure that would help to meet the spirit of the plans (e.g. using the existing CMAT facility at Tilbury2 to reduce carbon and energy use) and many of the working groups referred to appear to be 'talking shops' where | The Applicant does not agree that the management plans do not provide appropriate controls for the Project. Insofar as specific concerns have been particularised, these are addressed in the responses to the Port's Written Representation, and below as well as the Statement of Common Ground. |

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| | | disputes are either able to be ignored, or could take a long time to resolve whilst negative impacts remain. There is also a lack of firm targets to which the Applicant may be held.<br>In general, these plans must be updated to set out clear targets by which the Applicant and its contractors must be bound. Alternatively, but preferably in addition, the plans should make firm commitments by which these targets may be met. There is no basis for the Applicant to avoid placing firm targets into these plans, and not doing so does not inspire confidence that the Applicant is actually committed to the spirit of these management plans.<br>PoTLL also seeks to be added as a consultee, in respect of the land held for the purpose of its undertaking, in relation to a number of management plans. These have been set out in Appendix 6 | |
| 46 | Requirement 5<br>Landscaping and ecology | PoTLL is concerned to ensure that the ecological and landscape requirements of the LTC Scheme are proportionate, to both the actual impacts (based upon a baseline that remains 'current' to the actual commencement of the Scheme), and the extent of the mitigation required to address those impacts. The nature of PoTLL's concerns is set out in detail in section 7 of its Relevant Representation.<br>Amongst its concerns is the absence of up-to-date baseline ecological data that reflects the current baseline, taking into account the implementation of the Port of Tilbury (Expansion) Order 2019. Accuracy of environmental information is important in its own right for good decision-making, but PoTLL is also concerned to ensure that an inaccurate baseline does not lead to | At Deadline 2, an Environmental Statement Addendum has been submitted in relation to the impact of a two year construction delay on the Project. The Applicant has also undertaken a review of time-sensitive information and assumptions that have been used in the development of the Environmental Statement [APP-138 to APP-486] and the Habitats Regulations Assessment [APP-487 and APP-488]. The baseline data that has informed the Environmental Statement was valid at the time of application and remains |

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| | | inappropriate ecological and landscape mitigation being approved that has the effect of sterilising future port development at one of the few locations where it is appropriate.<br>To address this concern PoTLL suggests that requirement 5 is amended to require the provision of up-to-date baseline information, by the addition of a new sub-paragraph (2)(c)(iv):<br>"(iv) updated ecological surveys of that part which have been carried out in compliance with BS:42020 and conform to the best practice guidance issued by the Chartered Institute of Ecology and Environmental Management." | valid for the Examination. The application sets out the validity of the baseline data1. As it is not anticipated that there will be any change to the timing of the statutory process, the data on which the assessment has been undertaken remains valid for decision making.<br>In light of the above, the Applicant does not consider it necessary to add the proposed amendment suggested by PoTTL. |
| 47 | Requirement 10<br>Traffic Management | In section 4 of its Relevant Representation, PoTLL outlined its concerns with the Applicant's approach to assessing and mitigating the adverse effects of the construction of the LTC Scheme on the surrounding highway network and, in particular, levels of adverse impacts that could impose a serious detriment to the operation of the Port.<br>At paragraphs 4.58 to 4.77 of its Relevant Representation PoTLL outlined its concerns in relation to the ASDA roundabout, and other shortcomings in the Applicant's assessment of construction traffic and provision of mitigation. PoTLL would wish to see the appropriate commitments given in the oTMPC that would give confidence that the necessary assessments would be completed so as to inform any traffic management plan submitted for approval under this requirement, together with an obligation to deliver the traffic mitigation required to render the impact acceptable. | Please see the Applicant's response to the Port's Written Representations in in relation to construction traffic related matters.<br>The Applicant does not agree with the proposed amendment for two key reasons. First, the Applicant further notes that the construction scenario which has been assessed represents a temporary period of time, and reflects a reasonable worse case based on the information known at the time of the application. The Applicant's delivery partners will develop the construction programme further and the Outline Traffic Management Plan for Construction [APP-547] states at paragraph 2.4.20 that in some instances, it may be |

| | Matter / Provision | PoTLL Comments | The Applicant's Response |
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| | | Notwithstanding PoTLL's overarching view that only very limited traffic management measures can be implemented on the A1089 and Fort Road (Infrastructure Corridor) without causing congestion that is so significant it would impact upon the carrying out of PoTLL's statutory undertaking, and notwithstanding the progress made in the draft Construction Traffic Management Protocol at Appendix 8, if the Applicant is unwilling to provide the required confirmations in an updated oPTMC, PoTLL suggests that the concern is addressed by way of an amendment to Requirement 10 to introduce a new sub-paragraph (3):<br>"(3) The traffic management plan submitted for approval under paragraph (2) must be accompanied by a report that assesses the impact of the implementation of the proposed traffic management plan on the strategic and local highway networks and the traffic management plan is to contain details of the mitigation required to avoid or reduce adverse traffic impacts." | deemed appropriate that junction modelling is carried out prior to works.<br>Second, the measures to ensure ongoing engagement and iterative development are secured via the mechanisms in the outline Traffic Management Plan for Construction. We note section 2.4.21 secures the outcome of monitoring to "to plan future works and to develop determine and implement appropriate mitigation for any localised traffic and traffic-related impacts which arise as a result of construction the project. It will also enable Lessons Learnt to be captured and used it the development of future mitigation and operating guidance", and specifically secures the Traffic Management Forum. |

# 11 Shorne Parish Council

**Table 11.1 Response to Shorne Parish Council ISH2 Submission [REP1-410]**

| Shorne Parish Council ISH2 Submission [REP1-410] | Applicant's Response |
|---|---|
| Shallowness of the tunnels under the Thames riverbed, also under the North Kent Marshes: | In relation to the depth of the tunnels, please see responses provided to the Port of Tilbury London Limited and Port of London Authority's Written Representations above. In relation to an impact on the Thames Estuary and Marshes Ramsar site, please see Items 2.1.58 and 2.1.59 of the Statement of Common Ground with Natural England. This matter is addressed in further detail in the Applicant's response to SPC's Written Representation. |
| Agenda item 4(a) and (b) – discharging authority, and support for local authorities as the discharging authority. | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. No new matters are raised by SPC. |
| Agenda item 4(b) – time limits | The Applicant considers that appropriate time limits have been provided. The Applicant reiterates its comments about the specific parameters which Schedule 2 is dealing with (see paragraph 1.3.21 of responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses]. The Applicant notes that most transport DCOs do not include a time period, and many include a shorter period. The Applicant has provided for a minimum 28 day period which can be extended to 42 days. In light of the extensive engagement to date, this is considered proportionate and appropriate. |
| Agenda item 4(b) – deemed consent | The Applicant's position on deemed consent is set out in response to Thurrock Council's Local Impact Report (see below in relation to Article 19). |
| Agenda item 4(b) – "The DCO can be regarded as a very large Planning Application," / "Control over the Construction stage" | The Applicant does not accept there are inappropriate controls, and considers that the level of information and detail is commensurate with the design development phase of the Project. The Applicant's position on how the project has been designed and contained appropriate controls is contained in the Applicant's Post-event submissions, including written |

| Shorne Parish Council ISH2 Submission [REP1-410] | Applicant's Response |
|---|---|
| | submission of oral comments, for ISH1 [REP1-183]. Please see the Applicant's response to SPC's Written Representation for further information. |
| Agenda item 4(b) – 3D modelling | Please see the Applicant's response to SPC's Written Representation for further information. |
| Agenda item 4(b) - Dis-application of legislative provisions etc, effect on Thames and Medway Canal | Please see the Applicant's response to SPC's Written Representation for further information.<br>Disapplication of relevant provisions ensures that the DCO is not prevented from being implemented because of the existence of any local enactment. The full works, and impacts on the canal, have been identified in the Environmental Statement.<br>The Applicant's position on the disapplication of section 28E and 28H is set out in response to the comments raised by the Environment Agency above. |
| Agenda item 4(b) – water drainage issues | This comment does not relate to the dDCO. Please see the Applicant's response to SPC's Written Representation for further information. |

# 12 Transport for London

**Table 12.1 Responses to TfL's comments on the draft DCO**

| TfL's Written submission of oral comments made at Issue Specific Hearing 2 [REP1-303] | Applicant's Response |
|---|---|
| 3.3 to 3.36 which covers:<br>• Consultation in relation to Requirements in Schedule 2<br>• Request for time periods under articles 12, 18, 19 to be extended<br>• Comments on the deemed acceptance by the Secretary of State under paragraph 18 of Schedule 2 to the dDCO | The Applicant welcomes the confirmation that TfL has no objection to the Secretary of State as the discharging authority.<br>In relation to the requests to be a consultee, the Applicant notes that amendments made at Deadline 1 satisfy and positively respond to the request made by TfL in connection with Requirements 3, 8, and 12. The Applicant is considering whether it is appropriate to include TfL within the scope of Requirements 5 and 6.<br>In relation to the time limits in articles 12, 18, 19, and paragraph 20 of Schedule 20, the Applicant maintains that the periods provided are appropriate. The Applicant reiterates its comments about the specific parameters which Schedule 2 is dealing with (see paragraph 1.3.21 of responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses]. In light of that context, and the extensive engagement carried out to date, it is not considered appropriate or in the public interest to extend the period further. An extended period would impede the expeditious delivery of this nationally significant infrastructure project. The Applicant would further note that under paragraph 20 of Schedule 2, there is provision for an extended (42 day) period. It is not considered appropriate to extend this as the articles which reference a 28 day period relate to more discrete matters than Schedule 2.<br>In relation to paragraph 18 of Schedule 2, the Applicant considers this provision is appropriate. In circumstances where there is no consultee reporting that there are materially new or materially different effects, it is considered appropriate for the Applicant to proceed. Leaving aside that Project-specific justification, the Applicant would note that virtually every SRN DCOs includes this provision. Whilst the Project dDCO needs to be |

| TfL's Written submission of oral comments made at Issue Specific Hearing 2 [REP1-303] | Applicant's Response |
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| | appropriate justified (and the Applicant considers it has been), this comment is a question of principle and that principle has been accepted by the Secretary of State noting that the provision is included in a plethora of precedents. |
| 3.7 to 2.8 – Request for Protective Provisions & Commuted Sums | This is addressed in Item 2.1.11 of the Statement of Common Ground with TfL.<br>The maintenance of both local highways and the strategic road network is funded by the Department for Transport. Local highway funding is mainly based on a formula linked to the total mileage of A roads, B and C roads, and unclassified roads in each area, together with the numbers of bridges, lighting columns, cycleways and footways. This funding is refreshed every few years to take account of changes in road length and number of highway structures. Accordingly, as local highway works are carried out under the DCO, the amount of funding that each local highway authority receives will be amended to recognise these additional responsibilities. Given that this process already exists, it is not appropriate to require the Applicant to provide funding for the maintenance of parts of the local network out of the money given to it to maintain the strategic road network. The Applicant recognises that Transport for London may have different funding arrangements than those highways authorities outside London. However, the Applicant's position is that it does not provide commuted sums to local highway authorities for any assets it provides as part of its major projects programme. Article 10(1) of the draft DCO provides that where a new local highway is constructed, it must be completed to the reasonable satisfaction of the local highway authority, who becomes responsible for its maintenance from completion. Note that the proposed draft side agreement would also provide appropriate provisions in respect of the maintenance period by the Applicant. Article 10(2) makes similar provision for alterations or diversions of existing local roads. Both provisions enable the Applicant and the local highway authority concerned to reach different arrangements for specific maintenance responsibilities, but otherwise the default position is that once the local highway authority is |

| TfL's Written submission of oral comments made at Issue Specific Hearing 2 [REP1-303] | Applicant's Response |
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| | satisfied that the highway has been properly completed, it becomes responsible for the maintenance of these highways just as it is for other public highways in its area. This arrangement is well-precedented for local highway works carried out by the Applicant in connection with NSIP schemes. It strikes an appropriate balance between the Applicant's ability to carry out its works, and local highway authorities' duties to maintain public highways in their areas. |

The Applicant further notes that in their Written Representation, TfL raised a number of matters relating to the dDCO:

| TfL's Written Representation 2 [REP1-303] | Applicant's Response |
|---|---|
| 4.7 – "The Applicant should be obliged to transfer such land and rights as TfL requires to operate and maintain the WCH bridge to TfL. The draft Order does not at present provide for the extension of the TLRN where the bridge footprints are being installed" | The Applicant is in discussions with TfL on a side agreement which addresses this comment, but the Applciant notes that Article 10 requires a handover process in relation to local road networks. |
| 4.8 – "TfL considers that the power to transfer the benefit of the Order should be limited to such articles as the listed bodies reasonably require to undertake works as part of the delivery of the Project." | Consent from the Secretary of State is required for a transfer for any transfer to a body (other than those in article 8(5). This is considered to provide a proportionate safeguard. In relation to those bodies exempted from that consent required under article 8(5), the powers which can be transferred are strictly and explicitly those related to their undertaking. The Explanatory Memorandum provides a justification for this approach. |
| 4.9 to 4.15 – Commuted sums | See table directly above. |
| 4.16 to 4.16 – Request for consultation under Schedule 2 | See table directly above. |

# 13 Thurrock Council

**Table 13.1 The Applicant's response to Thurrock Council's Local Impact Report Appendix I, - Annex 1- Analysis of the impacts of the draft DCO on the Council and its Residents TR010032-003048-Thurrock Council - Appendix I – Draft DCO Order and Legal Obligations.pdf**

| Article | Extract from Thurrock Council's Local Impact Report | The Applicant's Response |
|---|---|---|
| 3: Development consent etc. granted by the Order | 3(3) The wording 'adjoining or sharing a common boundary' causes uncertainty as the extent of other enactments being subject to the provisions of the order. We suggest that these refer to specific areas of land to avoid uncertainty.<br>It is the Council's position that justification for the disapplication of legislation should have been provided prior to submission to allow Council input (as the public body representing local residents).<br>We agree that NSIPs should usually take precedence. However, the Council is concerned that the precise impacts haven't been considered. Having a blanket provision, where the specific impacts of different legislation being disapplied has not been considered could lead to unexpected adverse impacts.<br>It is not an answer to the Council's concerns to highlight the fact that this is not an unusual provision in National Highways DC0s. Our concern is not primarily about the position, but the analysis which has been undertaken to justify it and avoid unintended consequences. | Article 3(3) states that any enactment applying to land within, adjoining or sharing a common boundary with the Order limits has effect subject to the provisions of the Order. Article 3(3) has been included and is necessary in order to ensure that there are no acts of a local nature that could hinder the construction and operation of this NSIP. It should be noted that 'adjoining or sharing a common boundary' is the phraseology explicitly requested by the PLA.<br>The Applicant takes the view that it is necessary to include land adjoining the Order limits as there may be statutory provisions which are expressed to relate to land which falls just outside the Order limits but which may also have an effect on land within the Order limits. 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. The Council has been provided with the outputs of this exercise. The Applicant further notes that the Port of Tilbury London Limited has requested further carve outs which the Applicant has accepted in the dDCO submitted at Deadline 2. The Applicant believes Thurrock Council should particularise its concerns as the "in principle" position it has provided (and which has been responded to) is abstract. |

| Article | Extract from Thurrock Council's Local Impact Report | The Applicant's Response |
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| | | The purpose of the regime created by the 2008 Act is to ensure that DCOs provide a unified consent for nationally significant infrastructure projects and the Applicant considers that disapplying and amending certain legislative provisions, as set out in the Order, is proportionate in this context.<br>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 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.<br>It is important to emphasise that article 3(3) operates in conjunction with article 55 of the dDCO, which identifies the specific local enactments revealed through the Applicant's proportionate search of local legislation, which are to be disapplied. The justification for these disapplications is provided in the Explanatory Memorandum (EM). Therefore, the Applicant has taken proportionate steps to identify the specific enactments which would be disapplied by the dDCO and article 3(3) is intended to act as a backstop, in circumstances where potentially incompatible statutory provisions were to come to light which could frustrate the delivery of the Project. The Applicant notes that the Council has not questioned the need for the disapplication of these provisions.<br>This is a widely precedented article (see most recently article 3(2) of the A19/A184 Testo's Junction Alteration Development Consent Order 2018 and article 3(2) of the M42 Junction 6 Development Consent Order 2020). |

| Article | Extract from Thurrock Council's Local Impact Report | The Applicant's Response |
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| 6: Limits of deviation | 6(2) The Council's main concern is about the uncertainty of flexibility, especially in relation to order limits. No explanation explaining why this is required has been provided, despite requests to do so. There remains a risk that the limits of deviation could extend the Project onto land not previously within the Order Limits (if the deviation does not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement).<br>It should be noted that article 3 now specifically removes the limitation in relation to undertaking the development within the Order limits (as was contained in the previously submitted DCO).<br>The Council requires sufficient certainty to the scheme, to allow it to fully comment on the impacts, and allow those potentially affected to take part in the examination. | Article 6(3) would permit the Applicant to vary the limits of deviation but only with the Secretary of State's approval, and only where that variation would not entail materially new or materially different environmental effects. As explained in the EM, the purpose of this well precedented provision is to provide the Applicant with a proportionate degree of flexibility when constructing the Project, reducing the risk that the Project as approved cannot later be implemented for unforeseen reasons but at the same time ensuring that any flexibility will not give rise to any materially new or materially different environmental effects. The Applicant considers this to be an acceptable compromise and the fact that the provision has been included in a number of DCOs would indicate that the Secretary of State is also persuaded of its acceptability.<br>Article 6(3) is identical to article 6(2) of the M42 Junction 6 Development Consent Order 2020, and equivalent provision is included in all of the last dozen or so development consent orders granted for which the Applicant was the promoter. The Council has been provided with the Applicant's justification on this provision.<br>The Council raises the issue of certainty. In this regard, we draw the Council's attention to the proposed drafting in relation to "materially different environmental effects" which was first used in the A160/A180 (Port of Immingham Improvement) Development Consent Order 2015 and the following decisions:<br>• the A19 / A184 Testo's correction notice wherein this phrase was explicitly endorsed, confirming that "the Secretary of State's view that the recommended wording would allow the necessary scope for changes that are |

| Article | Extract from Thurrock Council's Local Impact Report | The Applicant's Response |
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| | | better for the environment providing such changes do not result in significant effects that have not already been previously identified and assessed in the Environmental Statement";<br>• the Great Yarmouth Third River Crossing decision letter dated 24 September 2020 in which the Secretary of State altered the order for that project so that it referred to *"materially new or materially different environmental effects"* and confirmed that it "is wording preferred by the Secretary of State"; and<br>• the A303 Amesbury to Berwick Down correction notice where the Secretary of State confirmed that the phrase "reflects the Secretary of State's preferred drafting and ensures a consistency of approach across transport development consent orders".<br>Three further specific matters should be noted:<br>1. The limits of deviation for works are not to be conflated with the land interests required – in this regard, land and land rights are dealt with under Part 5 of the dDCO and importantly no compulsory acquisition of land outside of the Order limits is sought (nor would such compulsory acquisition be permissible) under the terms of the dDCO.<br>2. The provision does not enable a unilateral variation of limits of deviation, and any deviation sought must be approved by the Secretary of State; and<br>3. In order to provide further comfort, article 6(3) applies the process set out in Schedule 2 to the dDCO to any application for a variation. As consultation with the local planning authority is required, this would mean that any representations from the Council would have to be provided to the Secretary of State (as per paragraph |

| Article | Extract from Thurrock Council's Local Impact Report | The Applicant's Response |
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| | | 18(3) of Schedule 2 to the dDCO). We consider this this provides an appropriate safeguard for the Council in these circumstances.<br>The Applicant further refers to its response provided on article 6 and article 2(10) in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184].<br>The Applicant has asked the Council to particularise their concerns on potential new impacts, but on each occasion the Council has raised a potential impact which would be excluded because it would entail a materially new environmental effect.<br>For completeness, the Applicant has previously explained to the Council on a number of occasions that article 3 does not refer to development consent being granted "within the Order limits". This is because the Order 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)). The Applicant 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. This removal is carried through to the re-made A303 Amesbury to Berwick Down Development Consent Order 2023. |
| 8: Consent to transfer benefit of Order | The Council is concerned that proper due diligence to support the inclusion of those bodies listed in article 8(5) has not been carried out. | The Applicant can confirm that appropriate due diligence has been carried out to support the inclusion of the bodies referred to in article 8(5) of the dDCO. The bodies listed |

| Article | Extract from Thurrock Council's Local Impact Report | The Applicant's Response |
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| | | correspond to those with apparatus or interests or rights in land that would be affected by the construction and operation of the Project. By necessity, the list has therefore been developed to reflect the specific circumstances of this scheme.<br>The removal of the need for later consent by the Secretary of State under paragraph (5) is justified by the fact that such consent is sought for the purposes of this application for development consent; thus interested parties, the Examining Authority and ultimately the Secretary of State have an opportunity to consider the appropriateness of this power as part of this application, and therefore avoid unnecessary administrative burden. Further justification for this approach is that paragraph (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.<br>As explained in the Explanatory Memorandum, Article 8 allows the benefit of the Order to be transferred or leased to others by the Applicant. The exercise of any transferred benefits or statutory rights (e.g. the power of compulsory acquisition of land or rights) is subject to the same restrictions, liabilities and obligations as would apply under the Order if those benefits or rights were executed by the Applicant. |
| 9: Application of NRSWA | The Council considers that the provisions of the NRSWA should apply in full, as they apply to other development taking place within the Council's area. Failure to follow this approach risks a lack of co-ordination of works, and potentially significantly negative impacts on those using local roads. | As explained in the EM, the disapplication of these NRSWA provisions (which are designed primarily to regulate the carrying out of street works by utility companies in respect of their apparatus) is appropriate given the scale of works proposed under the Order, the specific authorisation given for those works by the Order (particularly article 3 and Schedule 1 to the dDCO), and the provisions in the Order (including the |

| Article | Extract from Thurrock Council's Local Impact Report | The Applicant's Response |
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| | Article 9(9) - the applicant has previously stated that this is needed in order to avoid a situation where the applicant cannot comply with conditions. The Council is not aware of any conditions that are likely to be imposed which would need to be a breach of the order, or that the applicant would be unable to comply with.<br>Accordingly, this provision is not needed. If the applicant has particular concerns then these should be raised now. | requirements) which would regulate the carrying out of the Order works. The NRSWA provisions are intended to regulate a general power exercisable by utilities by virtue of their status or a street works licence. By contrast, the DCO would grant specific authority to carry out works, and it is therefore inappropriate for them to be subject to further approval as if they were general powers. By way of further explanation for the approach incorporated into dDCO:<br>1. Section 56 would permit a street authority (such as the Council) to make directions as to the timing of "street works" (as defined by NRSWA). Section 56A would permit the Council to direct the Applicant to carry out consented works in a location which goes beyond the scope of the consent sought. The ability of the Council to make such directions is likely to lead to delays and has the potential to lead to works which do not form part of the scope of the environmental assessments, and for which separate consent may be required even though a DCO has been granted. In light of the potential for inconsistencies between the DCO (if made), and the provisions of NRSWA, it is proportionate to disapply these provisions We would stress that the Secretary of State has accepted the principle that in relation to projects promoted by the Applicant, it is appropriate for these provisions to be disapplied.<br>2. Sections 58 and 58A of the NRSWA give the power to the Council (and other street authorities) to impose moratoria on the carrying out of works for a period of several months. In due course the Project (if consented) will be delivered in phases. If such phasing was disrupted because of moratoria, it is likely to lead to significant delay, a protracted construction programme and worse |

| Article | Extract from Thurrock Council's Local Impact Report | The Applicant's Response |
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| | | environmental outcomes. It is not considered appropriate that a consented nationally significant infrastructure project should be subject to this level of delay in light of the safeguards provided. We would emphasise that the Applicant intends to utilise the local authority permit schemes subject to modifications (see further below), and that there will be a traffic management plan which the Council will be consulted upon, and which will need to be approved by the Secretary of State.<br>In relation to permits, by way of preliminary comment, we note that there are three broad approaches to how permit schemes are dealt with in development consent orders:<br>1. The permit schemes are disapplied (e.g. the A38 Derby Junctions Development Consent Order 2021);<br>2. The permit schemes are modified (e.g., the Southampton to London Pipeline Development Consent Order 2020); and<br>3. Local permit schemes are utilised without any modifications (e.g., schemes not promoted by highway authorities such as the Thames Tideway Tunnel Order) or not relevant (e.g., the A19 Downhill Lane Junction Development Consent Order 2020).<br>In light of the Council's (and other local authorities') concerns, the Applicant has not proposed to disapply the permit schemes. Instead, the Applicant proposes to utilise the Council's (and other local) permit schemes subject to modifications which are compatible with the precedented approach to disapplying provisions of NRWSA (see above), and which would ensure that conditions which may conflict with an Order (if granted) could not be imposed on the Applicant. In relation to article 9(9) there are a number of |

| Article | Extract from Thurrock Council's Local Impact Report | The Applicant's Response |
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| | | provisions in the Council's existing permit scheme which may conflict with the Order. The Applicant specifically refers to section 14.4 of the Thurrock Council's Permit Scheme. |
| 10: Construction and maintenance of new, altered or diverted streets and other structures | This Article requires that a variety of streets and other structures (including bridges) constructed by National Highways must be maintained by and at the expense of the local highways authority from completion.<br>It is our position that this is not reasonable. There needs to be a defect correction period to ensure that the works undertaken are of the correct standard. This should run not from completion, but from operation (as this is when the defects in construction are most likely to become apparent.<br>The Council suggests at least a 12 month defect correct period for a highway asset and structures such as bridges for 24 months.<br>Without this a huge burden is placed on the local highways authority who may have to try and find funds to repair defects in assets transferred to it. This would clearly divert monies from other essential Council services, which is especially problematic given the Council's financial position. | The Applicant is a strategic highways company and is not responsible for the local highway network, which is the responsibility of the local highway authority. Under National Highway's licence issued by the Secretary of State, it has statutory responsibility for the strategic road network. In particular, in exercising its functions and duties in relation to the strategic road network, the Applicant must act in a manner which it considers is best calculated to ensure efficiency and value for money (paragraph 4.2(d)) and must demonstrate how it has achieved value for money (paragraph 5.12(c)). Accordingly, the Applicant does not consider it appropriate for a public sector body, delivering nationally significant infrastructure which will have significant economic benefits, to be liable for payment of commuted sums or ongoing maintenance costs.<br>The Applicant notes that funding for the operation and maintenance of the local road network is a matter which ordinarily forms part of central government funding decisions. The Applicant considers it appropriate that the maintenance of roads which will form part of the local road network is a function which is proposed to be discharged by the local highway authority. The maintenance of both local highways and the strategic road network is funded by the Department for Transport. Local highway funding is mainly based on a formula linked to the total mileage of A roads, B and C roads, and unclassified roads in each area, together with the numbers of bridges, lighting columns, cycleways and footways. This funding is refreshed every few years to take account of changes in road length and number of highway |

| Article | Extract from Thurrock Council's Local Impact Report | The Applicant's Response |
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| | | structures. Accordingly, as local highway works are carried out under the DCO, the amount of funding that each local highway authority receives will be amended to recognise these additional responsibilities. Given that this process already exists, it is not appropriate to require the Applicant to provide funding for the maintenance of parts of the local network out of the money given to it to maintain the strategic road network. The Applicant notes that it is making a significant and substantial capital contribution to the delivery of these assets, and in light of the existing funding arrangements, it is not appropriate for the Applicant to have an ongoing and indeterminate responsibility.<br><br>The Applicant notes that this position has been endorsed, with limited and rare exceptions, on a number of transport DCOs (see, for example, article 14 of the M42 Junction 6 Development Consent Order 2020, article 12 of the A428 Black Cat to Caxton Gibbet Development Consent Order 2022 and article 9 of the A303 (Amesbury to Berwick Down) Development Consent Order 2023).<br><br>Accordingly, insofar as the Project involves the Council incurring expense for the management of the local road network, this is matter between DfT and the Council, particularly in the context of the significant capital contribution from the Applicant in delivering new or altered assets. Introducing a new funding mechanism for the road network separate from these existing processes is not considered appropriate in the context of the Project.<br><br>The Applicant is in discussion with TC in relation to appropriate mechanisms to address detailed matters associated with local highway handover processes. |

| Article | Extract from Thurrock Council's Local Impact Report | The Applicant's Response |
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| 12: Temporary closure, alteration diversion and restriction of use of streets | Our primary concern relates to the notice being given for diversions (which is not currently adequately dealt with in the outline Traffic Management Plan). Clearly the scale of the Project gives greater scope for multiple diversions which could be ongoing for a significant period of time. This makes it essential that they are properly co-ordinated (see our comments on the permit scheme modifications). There is no reason why the standard 3 month period cannot be followed. It will not lead to delay, it just requires the applicant to effectively plan works (which we assume will be done in any event).<br>See comments in relation to deemed consent at Schedule 2. | The Applicant does not agree that the outline Traffic Management Plan for Construction does not provide appropriate controls. The Traffic Management Plan submitted for approval under Requirement 10 would require further consultation. The outline management plan provides for the establishment of a Traffic Management Forum which would set out an ongoing monitoring and reviewing function providing further assurance. Insofar as the works to the council's own road network are concerned, the Applicant notes that the permit scheme is proposed to be utilised which has significant timescales and engagement built into it.<br>A 3 month period is not "standard" in the context of this provision, instead it is unprecedented in the Applicant's DCOs and the Applicant considers that it would impose risk to the delivery of the Project as it would introduce the possibility for delay and reduce certainty that the authorised development can be delivered by the Applicant in a timely fashion. |
| 15: Classification of roads etc. | Article 15(2)(a) a 12 month defect correction period for highways (24 months for structures) should be included before a newly classified road becomes the responsibility of the Council.<br>Article 15(4)(a) - 4 weeks' notice for roads to change classification (and therefore potentially who is responsible for maintenance) is not acceptable.<br>Article 15(6) should be removed as it is unnecessary. Future legislation can amend the DCO, however this needs to follow the correct process. | In relation to the Council's comment referring to Article 15(2)(a) we refer to the Applicant's response above regarding Article 10, where the same principles apply.<br>Article 15(4) relates to notice being provided in relation to a variation of a classification under article 15(3) which relates to trunk or special roads (i.e., roads primarily operated by the Applicant). The limitation of this provision to those roads was made at the Council's request. The period of 4 weeks is considered appropriate in those circumstances and the Council has not particularised why it considers 4 weeks to be inappropriate. Notwithstanding the Project-specific justification provided, the Applicant notes that the period is |

| Article | Extract from Thurrock Council's Local Impact Report | The Applicant's Response |
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| | | precedented (see article 46(3) of the A303 (Amesbury to Berwick Down) Development Consent Order 2023).<br>The purpose of paragraph (6) is to confirm that the matters covered in paragraphs (1), (2) and (3) can be varied or revoked in the future using existing enactments which are available to provide for such matters, without the need to apply under the 2008 Act for an amendment to the Order. For example, if the Council wishes to change the classification of a road for which it is the highway authority following the completion of the Project, article 15(6) permits the process under the Highways Act 1980 or Road Traffic Regulation Act 1984 to operate in order to amend any classification made under the DCO. The provision is heavily and broadly precedented (see, for example, article 46(7) of A303 (Amesbury to Berwick Down) Development Consent Order 2020, article 15(8) of the M42 Junction 6 Development Consent Order 2020, and article 11(6) of the A585 Windy Harbour to Skippool Highway Development Consent Order 2020). It is not considered appropriate or proportionate to limit the functions of a highway authority (including the Council) so that it is bound by classifications in the DCO thereby giving rise to the need for an amendment Order to the DCO (if granted). The highway network which falls within the scope of the DCO should not, once open for traffic, be subject to a less flexible regulatory regime as compared to the rest of the network to which it is connected. |
| 17: Traffic regulation — local roads | In article 17(2) the DCO refers to consent not being unreasonably withheld or delayed. The reference to delayed appears to be novel. In the Council's opinion this is not required as it adds uncertainty. | The Applicant considers that the requirement for consent not to be unreasonably delayed is eminently appropriate. The phrase "unreasonably delayed" is a well-used phrase and it is not considered that its removal would provide greater certainty. |

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| | The 24 month period in article 17(7) should be reduced to 12 months. The longer period reduces the ability of the Council to control its network. In the Explanatory Memorandum it states that this additional time period is needed because of the "complexity and scale of the project". This is insufficient reasoning. If the applicant has specific concerns, then the Council will consider these. | In relation to the novel drafting in 17(2), the Applicant also considers this necessary and justified. Given the complexity of the Project, it would impose risk to the delivery of the Project if consent were to be unreasonably delayed, as it would introduce the possibility for delay and reduce certainty that the authorised development can be delivered by the Applicant in a timely fashion. The Applicant notes, aside from the justification provided, that the 24 month period is precedented (see, for example, article 48 of the A303 (Amesbury to Berwick Down) Development Consent Order 2023 and article 18 of the M25 Junction 28 Development Consent Order 2022). |
| 18: Powers in relation to relevant navigations or watercourses | The Council is concerned that even if loss is to be compensated, this might not be provided in a timely manner and this could negatively impact the those affected. The Council suggests that the establishment of a separate compensation scheme would be more appropriate. | A new compensation scheme is not considered necessary as provision is made for compensation for any person "who suffers any loss or damage from the exercise of the powers" (see article 18(3)). The Council raise the concern that compensation may not be provided in a timely manner but there appears to be no basis or evidence to underpin this.<br>The Applicant is not aware of any transport DCOs, even where they include an equivalent provision, which support the Council's highly novel suggestion. |
| 19: Discharge of waters | The Council's concern is about those who do not have an interest in land being used in connection with the Project, who are nevertheless being adversely affected impacted. For example with discharges into watercourses, which adversely impacts flooding some distance from the Project. It is our understanding that this situation compensation wouldn't be payable on the DCO as currently drafted (despite comment from the applicant that compensation provisions were adequate — a comment which has yet to be tested). | The Applicant does not consider there is any scenario whereby the exercise of this power would lead to a requirement to provide compensation which is not already provided for by other provisions of the dDCO. In particular, the dDCO makes provision for compensation in connection with temporary works, use of land, the construction of permanent works and acquisition of land/rights. In this case, article 19 must be seen in the context of supporting provisions of the dDCO which make appropriate provision for the payment of compensation. In the absence of the Council |

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| | Accordingly, we suggest that specific compensation provisions are provided.<br>In Article 19(8). it is not appropriate to have deemed consent provisions. Please see comments in schedule 2. | providing a plausible scenario where compensation is not already covered by the dDCO, we do not consider it necessary to include such a provision (which, we note, is absent in DCOs, including projects of a similar scale and size, which contain the same power).<br>In relation to the deemed consent provision, the Applicant considers this is to be appropriate for the following reasons:<br>The Road Investment Strategy, which sets out a statutory programme of road works across the country and time frame in which the Applicant's resources are to be used to ensure value for money. Prolonging the programme would have a detrimental effect on the delivery of this programme and risk the inefficient use of public funds for construction contractors to be put on standby whilst a consent is provided.<br>The Council, and other authorities will have had sufficient time during the consultation and examination of the Project, and beyond, to understand better (compared to any usual approval unrelated to a DCO) the particular impacts and proposals forming part of the DCO.<br>The fact that deemed consent provisions take effect in relation to a failure to reach a decision, not a failure to give consent, is also relevant. 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.<br>The concept of deemed consent is well precedented including on complex projects: see, for example, 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 |

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| | | Consent Order 2021. The Council's position is an *in principle* objection which would equally apply to these projects mentioned, but the Secretary of State has nonetheless consented these provisions.<br>Leaving aside the Project-specific justification provided above, in relation to both the deemed consent provision and the question of compensation, the provisions put forward by the Applicant are heavily precedented. The Applicant is not aware of any DCO precedent relating to the strategic road network which supports the Council's suggestions. |
| 21: Authority to survey and investigate land | At Article 21(3)(b), the Council suggests the insertion of the word 'reasonably' necessary.<br>In relation to Article 21(6), please see earlier comments on deemed consent. | The Applicant does not agree that the word 'reasonably' should be inserted in Article 21(3)(b). The Applicant would only seek to take equipment or vehicles onto land where it would be appropriate to do so in connection with the powers to survey and investigate land under this article. The provision already requires the equipment/vehicles to be necessary. The power, as drafted, is based on section 289 of the Highways Act 1980, and the Applicant should not be in a worse position. The Secretary of State has confirmed this drafting should be utilised in virtually every DCO promoted by the Applicant. The Applicant further notes that the Office of Parliamentary Counsel's guidance on legislative drafting states that statutory drafting should 'use no more words than necessary'. In these circumstances, the Applicant considers that it would not be appropriate to introduce unnecessary drafting into the provision.<br>For the Applicant's full response in relation to deemed consent, please see comments above in relation to article 19 of the dDCO. |
| 22: Removal of human remains | The effect of Article 22(14) is to remove the requirement to advertise the fact that human remains | Article 22(14) ensures that no notice is required to be published under article 22(3) where the Applicant is satisfied |

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| | have been found. Not all DCOs contain this exemption. The Council wishes to understand how the applicant intends to work out that no relative or personal representative of the deceased is likely to object when no advertising of the remains has been undertaken. This is a departure from the Model Provisions and requires further explanation, so parties can comment on the proposed process.<br>At Article 22(19), no explanation for the disapplication of the Town and Country Planning (Churches and Places of Religious Worship and Burial Ground) Regulations 1950 has been provided. | that the remains were interred more than 100 years ago and that no relative or personal representative of the deceased is likely to object to the removal of the remains in accordance with the article. The Applicant considers that it is reasonable to expect that it is unlikely that there would be any surviving relatives or personal representative (in each case, within the meaning of article 22(20)) of persons interred more than 100 years ago, but has provided an additional safeguard for exceptional circumstances where it appears that an objection could be made.<br>The Applicant would take account of a number of relevant considerations in determining that no relative or personal representative of the deceased is likely to object. Furthermore, the exercise of this powers should be considered in the light of the Applicant's status as a public body subject to public and administrative law duties. We further note that the proposed interference with human remains is limited to "removal of human remains", following which a direction must be sought from the Secretary of State as to their subsequent treatment (under article 22(15)) – this will allow the Project to proceed unimpeded, but ensures that appropriate safeguards are in place.<br>Article 22(14) is identical to a provision in the M42 Junction 6 Development Consent Order 2020 and A303 (Amesbury to Berwick Down) Development Consent Order 2022.<br>On the disapplication of the Town and Country Planning (Churches and Places of Religious Worship and Burial Ground) Regulations 1950, those regulations make provision in connection with the removal of remains. The effect of Article 22 is to replace the existing and disparate regimes for regulating the removal of human remains and consolidate the applicable provisions in a single article in the Order. Article |

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| | | 22(19), which contains this disapplication, is identical to a provision in the M42 Junction 6 Development Consent Order 2020 and A303 (Amesbury to Berwick Down) Development Consent Order 2022. |
| 23: Felling or lopping of trees and removal of hedgerows | In relation to Article 23(1), to aid stakeholders in understanding the full impact of the scheme, a schedule and plan should be included identifying the relevant trees or shrubs.<br>In relation to Article 23(2), the industry best practice for tree work can be found in British Standard BS3998:2010. The DCO should reflect this.<br>At Article 23(4), in accordance with Advice Note 15 (paragraph 22 and good practice point 6) either a schedule and plan should be included identifying the relevant hedgerows should be included. or there should be a requirement for consent from the local authority. | The Applicant notes that a number of documents show the relevant assets (see Hedgerow and Tree Preservation Order Plans [Application Documents APP-053 to APP-055], Existing Tree Constraints Plan which shows the trees subject to TPOs [REP1-147] and [REP1-149] and the Environmental Masterplan. In relation to the Council's comments on article 23, the Applicant would refer to its responses in ISH2 Discretionary Submission Annex A Responses.<br>As regards, article 23(2), the Applicant refers to paragraph 5(3) of Schedule 2 to the dDCO which sets out that "All landscaping works must be carried out to a reasonable standard in accordance with the relevant recommendations of appropriate British Standards or other recognised codes of good practice". It is not considered appropriate to reference the specific standards on the face of the dDCO in the event they are substituted at a later date.<br>Article 23(4) - 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 |

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| | | 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:<br>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.<br>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. |

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| | | The Applicant had previously provided this explanation to the council, and it was addressed in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses]. |
| 24: Trees subject to tree prevention orders | In relation to Article 24(1). Advice Note 15 (paragraph 22.3) sets out that it is not appropriate to include the power to fell trees subject to TPO or trees in a conservation area on a precautionary basis. Proper identification of affected trees will enable the ExA to give full consideration to the particular characteristics they gave rise to their designation and desirability of continuing such protection.<br>The details in schedule 7 are noted, however the provision of a plan identifying the TPOs will help understand the impact of this provision. This should also include trees in a conservation area. | The Applicant notes that paragraph 22.2 of Advice Note 15 states that the power to carry out activities in relation to trees subject to Tree Preservation Orders "*can extend to trees which are otherwise protected by virtue of being situated in a conservation area*" The Applicant refers to 6.2 Environmental Statement Figures Figure 7.23 - Existing Tree Constraints Plan which shows the trees subject to TPOs [REP1-147] and [REP1-149]. |
| 26: Compulsory acquisition of land - incorporation of mineral code | The Council will be carrying out further investigation into the impact of the changes in relation to minerals in their land ownership and may have further comments accordingly. | Noted. |
| 27: Time limit for exercise of authority to acquire land compulsorily | At Article 27(1), the Council is not satisfied that the 8 year time period has been justified.<br>The majority of DCOs provide a 5 year time period for acquisition. Where the applicant is seeking a longer period, this must then place a substantive burden on them to justify this extended period of time.<br>The limited examples provided in response to the Council's comments which have granted a longer time period - being the Thames Tideway Tunnel (a 25km Super Sewer) and Hinkley Point C (a National Grid | The Applicant has already reduced the time period for compulsory acquisition from 10 years down to 8 years and considers this time period to be necessary and proportionate taking into account the length of the construction programme and the size of the project.<br>In relation to the time period, and the start of the relevant period, please see the Applicant's responses provided within responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses]. |

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| | project delivering 57km electricity connection) - do not provide any meaningful comparison. Furthermore, the majority of NSIPs have sought and secured powers with powers extending to only 5 years.<br>The Council are not aware of any highways project of this nature which has been granted such an extended period.<br>The new change to amend the definition of 'start date' at 27(3) exacerbates this position — increasing the level of time and uncertainty faced by landowners. This is on top of the already extended time period.<br>The Council has suggested that where elements of the project may require a period in excess of 5 years, that the time period is extended to these sections of the land only. In particular, consideration be given to:<br>• limiting the land to which this provision applies<br>• limiting the categories of work to which this provision will apply.<br>The applicant has consistently rejected this approach, citing a lack of precedent for a mechanism which would allow for different time periods to be applied over different parts of the Order land. Given the applicant is seeking a much extended time period, the fact that a proposal has not been used in previous DCOs, clearly should not preclude a full consideration of its appropriateness. The drafting to achieve this is not complicated and the applicant should by this stage have a clear project plan on a plot by plot basis.<br>The Council proposes the addition of a new part of article 27, which states: | As regards the novel and unprecedented suggestion that different compulsory acquisition periods should be applied to different parcels of land, this is not considered necessary or proportionate and would give rise to significant uncertainty about the interconnection between the works. The Applicant considers that this would result in greater uncertainty for landowners. |

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| | "The [8] year time period specified in subsection (1) shall not apply to the Order land listed in Schedule [ ] to which a [5] year time period shall apply"<br>As such, the Council considers it inconceivable that there are not any plots where the applicant is confident at this stage that they will be able to make a determination on requirements in less than 8 years.<br>Even if the number of plots affected by this provision were limited, it would be entirely consistent with compulsory purchase principles that the applicant should seek to have the minimum possible impact on land owners.<br>At this stage, the Council are not satisfied that evidence for an 8 year period has been provided.<br>Actions as set out at 27(1) above also apply to temporary possession dealt with at Article 27(2).<br>Further justification and consideration of alternative options required.<br>The comments at 27(1) equally apply to Article 27(3) and the new change to amend the definition of 'start date' at 27(3) exacerbates the position— increasing the level of time and uncertainty faced by landowners. This is on top of the already extended time period sought by National Highways.<br>The Council consider the start period should be the date of the making of the Order, which reflects standard drafting for DCOs and provides certainty to all parties from the outset. | |

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| 28: Compulsory acquisition of rights and imposition of restrictive covenants | In relation to Article 28(1), further explanation and justification should be provided in respect of the need for the power to impose new restrictive covenants.<br>The Council considers that the applicant should ensure that they cause the least impact possible on landowners. The blanket power set out at 28(1) creates significant uncertainty and could stagnate the local property market and impact prices / the ability to lease commercial land.<br>The Council does not accept that the applicant has provided sufficient justification either in the Statement of Reasons or in its formal responses, to demonstrate that it has taken all reasonable steps to reduce the area of land which are not subject to the restrictions at 28(2).<br>The applicant has previously referred to not being able to make a more specific determination 'at this juncture because of the stage of design development'.<br>In order to demonstrate a compelling case, the applicant should be taking every step to advance the progress of the design to ensure that the powers used are the minimum possible. The Council is concerned by wider powers being used with references to the Project design not being advanced sufficiently to limit these.<br>The Council's comments about time limits at 27(1) above apply equally to the use of powers to acquire rights, as they do to the compulsory acquisition of land.<br>The Council has undertaken a further review of land to be taken temporarily. The extent of this land is subject | The Applicant's position on the appropriateness and proportionality of its approach to the drafting of article 28(1) is provided in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses]. The Applicant does not consider any concerns have been particularised to allow for a constructive response. The justification for the acquisition of land and rights is contained in substantial detail in the Statement of Reasons [REP1-049].<br>As regards the Council's comments on the time limits for the exercise of the power in article 28, see the responses provided above in relation to article 27.<br>Article 28(6) provides that, where the Applicant needs only to acquire rights over land, it shall not be obliged to acquire any greater interest in that land. That is appropriate in the case of the acquisition of rights, and is heavily precedented (having been included in virtually every DCO which contains the equivalent provision).<br>The Council raises comments on Article 33 and material detriment. The Applicant's view is that the material detriment provisions are not relevant in the case of subsoil acquisition (in all developments, including the Project). The approach adopted is consistent with tunnels projects and applies to this specific Project.<br>The Council's comments on precedent are misconceived. This point of principle (i.e., that material detriment provisions are not relevant to the acquisition of subsoil) has been accepted in non-tunnels DCO projects, see for example A585 Windy Harbour to Skippool Highway Development Consent Order 2020, A30 Chiverton to Carland Cross Development Consent Order 2020, A19/A184 Testo's Junction Alteration |

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| | to a further review and the Council is waiting on the applicant for this together with a draft of the legal agreement that has been proposed by the applicant.<br>In relation to Article 28(2), the Council will be carrying out a review of the extent of the proposed Order Land and may have further comments accordingly.<br>In relation to Article 28(6), further justification should be provided for the disapplication of existing statutory provisions.<br>Responses from the applicant have indicated that they do not consider that `material detriment' are not relevant to the acquisition of subsoil, and so counter notice provisions requiring acquisition of retained land are not relevant.<br>Whilst it may be the case that material detriment is less likely in the case of a tunnel project, it is not accepted that the considerations are simply not relevant and this has not been addressed in the EM.<br>If the applicant is confident that there will be no material detriment, then the Council suggests that there should be no issue retaining the provision, as this will not then be a remedy available to a landowner.<br>It is noted that previous tunnel DCOs have included similar provisions — but this does not preclude, as a minimum, a detailed analysis/consideration at this stage of why there will in fact be no potential detriment to any of the landowners with the Order land.<br>We are concerned with the applicant's approach in relation to provisions being included in previous DCOs. Whilst previous DCOs confirm that specific | Development Consent Order 2018 and the M42 Junction 6 Development Consent Order 2020. This principle applies to the Project. The Applicant's agrees that provisions need to be appropriately justified, but considers that the Council's positions is less about seeking appropriate justification and more about questioning issues of principle (which apply to the Project) and which have been endorsed widely. |

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| | wording can be appropriate, it still needs to be justified as per the relevant Advice Notes (for example articles 1.2 -1.5 of Advice Note 15). This makes it clear that it is not sufficient to simply state that a particular provision has found favour with the SoS previously, the ExA will need to understand why it is appropriate for the scheme applied for. The Council is asked the clear reasons as to why there won't be material detriment in this Project. | |
| 30: Modification of Part 1 of the 1965 Act | In relation to Articles 30(2) and 30(4), time limits to be reviewed in accordance with actions set out at Article 27.<br>For Article 30(5), see comments at 28(6). | See response to Article 27 and 28 above. |
| 31: Application of the 1981 Act | For Article 31(3), further information on this approach is required. This is a significant departure from standard provisions and the Council needs to understand the full implications of the proposal. | The Applicant had considered this matter to be resolved between the parties: the Council confirmed that the approach to vesting land in third parties was an "area on which we have reached agreement" following further information from the Applicant. The Applicant requests that the Council clarify whether this item was included in error.<br>For completeness, the dDCO seeks to vest land and rights directly into statutory undertakers and other persons where appropriate and seeks further justification for this. The provision in question is part of article 31. As explained in the EM [REP1-045], the provisions confirm the position that notwithstanding references in the Compulsory Purchase (Vesting Declaration) Act 1981 and General Vesting Declarations Regulations 2017 to vesting land "in themselves" (i.e., in the Acquiring Authority), land and rights can be acquired by the Applicant in favour of any third party identified directly. A detailed justification for this is provided in the EM. |

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| 33:Acquisition of subsoil or airspace only | At Article 33(2), the Council will be carrying out a review of the extent of the land included at Schedule 10 and may have further comments in due course.<br>For Article 33(4). See comments at 28(6).<br>The EM does not explain the disapplication of statutory provision for counter notices. | In relation to article 33(2), noted. In relation to article 33(4), see the Applicant's comments above.<br>In relation to the disapplication of the provision for counter notices, as set out above, it is to be noted that land needed for development projects often cuts across parts of landowners' property. In such cases, acquiring authorities would only seek to compulsorily purchase the relevant parts required. This may result in "material detriment" to the claimant's retained land, where the retained land will be less useful or less valuable to some significant degree. Schedule 2A to the Compulsory Act 1965 therefore sets out a process whereby a landowner can serve a notice to require an acquiring authority to acquire a greater parcel as a result of that material detriment. Schedule 1A of the Compulsory Purchase (Vesting Declaration) Act 1981 (the second provision quoted) replicates that protection in connection with general vesting declarations and section 153(4A) replicates that protection in connection with the blight regime under the Town and Country Planning Act 1990.<br>As explained above, such considerations are not relevant to the acquisition of acquisition of subsoil. We note that the Acquisition of Land Act 1981 explicitly permits the disapplication of Schedule 2A in relation to subsoil. The approach adopted is consistent with every tunnel based DCO project, including the Thames Tideway Tunnel Order (relied upon by the Council in numerous respects), the A303 (Amesbury to Berwick Down) Development Consent Order 2020 and the Silvertown Tunnel Order 2018). |
| 35: Temporary use of land for carrying | In relation to Article 35(1), see points on time limits at Article 27. 8 years is an unacceptable period of time to create uncertainty over such a large area of land. | See response on article 27 regarding the 8 year time limit.<br>The rationale for the power at 35(1)(a)(ii) is that it reduces the amount of land that is required to be subject to outright |

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| out the authorised development | Further justification should be provided in relation to the power at 35(a)(ii) to temporarily possess Order Land that isn't specifically set out in Schedule 11. Consideration to be given to:<br>• limiting the land to which this provision applies<br>• limiting the categories of work to which this provision will apply.<br>Notification - General:<br>The Council considers that owners should be made aware at the outset if their land may be subject to temporary acquisition; when this might occur; how many times (the extent to which an AA can take entry, pull out and re-enter is the subject of some debate — but we are sure there is a precedent for it), for how long; and what will be returned at the end of that period (i.e. demolition of buildings etc.).<br>The applicant has indicated that it would not wish to use this approach on the basis that "There is a risk that, by setting estimated timescales, NH will create expectations that cannot subsequently be met and may even be required to serve notice of temporary possession, which would incur further delay, cost and frustration for landowners."<br>The Council considers the balance here is in favour of providing as much information as possible. This allows for owners to prepare and to better mitigate any losses. We therefore suggest that the Explanatory Memorandum makes a commitment to: (a) outlining estimated timescales as accurately as possible to landowners when notices are given; and (b) keeping them updated as to evolving timescales. | acquisition. Thus, article 25 with article 35(1)(a)(ii) make it possible for the Applicant to occupy land temporarily initially and only proceed to acquire permanently that part which is necessary for the Project as constructed. The alternative would be to acquire all of the land outright at the outset, when it may otherwise prove possible to reduce the permanent land take during construction of the Project. Such an approach would be counter-productive. The benefits of the approach proposed are lesser impacts on landowners and lower costs to the Applicant, which is in the public interest. This is a standard approach that is followed in many development consent orders, and there is no basis for the Applicant to deviate from this practice as endorsed by the Secretary of State. The limitation of this provision would worsen outcomes for landowners, increase compensation payments for a public body and discourage solutions which would cause less long term disruption to landowners.<br>Notification – notice requirements: under the dDCO, the notice will be required to set out "the works, facilities or other purpose for which the undertaker intends to take possession of the land". It is not considered appropriate, nor proportionate, for the notice to set out the time period during which possession will be taken. The Applicant is necessarily seeking a degree of flexibility to the deliver the Project and any requirement to set out prescriptive temporary possession periods would conflict with that. The detailed and precise construction programme is yet to be established, and will require flexibility. There is a risk that, by setting estimated timescales, the Applicant will create expectations that cannot subsequently be met and may even be required to serve notice of temporary possession, which would incur further delay, cost, uncertainty and frustration for landowners. The |

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| | The same principal points set out at Article 35 below, apply to maintenance period at Article 36.<br>At Article 35(2), the Council do not consider the 28 day notice period sufficient, given that possession can potentially be for a significant period.<br>The Council notes that the recent Lake Loathing (Lowestoft) Third Crossing Order 2020 includes a three-month notice period. Therefore, it not accepted that the Council are holding the dDCO to a higher standard than other DCOs or that a 3 month period is inconsistent with a desire to ensure NSIPs are expeditiously delivered — as has been suggested by the applicant.<br>Instead, this simply requires an appropriate level of planning and co-ordination to ensure that notices are served on time to allow this. It is not for the Council to evidence why a 3 month period is justified, but instead for the applicant to justify why it cannot in this case provide a longer period than 28 days.<br>Further, this would also appear likely to increase the likelihood of increased compensation - where a land owner has increased notice, there will clearly be cases where this gives them a better opportunity to mitigate any losses.<br>At Article 35(3), Council expects principle that safety issues may negate the requirement for a notice period to be served.<br>The Council suggests further wording be provided in either the DCO or the EM to explain what these safety concerns might be, to ensure that the definition is not to broadly interpreted. | Applicant is not aware that any DCO has included such a requirement, the 2008 Act does not require it and the Council has failed to explain why such a requirement is justified in this case.<br>Notification – time periods: Article 35(2) requires the Applicant to provide a notice 28 days (or a lesser period requested by the Applicant and then approved by the landowner) before taking temporary possession of land. A number of complex DCO projects have provided 14 days, but the Applicant has taken the decision for the Project to double that period. This 28 day period is proportionate and ensures that the Project can be delivered expeditiously, reducing impacts on local communities whilst balancing the need to provide appropriate notice to persons with interest in land. The provision also allows for this period to be reduced with the agreement of the landowners. This is considered reasonable because where a shorter period is agreed, there can be no question of the landowner being prejudiced. Paragraph (2) also requires that the notice set out the works, facilities or other purposes for which temporary possession has been taken.<br>The Applicant does not consider a 3 month notice period is appropriate or proportionate for the Project. The Applicant notes that complex projects such as the A14 Cambridge to Huntingdon project have provided 14 days (which the dDCO is *doubling*)**.** The 28 days period must be seen in the context that landowners and occupiers have been consulted on land use over numerous consultations; will have an opportunity to take part in the examination process; and the Applicant will be required to publish a notice under section 134 of the Planning Act 2008. A 3 month period is consistent with the |

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| | In relation to Articles 35(5), (7) and (8). the applicant is required at 35(5) to restore the land to the reasonable satisfaction of the owner. However the wording at 35(8) does not stop the applicant giving up possession of the land.<br>The Council considers that the applicant should be required to comply with the requirement prior to giving up temporary possession of the land.<br>In relation to Article 35(11), The Council will be carrying out a review of the extent of the land included within Schedule 10 and may have further comments accordingly.<br>Article 35(13) allows multiple temporary possessions. The Council has reservations about this provision. It recognises that, in some cases, two shorter entries may be better thana prolonged stay. But the applicant should provide further justification for the inclusion of this power. If the power remains, all the points set out in this section are more poignant —i.e. notice periods, extent of land which the provision covers etc. | government's desire to ensure nationally significant infrastructure projects can be expeditiously delivered.<br>On Article 35(3), the Applicant assumes the reference to "excepts" should read as "accepts" but would welcome confirmation. The dDCO already explains that the power to take possession without notice applies where the Applicant has identified a risk to "(a) any person carrying out the authorised development or any of its parts; (b) the public; and/or (c) the surrounding environment". No further amendment to the Explanatory Memorandum is considered necessary. This provision has been included in made temporary possession articles (see, for example, article 34 of the M42 Junction 6 Development Consent Order 2020) but subparagraph (a) has been narrowed in scope so that it refers to those carrying out the authorised development. That change was made following comments received by the Council.<br>In relation to article 35(8), the Council's novel and unprecedented suggestion is not considered appropriate. The Applicant should not be compelled to remain in possession of land in circumstances where it has completed the relevant works. It is not considered appropriate for a public sector body to risk an increase of its compensation liability after the time it has given up possession of the land (and, indeed, DCOs do not impose such a requirement, even on private developers). Such a requirement would also penalise the Applicant, in circumstances where any dispute about the restoration of land and removal of temporary works is subsequently ruled in its favour. This again is an in principle position which would apply to temporary possession of land under any DCO project but which has not been |

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| | | adopted by the Secretary of State in a number of different projects (including on the scale of the Project).<br>In relation to article 35(11), noted.<br>In relation to article 35(13), the provision allows the undertaker to give up possession and then re-take possession when required thereby reducing the interference with landowners' interest. |
| 36: Temporary use of land for maintaining the authorised development | In relation to Article 36(1), the Council does not take issue with the principle of this provision, but the Council is not satisfied that the applicant has taken all steps reasonably possible to reduce the area of land.<br>The Council considers that the area covered by this power can be reduced. This would remove the uncertainty for those landowners. Wherever the applicant can reasonably rule out a need for maintenance on an area of land, that area land should be excluded from this provision.<br>At Article 36(3), the Notice period is considered insufficient. See comments at Article 35(2).<br>For Article 36(8), please see comments at 18(3) which apply equally to this provision.<br>In relation to Article 36(11), the Council will be carrying out a review of the extent of the proposed Order Land and may have further comments accordingly.<br>In respect of Article 36(13), see actions at Article 27, which are in addition to the maintenance period.<br>Further justification to be provided:<br>As per actions at 36(1), power to be limited to specific areas. | The Applicant welcomes the Council's confirmation that it accepts the principle which underpins the inclusion of this provision. The power under article 36(1) is intended to provide the Applicant with the powers to maintain parts of the authorised development. This is a necessary and proportionate power provided for in every transport development consent order and is required to ensure that the Applicant has the necessary powers to maintain the authorised development. In addition, under the proposed Register of Environmental Actions and Commitments, the Applicant is proposing to commit to specific maintenance activities in relation to environmental mitigation. Powers to maintain the authorised development are therefore necessary.<br>In relation to the Council's comments on article 36(3), see the Applicant's comments on article 35(2) above.<br>In relation to the Council's comments on article 36(8), see the Applicant's comments on article 18(3) above.<br>The Council's comments on article 36(11) are noted.<br>As regards the Council's comments on the maintenance period, see the Applicant's comments on article 27 above. |

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| | Necessity for 5 year period (as opposed to any permanent right of maintenance) to be justified. This should include assessment of whether areas of land can have a lower time limit.<br>Rights of land owner during the maintenance period to carry out activity on the land to be clarified. | |
| 38: Apparatus and rights of statutory undertakers in stopped up streets | For Article 38(2), the principle of the provision is not disputed, but the Council considers that the wording should require the applicant to consult with the landowner who should be given the opportunity to have their comments taken into account by both the applicant and the statutory undertaker. The Council notes that other DCOs don't amend this provision. However, it is good example of where modifications can be made to improve outcomes for the public. This is especially relevant where the power of the Council under section 56A of NRSWA (power of the Council to give directions as to the placing of apparatus) is proposed to be disapplied. | The Applicant welcomes the Council's confirmation that the principle for this provision is agreed.<br>The Applicant does not consider this highly novel and unprecedented suggestion to be appropriate, and it would incur additional delay to the delivery of Project.<br>Article 38(2) specifically states that any replacement of an asset must be "(a)…. in such other position as the utility may reasonably determine and have power to place it" or "(b) provide other apparatus in substitution for the existing apparatus and place it in such position as described in subparagraph (a)". The land in question must, therefore, be a position "as the utility undertaker.. have power to place it". Separately, insofar as the relevant works form part of the authorised works, and land uses, landowners will have been consulted. Accordingly, the statement that "until a decision is made to move apparatus, and the statutory undertaker has a proposed location – there can be no meaningful consultation response from the landowner" misunderstands the position of the relevant landowner.<br>The Applicant notes that the Council's position here is an *in principle* position which would apply to any DCO project but the Secretary of State has nonetheless confirmed the powers, and has not raised a concern about landowner consultation. The Project is no different in this respect from those precedents. |

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| | | The Project has carried out extensive consultation and engagement with the public, and further ongoing engagement will be proportionately secured under the Community Liaison Groups secured in the Code of Construction Practice. In relation to section 56A of NRSWA, please see the Applicant's comments above. |
| 39: Recovery of costs of new connections | For Article 39(2), the provision to be extended to cover compensation for losses, not just expenditure. | The provision already secures compensation in respect of expenditure reasonably incurred by that person, in consequence of the removal. The Council's novel and unprecedented suggestion is not appropriate. No justification has been provided for a departure from the consistent and uniform line of transport DCOs on this issue. |
| 40: Special Category Land | In relation to Article 40(1), there currently appears to be a significant risk of delay in replacement land being provided. The wording should follow the Model Provisions i.e. the replacement land should be delivered before the special category land is vested in the applicant. Otherwise, there is a least a temporary loss of open space, and a potential long term risk of loss/non delivery.<br>Clear justification is needed if fully implemented replacement land is not in place prior to vesting. The direct impact of this will be felt by those who use this valuable resource without compensation.<br>The Model Provisions specifically require that the approved scheme has been implemented on the replacement land prior to the special category land being discharged from its rights, trusts and incidents.<br>The Council does accept that there are DCOs where this has been approved, but this is not considered to | The Applicant's position in response to the Council's comments on article 40(1) is set out in in its written submissions on Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses].<br>On article 40(5), the provision is justified because some common land included in the Order limits may be deregistered as common land before the exercise of the relevant Order powers. Accordingly, no provision for replacement land (as defined in the 2008 Act) would be required under sections 131 and 132 of the 2008 Act in those circumstances. The provision does not enable a net loss in common land as the provisions of the Commons Act 2006 would be engaged. In other words, if land was de-registered, then the requirement to provide replacement would have been dealt with.<br>On article 40(7)/(8), noted. |

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| | be a scheme where it is appropriate for the land to be vested. until the alternative land has been delivered.<br>The applicant is seeking to reduce this burden such that Special Category land could be acquired prior to the replacement land being provided. In this context it is unclear as to the driver for the applicant to provide replacement land and on a meaningful timescale<br>If it was argued that that Special Parliamentary Procedure should not apply full details should be provided to support the application for example (in relation to common, open space or fuel or field garden allotments):<br>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<br>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.<br>The Council is not aware that the argument has been deployed but should it then the Council would want to better understand what amounts to prohibitive cost and why this should mean that the applicant avoids incurring a liability.<br>The Council does not agree with the wording at Article 40(5) — i.e. that replacement land should be provided for special category land that is in existence at the date of DCO. Otherwise, there may be an incentive to | |

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| | delay providing replacement land if there is a risk of de-registration.<br>In relation to Article 40(8) (formerly 40(7)), The Council will be reviewing these plots and may have further comments. | |
| 44: Power to operate, use and close the tunnel area | The Council requests further information as to why the relevant local authorities are limited to Kent CC, Thurrock and Gravesham. The Council are concerned at the short notice period for shutting the tunnel. This could have significant impacts on networks and network planning. The Council would like the applicant to explain why a 7 day notice period is appropriate. | These bodies comprise the two host local authorities (Thurrock and Gravesham), and the two local highway authorities (Thurrock and Kent) for the tunnel area. The need for notification was inserted at the request of Thurrock Council. The tunnel area will form part of the Strategic Road Network and it is not considered appropriate for the Applicant's powers to be unduly limited. It is to be noted that the 7 day period is precedented (see A303 Amesbury to Berwick Down Development Consent Order 2023 as well the Silvertown Tunnel Order 2018). |
| 53: Disapplication of legislative provisions, etc. | Whilst it is not unusual to disapply certain legislative provisions, this amount of disapplied legislation is greater than in many other DCO's.<br>The Council request that National Highways explains the impact of the disapplication of statutory provisions, including the analysis which justifies this. In our opinion significant additional justification is required to explain the rationale for such a wide approach.<br>Despite this we don't disagree with the fact that primarily the DCO should take precedence, the Council's position is that we need to understand the impact better so we can assess whether any specific mitigation is required.<br>The Council is concerned about the disapplication of parts of the Wildlife and Countryside Act 1981. The | This article provides (pursuant to section 120(5)(a) of the 2008 Act) for the disapplication in relation to the authorised development of certain requirements which would otherwise apply under general legislation. Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order. The justification for each of the provisions listed in article 53 is provided in the EM. The number of disapplications reflect the scale of this project.<br>In relation to the Wildlife and Countryside Act 1981, the Applicant considers the Council's position is misconceived. The disapplication of sections 28E and 28H of the Wildlife and Countryside Act 1981 confirms that approvals and notifications under those provisions are not required to be obtained or given; these are not provisions which require the |

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| | uncertainty in the application (for example with the significant flexibility of order limits) means that it is going difficult to fully assess the potential impact on sites of special scientific interest. The requirements of the Wildlife and Countryside Act 1981 should therefore apply to avoid harm being caused to these sites. | relevant body (Natural England, in this case) to consent to their inclusion, under section 150 of the 2008 Act in England; and the disapplication of section 28E in particular is precedented (e.g. article 3 of the M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022). Section 28P of the 1981 Act confirms that there is no contravention of sections 28E and 28H by carrying out operations in a SSSI where there was a reasonable excuse for not complying with those sections. There is a reasonable excuse where the operation in question was authorised by a section 28G authority (for example, the Secretary of State where it grants a DCO) following the process set out in section 28I (this provides that the section 28G authority must give notice to NE of the proposed operations and provide NE the opportunity to advise upon those operations). NE has previously confirmed that it considers the provisions of section 28I to be met in relation to DCO applications, therefore the defence in section 28P would in principle be available to the Applicant in relation to existing SSSIs. The disapplication for existing sites therefore merely confirms the existing position. In addition, in the Applicant's view, the development of NSIPs should not be frustrated or delayed by potential SSSI designations over land for which development consent has been granted. The Applicant considers that it is clearly preferable for the dDCO to disapply these provisions rather than require the application of the statutory defence to be considered on a case by case basis, thus failing to provide legal certainty. |
| 55: Application of local legislation | The Council would like to see the applicant's analysis of the potential impact of this disapplication. This would be to allow specific mitigation works to be put in to address any concerns. For example, what are the | The Applicant has carried out a proportionate search of local legislation directories for legislation by using localities along the Project route as search terms (e.g. Tilbury and Thurrock). This is a standard approach to identifying local legislation. |

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| | potential impacts from the disapplication of the Thames Barrier and Flood Prevention Act 1972? The Council clearly wants to avoid an increase in flood risk. | The Applicant has shared the outputs of this analysis with Thurrock. The EM provides an explanation for why each referenced local enactment has been referenced in article 55 (in terms similar to the Silvertown Tunnel EM). With regards to the Thames Barrier and Flood Prevention Act 1972, that Act includes powers to undertake works across a broad geographical area. The disapplication of these powers, insofar as their exercise would be inconsistent with a provision of, or power conferred by, the Order ensures that there is no prejudice to the delivery of the works pursuant to the Order. The disapplication of this Act is precedented, under article 3 of the Silvertown Tunnel Order 2018 and article 3 of the Port Tilbury (Expansion) Order 2019<br><br>Article 55 operates by stating that the provisions of the enactments therein are "*excluded and do not apply insofar as inconsistent*" with a provision or power in the dDCO. Article 55 provides a non-exhaustive list of where a provision may be inconsistent. The basis on which local legislation has been listed in article 55 is generally because the provisions may give rise to a conflict because, for example, they impose restrictions or make provision for matters which would not be consistent with the powers sought under the dDCO. The disapplication would not frustrate the underlying purpose of the 1972 Act to address flood risk. |
| 56: Planning permission, etc. | Regarding the new 56(3) and (4) provisions we understand why the applicant considers this relevant. Although Hillside wasn't a statement of new law — there was, and still is, some ambiguity in this area that future cases are going to have to resolve. For certainty we think it is sensible that this provision is included. | The Applicant thanks the Council for the confirmation that the provision "makes the position clearer for the Council" and that the provision should be included. |

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| | In the Council's opinion this falls within the range of broad powers for the DCO — see section 120 of the Planning Act 2008. It would be useful for the applicant to identify where this may be applied however, broadly speaking, this is considered positive.<br>The Council agrees there is not caselaw on exactly this situation — however its addition makes the position clearer for the Council. | |
| 58: Defence to proceedings in respect of statutory nuisance | This article sets out the scope of the defence to proceedings in respect of statutory nuisance. It remains the Council's position that the purpose of this section is only to provide the statutory defence to nuisance where it is demonstrated that the nuisance is likely to be caused and it is not practicable to mitigate against it. In those situations the greater good of undertaking the project justifies the nuisance being caused. However, it is not appropriate to have a blanket defence as this discourages appropriate steps to reduce nuisance. It is also contrary to precedent from other highways DCOs. This is a long-term project and the impacts on local residents need to be carefully considered.<br>If the applicant states that it is required, due to the scale of the project, the applicant needs to demonstrate why is it required. | The Applicant considers these comments to be misconceived. Article 38 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 references paragraphs (c), (d), (e), (fb), (g), (ga) and (h) of section 79(1) the Environmental Protection Act 1990 in the equivalent provision. Other DCOs contain references to a longer list of nuisances (e.g. article 39 of the Drax Power (Generating Stations) Order 2019) and others contain a shorter list (e.g., Cleve Hill Solar Park Development Consent Order 2020). In the case of the Order, the Applicant has narrowed the list of references to those nuisances which are considered to be potentially engaged. 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.<br>However, there is an important wider context to this question. Section 158 of the Planning Act 2008 provides statutory authority as a general and comprehensive defence to any |

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| | | 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. |
| 62: Certification of documents | The Council considers the addition of paragraphs 4-7 of this article to be unnecessary. They weren't in the originally submitted DCO, they act to avoid the normal procedure for amending the DCO and increase uncertainty. | As noted in the EM, these provisions are included in section 52 of the Crossrail Act 2008. They also find precedent in section 54 of the High Speed Rail (West Midlands - Crewe) Act 2021, section 53 of the Channel Tunnel Rail Link Act 1996, and section 43 of the Dartford-Thurrock Crossing Act 1988. It is considered that the Project, being of a similar scale and complexity to those projects, should incorporate these provisions on a precautionary basis to minimise a potential delay to the delivery of the Project in the unanticipated event that there is an error. It is not relevant that the projects which have included these provisions to date have been promoted by Acts of Parliament; rather it is affirms the principle that it would be disproportionate to require subsequent instrument (be it an amendment Order or an Act of Parliament) to deal with errors (as distinct from 'changes' to an application). It is the Applicant's view this provision is capable of being included in the dDCO under section 120(3) of the Planning Act 2008. The existing |

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| | | processes under the Planning Act 2008 are not intended to prevent the ability to ensure that inadvertent errors or mistakes in certified plans do not delay a nationally significant infrastructure project.<br>For the avoidance of doubt, these provisions were included in the dDCO as submitted. |
| 65: Appeals to Secretary of State | It is the view of Thurrock Council that the 10 business day period for responding appears unnecessarily short. While there is precedent for the 10 business days (see A14 Cambridge to Huntington), we suggest a minimum of 20 days considering the scale of the scheme. | It is not considered that 10 business days is insufficient time in the specific context of the appeals process. At that stage, any appeal party would have had the benefit of the extensive engagement up until the end of the examination, it would have seen the application (which would have been refused), and then provided with further time to consider the submissions from the Applicant. The same time frame of 10 days is given for counter-submissions and for the appointed person to make their decision. These timescales are precedented (see, for example, article 52 of the M25 Junction 28 Development Consent Order 2022). |
| Schedule 1 | As the Council has noted in its Procedural Deadline C submission, the Council is concerned that although there has been engagement with utility companies, there has been very little engagement with the Council. The Council would have expected separate utilities document outlining the gas and electrical diversions, with drawings highlighting each one. These have not been provided. The Council have made a number of comments on the gas and electrical diversions over the last 2 years, but these not appear to have been considered by the applicant. | The Applicant does not accept there has been little engagement with the Council as explained in Part 1 of the response to Thurrock Council's Local Impact Report. The Applicant refers to [APP-021] to [APP-023] which show the utilities works. |
| Schedule 2 | Requirement 3 - detailed design. There is uncertainty the in this requirement due to the SoS be able to approve amendments if they don't give rise to | Requirement 3 - At present the Project has not yet been designed in detail. The drafting of Requirement 3 allows for a proportionate and acceptable level of flexibility in the final |

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| | materially new or materially different environmental effects in comparison with those reported in the environmental statement. This means that the design could change, and not take into account non-environmental effects, such as new land ownership. It could lead to changes in assumed construction and methodologies that were used to assess impacts in the ES that make such assessments invalid. It could also include adverse effects on businesses.<br><br>Requirement 4 - construction and handover environmental management plans. The Council is concerned about the concept of preliminary works. It appears to have been included so as to satisfy the requirement to 'begin' rather than 'commence' the DCO within 5 years (requirement 2). The purpose of this appears to be to preserve the DCO with minimal works. This provides greater uncertainty, as if consented, the longer it takes the applicant to develop the scheme, the greater the time the uncertainty created by the order will impact residents.<br><br>In addition, we have not been consulted on this document (ES Appendix 2.2, Annex C). In our opinion the proposed preliminary works could have quite significant environmental effects (they involve vegetation clearing). If they were part of the EMP (Second Iteration) we would have to be consulted, so we need to make sure we are happy with them.<br><br>Despite the mitigation measures in the REAC being based on a reasonable worst case scenario, it is the Council's opinion that in exceptional circumstances it can be updated. For example, if it was identified that significant environmental harm was being caused, the | design of the Project, something that is considered necessary and appropriate in delivering complex major infrastructure projects such as this, where an appropriate degree of flexibility is in the public interest. A failure to include any flexibility runs the risk that the Project as approved cannot later be implemented. Importantly, any changes that are within the scope of the assessment must be agreed by the Secretary of State following consultation with the relevant planning authority (or highway authority as necessary). Furthermore, no land outside of the Order land is proposed to be compulsorily acquired under the terms of the dDCO and the dDCO does not authorise such acquisition.<br><br>Requirement 4 – the Applicant's position on this is set out in its responses to the Annex A of the Agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. For the avoidance of doubt, the suggestion that the council has "not been consulted on this document" is not correct. Section 3 of the version of the Code of Construction Practice included in the Community Impacts Consultation was an early iteration of this document. The Council provided comments on that document, including section 3 (i.e., the early version of this document).<br><br>The Applicant does not agree with the Council's statement that there has been "limited engagement…on the impact on the local road network". The Applicant would also highlight its obligations under the National Highways Licence (April 2015) at paragraphs 4.2(f) and 5.17(c) as set out below:<br><br>*"4.2 Without prejudice to the general duties on the Licence holder under section 5 of the Infrastructure Act 2015, the Licence holder must, in exercising its functions and* |

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| | plan should be capable of adaptation to stop the harm being caused. Whilst it is noted that the Secretary of State has previously authorised projects without this requirement, the last 3 years has seen exceptional domestic and international changes and challenges. There is a real risk that the current inflexible drafting for mean that the project is already unfit for purpose and/or represents poor value for money prior to being concluded.<br><br>The Council should be consulted on the EMP Third Iteration. We acknowledge that this is a management plan relating to the operation and maintenance of the authorised development. However, the operation of the strategic road network has the potential to have significant impacts on the local road network. Especially when the project proposes to disconnect the existing strategic road network (SRN) port link between the A13 west-bound and the A1089 south-bound and instead divert this traffic via local authority roads. Considering the limited engagement by the applicant with the Council on the impact on the local road network, the Council has real concerns that National Highways is making decisions regarding the operation of the strategic road network without considering the impact on the local road network.<br><br>Requirement 6 - contaminated land. The Council's key concern is that historic contamination is picked up too late. Requirement 6 is only engaged when carrying out the authorised development, whereas the Council suggests that there needs to be a more robust understanding of Ground conditions before the construction commences. | *complying with its legal duties and other obligations, act in a manner which it considers best calculated to…*<br><br>*f. Cooperate with other persons or organisations for the purposes of*<br><br>*coordinating day-to-day operations and long-term planning;*<br><br>*…*<br><br>*5.17 - In complying with 4.2(f) and its general duty to cooperate under section 5(1) of the Infrastructure Act 2015, the Licence holder should co-operate with other persons or organisations in order to…*<br><br>*c. Take account of local needs, priorities and plans in planning for the operation, maintenance and long-term development of the network (including in the preparation of route strategies, as required at 5.13);"*<br><br>Requirement 6 - Requirement 6 would apply to any contaminated land identified post-DCO, and which has not been identified in the Environmental Statement. Historic contamination has been identified to date as part of the environmental impact assessment process. The site investigations carried out are appropriate for this stage of |

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| | Accordingly, the Council suggest the following additional requirement for Geology and Soils:<br>*(1) No part of the Works may commence until an investigation and assessment report to identify ground conditions and ground stability has been submitted to and approved by the relevant planning authority.*<br>*(2) The report submitted pursuant to sub-paragraph (1) must identify the extent of any contamination and the remedial measures to be taken to render the land fit for its intended purpose, together with a management plan which sets out long-term measures with respect to any contaminants remaining on the site.*<br>*(3) In the event that the report submitted pursuant to sub—paragraph (1) identifies necessary remedial measures, no part of the Works may commence until a remediation verification plan for that part has been submitted to and approved by the relevant planning authority.*<br>*(4) The authorised development must be carried out in accordance with the approved report referred to at sub-paragraph (1) and, where necessary, the approved plan referred to at sub- paragraph (3).* | development. Requirement 4 requires that an Environment Management Plan (Second Iteration) (EMP2) is submitted and approved by the Secretary of State. That plan must reflect the mitigation measures in the REAC.<br>The REAC includes the following relevant measures:<br>GS001 - requirement to undertake further investigation for detailed design.<br>GS016 - requirement to prepare a verification plan after remediation.<br>GS018 - investigation to inform gas regime and appropriate mitigation in design of structures on site.<br>GS027 - requirement to develop site specific remediation in consultation with the relevant local authority.<br>MW005 – requirement for pre-demolition surveys. Demolition materials would be identified and quantified including potential sources of recycled aggregate to be reused on site, as well as hazardous materials such as asbestos.<br>MW010 – requirement to comply with waste storage and handling requirements required by legislation, e.g. for asbestos or waste electronics where practicable in order to reduce the quantities of waste requiring offsite management, enhance recovery and recycling rates and minimise the generation of hazardous waste.<br>On the basis that EMP2 will be required to reflect these commitments, it is considered that there are measures in place to capture and if necessary to address historical contamination in connection with the Project. The mitigation measures detailed above are standard practice on schemes such as this. More particularly, if unacceptable contamination is encountered then a site-specific remediation strategy would be prepared (GS027) and the local authority would be |

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| | | consulted on the strategy prior to work taking place – this would give the Council an opportunity to provide input if they deem this to be necessary. After remediation, a verification report would be prepared (GS016) detailing the work undertaken and these reports would be provided to the Council and the Environment Agency for review. |
| | Requirement 14 - traffic monitoring. The Council considers that traffic monitoring should include noise and air quality. It should not lead to changes due to the environmental and traffic assessments being based on a reasonable worst case scenario. However, in the event that there are significantly worse environmental outcomes this monitoring will allow them to be identified and ultimately mitigated. | Requirement 14 - The purpose of Requirement 14 is to monitor traffic related issues like congestion; it is not intended to deal with noise and air quality monitoring. The issues relating to Air Quality are addressed in detail in Part 3 of the response to Thurrock Council's Local Impact Report. |
| | Requirement 15 - interaction with Thurrock flexible Generation Plan. The Council is unclear why this is only necessary if the Flexible Generation Plant Development Consent Order 2022 is commenced. Further explain is needed to that the Council can fully assess the impacts. | Requirement 15 - the Applicant's position on this is set out in its responses to the Annex A of the Agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] |
| | Requirement 18 highlights two key areas of concern for the Council; deemed consent and the relevant discharging authority. | |
| | Deemed consent | Deemed consent – we refer to our comments provided in relation to article 19 above. |
| | Deemed consent is found in: | |
| | Al2 - Temporary closure, alteration, diversion and restriction of use of streets | |
| | A17 - traffic regulation local roads | |
| | A19 - discharge of water (not the council) | |
| | A21 - authority to survey and investigate the land | |

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| | Requirement 13 — travellers site<br>The Council considers that deemed consent in this situation would not be in the public interest, despite numerous highways DCOs containing these provisions. The Council understands the need to ensure there isn't any unnecessary delay. However inflexible deemed consent provisions will result in unnecessary delay.<br>In the Council's opinion, the public interest and the interests of the applicant would be better served if:<br>There was the ability for the parties to agree a mutually agreed extension of time (which we would be prepared to cap at a maximum of 3 months), to avoid unnecessary appeals and also avoid delay by having to refuse applications that could have been approved if a short extension could have been agreed.<br>The Council note the applicant's position that there is no need for this, as the Council can simply refuse consent and the applicant can then submit a further application when ready. However, in our opinion this would be more less efficient.<br>The provisions were deemed refusal rather than deemed consent. This will continue to incentivise the Council to work within the specified timeframes, but avoid the risk of decisions being deemed as having consent when they have not been considered by either the Secretary of State or the Council.<br>Discharging Authority and Local Authority Consultation<br>The applicant is strongly of the view that the DCO requirements (currently set out in Schedule 2 of the | Discharging Authority and Local Authority Consultation<br>The Applicant has set out its position on this in its written submissions on Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. The |

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| | draft DCO) should largely be discharged by the Secretary of State. It is the Council's position that Requirements 3 (detailed design), 4 (Construction and Handover EMPs), 5 (landscaping and ecology), 6 — (contaminated land), 8 (surface and foul water drainage at a local level (with the Environment Agency responsible for those elements not at a local level), 9-historic environment, 10 (traffic management), 11 (construction travel plans), 12 (fencing), 14 traffic monitoring, 16 — carbon and energy management plan and 17 (amendments to approved details) should be discharged by the relevant local planning authority, with any appeal going to the Secretary of State. Whilst it is not uncommon for transport DCOs to have the Secretary of State as the discharging authority, it is by no means universal (there are at least four other transport DCOs where this is not the case). In addition, the Council are not aware of any other Secretary of State (for example DHLUC, DEFRA or BEIS) being the discharging authority in connection with non-transport DCOs. In relation to this scheme, the Council is the local highways authority for 70% of the route. Accordingly, the applicant's concerns regarding co-ordinated discharge of functions is not well founded in relation to this LTC scheme.<br><br>In the Council's view, locally elected local authorities, who are experienced in discharging similar planning conditions, should be the discharging authority. It is precisely because of the complexity of the project that a detailed understanding of the locality, including the local highway network, is required. It is accepted that changes to local highway sections will need to | Applicant would note that the precedents relied upon for a different approach are not comparable to the Project. In particular, the "four" transport projects referred to and the reasons they are not appropriate are set out below:<br><br>the West Midlands Rail Freight Interchange Order 2020 and the Port of Tilbury (Expansion) Order 2019 – precedents which are not appropriate because they are site-specific, do not traverse multiple local authorities, and are promoted by private developers rather than a highway authority (who have wide ranging statutory powers which are not subject to secondary consents, and which are not subject to judicial review). Unlike the Project, Reasons, 1, 2, 3, 4, 5, 8 and 9 set out in the Explanatory Memorandum do not apply to these DCO precedents.<br><br>the Lake Lothing (Lowestoft) Third Crossing Order 2020 – a precedent which is not appropriate because it involves a scheme which is promoted by a local authority, and does not traverse multiple local authorities, or pertain to the strategic road network. Unlike the Project, Reasons, 1, 2, 3, 4, 5, 8 and 9 do not apply to this DCO precedent.<br><br>the Silvertown Tunnel Order 2018 – whilst it is acknowledged this project traverses local authorities (albeit a more limited number compared with the Project), Reasons 2, 3, 4, 5, 8 and 9 do not apply to this precedent.<br><br>For completeness, the discrepancy between the 8 weeks deemed consent period for the Secretary of State and the consultation period is appropriate. The former relates a deemed consent in relation to a decision, and the latter relates to a consultation function. The comments raised by the Council are an "in principle" issue yet the provisions are heavily precedented (and, indeed, in a number of cases the |

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| | consider the impact of those changes on trunk road sections (and vice versa), and accordingly it is suggested that the relevant planning authority will discharge requirements in consultation with relevant parties, such as the applicant and other key stakeholders. The current proposal, of the Secretary of State being the discharging authority, after consulting the Council, is likely to lead to unnecessary expenditure as the relevant local planning authority will have to commit significant resources to explaining to the Secretary of State the impact of proposals.<br>A number of the requirements (as currently drafted) refer to consultation with the relevant planning authority. There are no details in the draft DCO as to how long this consultation will be or how it will take place. However, it is understood from the applicant verbally that the consultation period will be four weeks, with the ability to extend to 6 weeks. Accordingly, the Council contends that the setting of 8-week discharge period for the Secretary of State and then only allowing only 4-6 weeks for consultation with local planning authorities is not appropriate or fair, as it does not take into account the complexities of the individual matters being discharged.<br><u>Updating of control documents</u> - including the CoCP, oTMPfC, FCTP and oMHP. The Council's position is that just because documents are based on a 'reasonable worst case scenario' does not mean that they cannot become unrepresentative. This is especially true given the affects of the pandemic and the drive to reach Net Zero. The Council does not accept that under no circumstances should the | consultation period is shorter than the period suggested for consultation in the Project dDCO).<br><br><u>Updating of control documents</u> – The Applicant objects in the strongest possible terms to this highly novel approach suggested by the Council. It does not consider the proposed approach is reasonable or proportionate in light of the fact that the environmental and traffic assessments are based on a reasonable worst-case scenario. The construction methodology is controlled via the various control documents provided (e.g., the traffic management plan for construction |

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| | documents be capable of review, although it is anticipated that only in exceptional circumstances will they be reviewed.<br>The Council understands the need for certainty in relation to the Project, and the reasons why the environmental and traffic assessments are based on a reasonable worst-case scenario.<br>However, the last two years has seen unprecedented change in how we live and work. This is combined with significant environmental concerns and the need to reduce carbon emissions.<br>Accordingly, there needs to be the ability to review and amend the scheme in exceptional circumstances. This is because the likelihood of there being exceptional circumstances, although low, is significantly higher than it might have been two years ago.<br>We note that the outline management plans will provide mechanisms for ongoing engagement and coordination, however the Council does not consider this sufficient because the Council is only consulted, it does not provide the Council with either approval rights or for the applicant to take into account our comments. | must be substantially in accordance with the outline traffic management plan for construction). The Requirements would require further consultation on updated iterations of the control documents. Moreover, the outline management plans will provide mechanisms for ongoing engagement and coordination which is considered sufficient to deal with the highly unlikely "exceptional" circumstances referred to by the Council. The Applicant refers to its response in relation to the Written Ministerial Statement which sets out how further monitoring and survey work would be carried out (see pages 4 to 6 of [AS-086]). In light of these controls, no further amendment to the dDCO is considered necessary.<br>The Applicant notes that even though this comment would apply to any DCO project promoted by the Applicant (including complex infrastructure of a similar size and scale to the Project), the Secretary of State has not considered such a requirement to be appropriate or necessary. The Applicant considers that the suggested approach would have implications well beyond the Project and impose an unprecedented and wholly inappropriate effect on development in the UK. |
| Schedule 14 | The Council appreciates the applicant's reasoning around disapplying Land Drainage Act Powers when the Project spans multiple LLFA areas. However, the Council considers that that ultimately enforcement action should be carried out at the discretion of the LLFA in accordance to their respective enforcement policy and protocol. | The Applicant does not agree that enforcement action should be carried out at the discretion of the LLFA in accordance with each drainage authority's Enforcement Policy and Protocol, in place of the provisions in Schedule 14, Part 3 to the dDCO.<br>The purpose of the 2008 Act was, and is, to streamline consents, and to acknowledge that because of their |

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| | The Council does not consider it possible to include parts of enforcement policy/protocol in the protective provisions as this comes as a complete package (ie procedure, timescales etc).<br>In relation to previous examples of this in DCOs, we note that it is far from universal that the usual enforcement provisions in the Land Drainage Act 1991 are disapplied. For example, see the A30 Chiverton to Carland Cross Development Consent Order 2020.<br>Schedule 14 Part 3, Paragraph 23(5)(b) refers to the removal of obstructions in watercourses. The Council maintains that the current wording places an unacceptable risk on residential properties. We understand National Highway's comments about the fact that, in some instances, it may not be practical to remove an obstruction within 14 days. However generally the applicant should be aiming to remove obstructions within set timescales and where there are exceptions to be made, these can be negotiated with the LLFA on a case by case basis.<br>This will ensure that the risk of watercourse flooding is reduced as it will place some urgency on the applicant to remove obstructions from any watercourses under their care. The risk is that only including 'as soon as reasonably practicable' will mean that bias is placed on the practicality for the applicant of carrying out the work, rather than the increased flood risk the obstruction will cause (which could put residential properties at greater risk) | importance, and scale, the regimes which would otherwise apply could and should be disapplied. It is acknowledged that protections should be in place and the Applicant considers that the dDCO includes proportionate protections and safeguards for drainage authorities.<br>Parliament set out the enforcement provisions which it considered should apply in Part 8 of the 2008 Act, and the dDCO does not modify those provisions.<br>The proposed wording, "*as soon as reasonably practicable*" in paragraph 23(5)(b) already places urgency on the Applicant to remove any obstructions in waterways. The Applicant firmly rejects the assertion that the wording "*as soon as reasonably practicable"* could put residential properties at unacceptable risk owing to bias. It would be unreasonable to require the Applicant to separately negotiate specific timescales with the Council, and it would be unreasonable to spend time negotiating a time period, when time and resources would be better spent on resolving the obstruction as soon as reasonably practicable. It is not considered appropriate for the Applicant, as a public sector body which utilises public funds, to carry out *unreasonably* practicable steps. The protective provisions allow any disputes as to reasonableness to be settled under the arbitration article, article 64, in the dDCO. |

## Table 13.2 The Applicant's response to Thurrock Council's Local Impact Report Appendix I, - Annex 2- Comments on the draft DCO presented to the ExA within ISH2 [REP-290]

*Applicant note: Annex 2 of Appendix I of the Thurrock Council LIR repeats a number of points, but the Applicant has provided a response for completeness. The Applicant notes that Thurrock Council have also copy and pasted its responses contained in Annex 2 of Annex I of its Local Impact Report in the table contained its written submissions of ISH2 Submission [REP1-295]. The Applicant considers that latter document raises no new issues and therefore has not reproduced that table.*

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| **1. Novel Dratfing** | | | |
| | 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:<br>• be unambiguous;<br>• be precise;<br>• achieve the purpose sought for the proposed development by the applicant;<br>• be consistent with any related definitions or expressions in other provisions of the dDCO; and<br>• follow guidance and best practice for SI drafting. | Thurrock Council has previously raised this point. It is also the view of Thurrock Council that the inclusion of novel drafting in one DCO does not mean that this is the current established preference of the SoS (see also paragraph 1.5 of Advice Note 15).<br>There are a number of instances where wording has been chosen to provide a significant amount of flexibility to the applicant, with little explanation except that a project of this size should not be delayed. For example, no explanation has been provided to Thurrock Council as to why such broad Order Limits are in the public interest (article 6), how deemed consent is in the public interest (articles 12,17,19,21 and requirement 13) and how the applicant intends to establish whether remains were | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. |

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| | | interred more than a hundred years ago (article 22).<br>Thurrock Council has many broader comments on the DCO (please see the LIR) however in this document the Council will only be commenting on the specific points raised by the ExA. | |
| 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.<br>The phrase "materially new or materially different environmental effects" is used several times in the DCO, including in the definition of maintain, the limits of deviation and requirements securing essential mitigation. The drafting here appears to provide that it is acceptable for work which has the effect of avoiding, reducing or removing an adverse effect to be undertaken without further scrutiny, even if the effect is materially different from that assessed in the ES. Views are sought on the degree to which that | It is accepted that similar wording has been used in other the applicant DC0s. Thurrock council does not<br>Thurrock Council's main concern is that although new measures might avoid, remove or reduce an adverse effect reported in the ES, the proposed wording does not consider other adverse effects, which are not in the ES (for example land ownership and economic effects). This is especially true in relation to article 6 and the extension of the maximum limits of deviation. This creates uncertainty, which makes it more difficult for those affected by the proposed DCO to fully engage in the examination process.<br>The applicant notes that the purpose of this wording is to limit the need for material and non material amendments to the DCO, as this would cause delay. It is the Council's position that although delay should be minimised, it should not be at the expense of issues being properly | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above.<br>The Applicant would note the question of materially new and materially different environmental effects does not directly pertain to the limits of deviation which are controlled under article 6. Plainly, though, going outside of the Order limits may give rise to materially new or materially different effects but such an eventuality cannot arise because of article 6(3) (which prohibits such changes). |

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| | approach is being provided for here and, if it is, is acceptable?<br>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.<br>See comments in section 2 below. | considered. Significant changes, for example exceeding the stated limits of deviation, should in the Council's opinion usually go through the material or non-material amendment process to ensure that all impacts are properly considered. | |
| 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). | Please see comments below in section 4.<br>The applicant has adopted consistent/ standard periods for temporary occupation of land. The Council strongly considers that the applicant should have given greater consideration as to the extent, in each instance and on a plot by plot basis, whether a shorter period is sufficient. This has been rejected by the applicant, but the Council consider could be achieved with simple drafting. | |
| Article 28 —extent of imposition of transfer | Article 28 — See comments in section 4 below re novel approach/ precedent for the extent of imposition | Please see comments below in section 4. | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 |

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| of CA powers without consent | of restrictive covenants and the transfer of benefit of imposed covenants. | | [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. |
| 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)*<br>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.<br>The Applicant is requested to:<br>• 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<br>• provide details of any planning permissions within the order | The Council does not object to these provisions. Although Hillside wasn't a statement of new law —there was, and still is, some ambiguity in this area that future cases are going to have to resolve. For certainty the Council consider it beneficial that this provision is included.<br>In the Council's opinion this falls within the range of broad powers for the DCO — see section 120 of the Planning Act 2008. However, the Council suggests that the applicant should identify where this may be applied as this will provide added certainty. | These matters are addressed in the Applicant's response to Annex 1 of Appendix I. Please see above. |

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| | limits that this provision would apply to.<br>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.<br>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.<br>On a drafting point, there appear to be some words missing in the second line of Article 56(4): "under the authority of a granted under section 57 of the 1990 Act". Amended drafting is sought. | | |
| Work No. 7R — Traveller site & Requirement 13 | Work No. 7R is described in part as "re-provision of a traveller site". In effect, it provides for the grant of consent for change of use of a plot of land within the order limits to use as a Traveller site, which appears to be a use of land that is residential in | The location and broad design of the travellers site is something that the Council and the applicant broadly agree on and is covered in Design Principles, a secured Indicative Plan and the Requirement 13. However, the Council notes and agrees with the | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. |

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| | nature. The ExA's primary question is about whether this is intra vires, within the powers of a DCO.<br>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.<br>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'.<br>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 | points raised by the ExA. Although section 120(3) and (4) is very broad. section 115 of the PA 2008 does limit what consent can be granted for.<br>Dwelling isn't defined, and our concern is that a Traveller site wouldn't fall under the definition of a dwelling. The applicant's additional submissions of 6 July do not address this point.<br>The Council are not aware of any precedent for similar provisions in other DC0s.<br>The Council does not consider that conditions are required, as consent for the use of the site is contained within the DCO. The Council are aware that the applicant has agreed to update the Stakeholder Actions and Commitment Register to secure the occupation of the site prior to the start of significant construction works. | For completeness, the question on the limitation on consenting "dwellings" relates to associated development, not related housing development.<br>The Applicant welcomes the confirmation that no conditions are required. For completeness, the the Stakeholder Actions and Commitment Register was updated at Deadline 1 to secure the occupation of the site prior to the start of significant construction works. |

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| | residential element. Consideration should be given to whether the provision of pitches and related facilities on a traveller site fall under the definition of a dwelling (which is expressly excluded from the definition of associated development).<br>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.<br>Further consideration will also need to be given to the appropriateness of any such conditions being within a DCO (and thus only capable of being changed via a change to the DCO) or whether an alternative approach might be that the applicant submits an application for planning permission to the LPA (under the | | |

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| | Town and Country Planning Act 1990) seeking approval before works can take place on the existing traveller site, or any CA of that land is authorised. The views of the local planning authority on applicable policy and process for such an approach will be sought, as will views on timing, certainty (or otherwise) of outcome and the effects of a refusal or delay on the deliverability of the dDCO proposed development overall. | | |
| **2. Flexibility of operation** | | | |
| Articles 2, 4, 5, 6 and generally — Definitions, maintenance and limits of deviation<br>Requirement 4(1)—<br>"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.<br>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 | The issue of excess flexibility is a key concern to the Council. strongly agree on the issue of flexibility. It is accepted that a scheme of this size requires some flexibility to overcome unforeseen technical issues and avoid the need to amend the DCO. However that flexibility needs to be within defined parameters, so that those potentially impacted can input into the DCO process.<br>Thurrock Council's main concern is about the uncertainty caused by flexibility, especially in relation to order limits. No explanation explaining why this is required has been provided, despite requests to do so. Notwithstanding that, in light of the | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above. |

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| | 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.<br>Observations on novel drafting in Article 2(10) above are relevant here.<br>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.<br>Submissions from hearing participants on the adequacy and | lack of design work, the applicant is unable to demonstrate that every parcel identified is required there remains a risk that the limits of deviation could extend the Project onto land not previously within the Order Limits (if the deviation does not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement).<br>The Council requires sufficient certainty to the scheme, to allow it to fully comment on the impacts, and allow those potentially affected to take an effective role in the examination.<br>In relation to the Preliminary Works EMP — this is a new concept when compared with the previous DCO. Thurrock Council has not been consulted on this document (ES Appendix 2.2, Annex C). In our the Council's opinion the proposed preliminary works could have quite significant environmental effects (they involve vegetation clearing). If they were part of the EMP (Second Iteration) we would have to be consulted. Accordingly the applicant needs to fully explain how all environmental considerations have been taken into account. | |

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| | appropriateness of provisions providing flexibility will be sought. | It is also of concern that the purpose of the Preliminary Works EMP is to trigger the need to begin the development pursuant to Requirement 5. This appears to be an acknowledgment that the applicant does not intend to commence substantive works within the 5 year period. Delaying the commencement of works further adds to the uncertainty of those potentially impacted, having a chilling effect on local development and unfairly impacting local residents. It also impacts the validity of the assessments undertaken in relation to other aspects underpinning the application, such as traffic modelling and environmental impacts.<br>Thurrock Council understands the need to balance flexibility for the applicant with certainty for local residents. It is the Council's position that the balance has not been set fairly in the current drafting of the DCO, with too much emphasis on flexibility for Thurrock. The applicant's response of 6 July does not address how the balance of flexibility vs certainty for local residents has been set. Instead it relies upon a broad statement that flexibility is in the public interest, without considering the extent of that | |

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| | | flexibility and negative impacts associated with that flexibility. | |
| **3. Development consent etc granted by the order** | | | |
| Article 3(3) —General disapplication of provisions applying to land | The intent of this article is to avoid inconsistency with other relevant statutory provisions applying in the vicinity and is precedented in highways made Orders. The drafting in its current form has the effect of a general disapplication of other statutory provisions applying to land, including land lying beyond the Order land. However, the proposed development in this instance and the extent of the Order land are very large and understood to be larger than the extent of Order. It follows that the potential effect of the disapplication sought could be very large.<br>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 | The wording 'adjoining or sharing a common boundary' causes uncertainty as the extent of other enactments being subject to the provisions of the order. We suggest that these refer to specific areas of land to avoid uncertainty. The applicant's position that "how far this extends as a matter of fact and degree to be considered on a case-by-case basis" (comments from 6 July 2023) creates significant uncertainty. Considering the scale of development this uncertainty is likely to have a significant negative impact.<br>It is the Council's position that justification for the disapplication of legislation should have been provided prior to submission to allow Council input (as the public body representing local residents).<br>Thurrock Council agree that NSIPs should usually take precedence. However the Council is concerned that the precise impacts haven't been considered. Having a blanket provision, where the specific impacts of different legislation being disapplied has not been considered could lead to unexpected adverse impacts. | These matters are addressed in the Applicant's response to Annex 1 of Appendix I. Please see above. |

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| | 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. | It is not an answer to the Council's concerns to highlight the fact that this is not an unusual provision in National Highways DCOs. Our concern is not primarily about the position, but the analysis which has been undertaken to justify it and avoid unintended consequences. | |
| 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).<br>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?<br>Having regard to the definition of a gas transporter pipeline NSIP in PA2008 s 20, is it clear that the proposed gas transporter pipeline works meet that definition? Is there any reason why alternatively the gas transporter pipeline works could not proceed as associated development | Thurrock Council notes that the applicant has undertaken an analysis of whether the electric lines and gas transporter pipelines are NSIPs in their own right. The Council has no comment with the applicant's analysis.<br>The applicant's position is that because these works are NSIPs in their own right, they should be considered as such rather than as associated development pursuant to section 115 of the Planning Act 2008.<br>The Council is not aware of any precedent on this point, however on the natural construction of legislation we agree that it is appropriate for these to be included as separate NSIPs.<br>From Thurrock Council's perspective the key point is that the impact of these need to be properly understood, and those potentially impacted need the ability to understand the proposals and engage with them. | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above. |

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| | (under PA2008 s 115) to the highway NSIP? | As the Council have noted in its Procedural Deadline C submission. the Council is concerned that although there has been engagement with utility companies, there has been very little engagement with the Council.<br>The Council would have expected separate utilities document outlining the gas and electrical diversions, with drawings highlighting each one. These have not been provided. The Council have made a number of comments on the gas and electrical diversions over the last 2 years, but these not appear to have been considered by applicant. | |
| **4. Compulsory acquisition and extinguishment of rights** | | | |
| Articles 25 — 34<br>Articles 35 — 36 | 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).<br>The effect of the drafting discussed here will be tested in Compulsory Acquisition Hearing 1 (CAH1) and may be the subject of oral or written submissions by Affected Persons. The purpose of this hearing will be to examine the basis for the drafting approach taken. | Thurrock Council agrees with these comments. | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. |

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| Article 66 — Compulsory Acquisition (CA),<br><br>Temporary Possession (TP) and related powers | 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:<br>• 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);<br>• 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.<br>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.<br>Where the applicant wishes to create and compulsorily acquire new rights over land, those rights should be | The Council agrees with the general observation that the provisions should be drafted in accordance with Advice Note 15.<br>As set out in further detail in the provisions below, the Council is concerned that the extent of the powers sought is not sufficiently refined, due to the project stage of design reached by the applicant at this stage. The applicant should be seeking to limit the impact of compulsory purchase rights by acquiring the minimum necessary.<br>The applicant has suggested that the *'Council's comments on the extent of compulsory acquisition requires further particularisation, and can be addressed as part of any Compulsory Acquisition Hearings the ExA decides to hold'*. The Council has already set out substantive points of principle on the timing and extent of the rights acquired both in correspondence with the Applicant and as summarised in the paragraphs below. The Council has raised fundamental concerns with the approach taken and provided alternative approaches, which have been rejected. These comments remain. Further, the Council considers | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184].<br>The Applicant's position remains that there is no particularisation of the council's position. The Applicant has, in its view, justified the proposed land use as set out in the submissions referenced above. |

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| | 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. 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. | it is for the applicant to fully justify the extent of the powers they are seeking. | |
| 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.<br>Additionally, Article 27(3) defines the start date for the 8-year period as being the date after the expiry of the | Thurrock Council agrees with the questions raised by the ExA and has raised these points with the applicant on previous occasions.<br>The overwhelming majority of DCOs provide a 5 year time period for acquisition. Where the applicant is seeking a longer period, this must then place a substantive burden on them to justify this extended period of time.<br>The limited examples provided in response to the Council's comments which have granted a longer time period - being the Thames Tideway | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above. |

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| | period within which a legal challenge could be made under s118 PA 2008, or after the final determination of any legal challenge made under that section. The more normal, certain and precedented drafting in DCOs to date is for a 5-year period to commence on the date of the making of the Order. This amended definition of the start date could have the effect of significantly adding to the 8-year period within which persons with an interest in land will have their land burdened with the threat of CA before it is compulsorily acquired. This represents an additional interference with their rights (over and above those that normally arise from CA) which must be justified. The start date definition adds an additional element of uncertainty, as it is not possible to know how long any challenge may take to be finally determined — and it is not impossible that one running through an appeal to the Court of Appeal and thence to the Supreme Court might take a long time.<br>Are these approaches to drafting acceptable, considering their effect on the rights of persons with an interest in land and the possibility of blight? | Tunnel (a 25km Super Sewer) and Hinkley Point C (a National Grid project delivering 57km electricity connection) — do not provide any meaningful comparison. Furthermore, the majority of NSIPs have sought and secured powers with powers extending to only 5 years<br>We are not aware of any highways project of this nature which has been granted such an extended period.<br>The new change to amend the definition of 'start date' at 27(3) exacerbates this position —increasing the level of time and uncertainty faced by landowners. This is on top of the already extended time period.<br>The applicant refers to the Manston Airport DCO as precedent for this practice. The applicant has not explained why this single example provides justification for the wording in this case. As stated above, the change to the wording comes on top of the 8 year period which the Council already considers to be excessive.<br>Thurrock Council has suggested that where elements of the project may require a period in excess of 5 years, that the time period is extended to these sections of the land only. In particular, consideration be given to: | |

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| | | • limiting the land to which this provision applies<br>• limiting the categories of work to which this provision will apply.<br>The applicant have consistently rejected this approach, citing a lack of precedent for a mechanism which would allow for different time periods to be applied over different parts of the Order land. Given the applicant is seeking a much extended time period, the fact that a proposal has not been used in previous DCOs, clearly should not preclude a full consideration of its appropriateness. The drafting to achieve this is not complicated and the applicant should by this stage have a clear project plan on a plot by plot basis.<br>For example, for a second category, an single extra subjection and schedule could be added as follows:<br>27.—(1) After the end of the period of 8 years beginning on day on which this Order comes into force<br>(a) no notice to treat is to be served under Part 1 of the 1965 Act as modified by this Order; and<br>(b) no declaration is to be executed under section 4 (execution of declaration) of the 1981 Act as applied | |

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| | | by article 31 (application of the 1981 Act),<br>in relation to the Order land (other than land specified in Schedule [ ]) for the purposes of this Order.<br>27.-- (2) The [8] year time period specified in subsection (1) shall not apply to the Order land listed in Schedule [ ] to which a [5] year time period shall apply<br>As such, the Council considers it inconceivable that there are not any plots where the applicant are confident at this stage that they will be able to make a determination on requirements in less than 8 years.<br>Even if the number of plots affected by this provision were limited, it would be entirely consistent with compulsory purchase principles that the applicant should seek to have the minimum possible impact on land owners.<br>At this stage, the Council are not satisfied that evidence for an 8 year period has been provided. | |
| 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 | Thurrock Council agrees with the questions raised by the ExA and has raised several of these points with the applicant on previous occasions.<br>The Council considers that the applicant should be ensuring they | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's |

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| | 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<br>as defined in article 2(1) in the absence of a specific and clear justification for conferring such a wide-ranging power in the circumstances of the proposed development and without an indication of how the power would be used- (paragraph 62).<br>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.<br>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 | cause the least impact possible on landowners. The blanket power set out a 28(1) creates significant uncertainty and could stagnate the local property market and impact prices / the ability to lease commercial land etc.<br>The Council does not accept that the applicant has provided sufficient justification either in the Statement of Reasons or in its formal responses, to demonstrate that it has taken all reasonable steps to reduce the area of land which are not subject to the restrictions at 28(2).<br>The applicant has previously referred to not being able to make a more specific determination 'at this juncture because of the stage of design development'. Similar comments have not been made by the applicant in their ISH2 response. In order to demonstrate a compelling case, the applicant should be taking every step to advance the progress of the design to ensure that the powers used are the minimum possible. The Council is concerned by wider powers being used with references to the Project design not being advanced sufficiently to limit these.<br>The Council's comments about time limits at 27(1) above apply equally to the use of powers to acquire rights. as | response to Annex 1 of Appendix I provided above. |

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| | departure from the SoS' previous positions on this matter.<br><br>Article 28 (3) and (4) purport to enable the power to acquire rights and impose restrictive covenants compulsorily to be transferred to a statutory undertaker (defined by reference to s127 PA 2008), save for the requirement to pay compensation. This provision is linked to the approach taken to the transfer of benefit article (Article 8), but the two provisions do not appear to be fully consistent in their drafting. The drafting of Article 8(3) may require amendment to reflect Article 28(3) and (4). It will be very important to ensure that the drafting of the DCO ensures that the undertaker always remains liable for all compensation for CA. If the DCO is to permit CA powers to be exercised by unknown individuals or statutory undertakers whose ability to meet CA costs has not been examined. there is potential for a power to acquire to be transferred to a person who is not 'good- for the related liability in compensation. Precision of intent and effect are very important here.<br><br>At present Article 8(6) implies that article 28(3) enables the CA powers | they do to the compulsory acquisition of land.<br><br>The Council has undertaken a further review of land to be taken temporarily. The extent of this land is subject to a further review and the Council is waiting on the applicant for this together with a draft the legal agreement that has been proposed by the applicant. | |

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| | to be transferred to be exercised by persons other than statutory undertakers. Article 28(3) as presently drafted only permits the transfer of CA powers to statutory undertakers. If 28(3) reflects the correct intention, article 8(6) should be amended to remove reference to "any other person". | | |
| Articles 35 & 36 — Temporary Possession | These articles follow a well-precedented form. However. Article 35(1)(a)(ii) and Article 36 (1)(b) enable Temporary Possession (TP) to be taken of any Order land (subject only to limited exceptions). The proposed development in this instance and the extent of the Order land are very 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.<br>Notwithstanding other precedents, as much information as possible should be provided about land potentially capable of being subject to TP. Additional diligence on and justification for the extent of TP sought are required, as in general terms possession of land is a matter that is specifically examined, to avoid | Thurrock Council agrees with the questions raised by the ExA and has raised similar concerns with the applicant on previous occasions.<br>See points on time limits at Article 27. 8 years is a too long a time period to create uncertainty over such a large area of land.<br>Further justification should be provided in relation to the power at 35(a)(ii) to temporarily possess Order Land that isn't specifically set out in Schedule 11.<br>Consideration to be given to:<br>• limiting the land to which this provision applies<br>• limiting the categories of work to which this provision will apply.<br>The same principle points, as set out at Article 35 below, apply to maintenance period at Article 36. | These matters are addressed in the Applicant's response to Annex 1 of Appendix I. Please see above. |

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| | the possibility of inadvertent adverse effects. | Again, simple wording, as set out by the Council in its response at 27 above. could be used to establish different time periods for different categories of land.<br><br>Notification — General<br><br>The Council considers that owners should be made aware at the outset if their land may be subject to temporary acquisition; when this might occur; how many times (the extent to which an AA can take entry, pull out and re-enter is the subject of some debate — but we are sure there is a precedent for it), for how long; and what will be returned at the end of that period (i.e. demolition of buildings etc.).<br><br>The applicant has indicated that they would not wish to use this approach on the basis that *"There is a risk that, by setting estimated timescales, National Highways will create expectations that cannot subsequently be met and may even be required to serve notice of temporary possession, which would incur further delay, cost and frustration for landowners."*<br><br>The Council considers the balance here is in favour of providing as much information as possible. This allows for owners to prepare and to better mitigate any losses. We therefore | |

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| | | suggest that the Explanatory Memorandum makes a commitment to: (a) outlining estimated timescales as accurately as possible to landowners when notices are given; and (b) keeping them updated as to evolving timescales.<br><u>Notification — 28 day period</u><br>The Council do not consider the 28 day notice period sufficient, given that possession can potentially be for a significant period.<br>The Council notes that the recent Lake Loathing (Lowestoft) Third Crossing Order 2020 includes a three-month notice period. Therefore. it not accepted that the Council are holding the dDCO to a higher standard than other DCOs or that a 3 month period is inconsistent with a desire to ensure NSIPs are expeditiously delivered - as has been suggested by the applicant.<br>Instead, this simply requires an appropriate level of planning and co-ordination to ensure that notices are served on time to allow this. It is not for the Council to evidence why a 3 month period is justified, but instead for the applicant to justify why it cannot in this case provide a longer period than 28 days. | |

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| | | Further, this would also appear likely to increase the likelihood of increased compensation - where a landowner has increased notice. there will clearly be cases where this gives them a better opportunity to mitigate any losses.<br>Article 35(5)<br>The applicant is required at 35(5) to restore the land to the reasonable satisfaction of the owner. However, the wording at 35(8) does not stop the applicant giving up possession of the land.<br>The Council considers that the applicant should be required to comply with the requirement prior to giving up temporary possession of the land.<br>The wording in this article 35(8) is regularly excluded — for example the Silvertown Tunnel Order 2018; Lake Lothing (Lowestoft) Third Crossing Order 2020; A19/A1058 Coast Road (Junction Improvement) DCO 2016; Great Yarmouth Third River Crossing DCO 2020; Hinkley Point C Connection and indeed the Model Provisions.<br>Article 35(13) The applicant confirmed in the Issue Specific Hearing 2 that the DCO allows multiple temporary possessions. | |

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| | | The Council has reservations about this provision as currently drafted.<br>It recognises that, in some cases, two shorter entries may be better thana prolonged stay. But the applicant should provide further justification for the inclusion of this power.<br>As identified by the ExA below - the ability for owners to require acquisition rather than temporary possession should be considered.<br>If the power remains, all the points set out in this section are more important - i.e. notice periods, extent of land which the provision covers etc. and require extensive justification from the applicant. | |
| 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 | We agree with the general comments about very broad powers in the DCO, seemingly not supported by detailed analysis. This creates a risk of unintended consequences. | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. |

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| | who may not be aware that they are subject to it over a very large area of land.<br>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.<br>Are all such persons considered to be Category 3 Persons. Are they all identified in the Book of Reference at Part 2? | | |
| **5. Special category land** | | | |
| Article 40 — (and preamble) | If it is argued that Special Parliamentary Procedure (SPP) is not to apply (before authorising CA of land or rights in land being special category land), full details should be provided to support the application of the relevant subsections in PA2008 Sections 130. 131 or 132, for example (in relation to common, open space or fuel or field garden allotments):<br>• 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 | The Council agrees with the ExA's comments. These are points the Council has previously raised with the applicant.<br>There currently appears to be a significant risk of delay in replacement land being provided. The wording should follow the Model Provisions i.e. the replacement land should be delivered before the special category land is vested in the applicant. Otherwise there is a least a temporary loss of open space, and a potential long term risk of loss/non delivery. | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above. |

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| | other persons, if any, entitled to rights of common or other rights, and clarifying the extent of public use of the land<br>• 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.<br>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.<br>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 | Clear justification is needed if fully implemented replacement land is not in place prior to vesting.<br>The Model Provisions specifically require that the approved scheme has been implemented on the replacement land prior to the special category land being discharged from its rights, trusts and incidents.<br>The Council does accept that the wording has been approved in other DC0s, but this is not considered to be a scheme where it is appropriate for the land to be vested, until the alternative land has been delivered.<br>The Council does not agree with the wording at Article 40(5) — i.e. that replacement land should be provided for special category land that is in existence at the date of DCO. Otherwise there may be an incentive to delay providing replacement land if there is a risk of de-registration. | |

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| | land or right in accordance with s.131(4) and s.132(4)?<br>Although Article 40(3) provides that the applicant must implement the certified scheme, and that once it is implemented the replacement land must vest in the persons with an interest in the special category land, it would still appear to allow the undertaker to CA the special category land before the replacement land is available to use and without any particular security or limitation preventing or confining the prolongation of the time between the certification of a scheme and the completion of the transfer of the replacement land. If the undertaker did not then implement the scheme or delays implementing the scheme it could fall to the LPA to seek to enforce this provision, which could take a significant time, during which persons would be deprived of access to the special category land. This does not seem to align in spirit with the intention of the legislative provisions on special category land, which seek (amongst other provisions) its replacement without a period of delay.<br>The drafting of Article 40 generally is confusing and the ExA remains | | |

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| | 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.<br>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". | | |
| **6. Statutory undertakers and apparatus** | | | |
| Articles 37 & 38 — | Where a representation is made by a statutory undertaker (or some other person) that engages section 127(1) of the Planning Act 2008 and has not been withdrawn, the Secretary of State will be unable to authorise | Note and agree with the comments of the ExA<br>It is noted from the applicants ISH2 response that they are engaged in discussions with statutory undertakers. The Council defers to those | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. |

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| | 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.<br>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<br>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. | undertakers on their requirements. however there is a clear question as to whether a compelling case can be made by the applicant to interfere with the relevant land and apparatus when it does not have a fully designed scheme. There is a clear risk of overestimation of the land required. | |
| **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 | Thurrock Council agree that this should be justified.<br>However, from the Council's perspective, so long as the usual planning provisions apply then the Council does not object to this provision. | These matters are addressed in the Applicant's response to Annex 1 of Appendix I. Please see above. |

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| | Planning Act 2008). This article should be justified. | | |
| **8. Classification of roads** | | | |
| **9. Clearways, prohibitions and restrictions** | | | |
| **10. Speed restrictions** | | | |
| Articles 15, 16 and 17 — | Variation of the application of provisions in these articles is apparently possible using extensive means including by agreement. Arguably, this has the effect of disapplying PA2008 section 153 which provides a procedure for changing a DCO. Is this approach necessary and justified? There may be precedent in other made DCOs for the same drafting, but the Applicant needs to be clear under which section 120 power these articles are made and if necessary provide justification as to why the provisions are necessary or expedient to give full effect to any other provision of the DCO. | Article 15 concerns the classification of roads. Article 16 concerns prohibit patients and restrictions, and article 17 concerns traffic regulation on local roads.<br>All 3 contain provisions to vary the effect of these articles (see article 15(3) and (4), article 16(6) and article 17(2).<br>Whilst it is important that these are properly justified, the Council does not have any specific concerns regarding these provisions. | These matters are addressed in the Applicant's response to Annex 1 of Appendix I. Please see above. |
| **11. Temporary stopping up and restriction of use of streets** | | | |
| Articles 12 & 13 — | Notwithstanding other precedents, justification should be provided as to why the power is appropriate and proportionate having regard to the impacts on pedestrians and others of | • Thurrock Council agrees with the ExA's comments. The Council has a number of concerns on these provisions, including:<br>• they should not contain deemed consent provisions, | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's |

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| | authorising temporary working sites in these streets. | • there should be a 90 day response period, which is the standard permit notification period<br>• Diversions should be to roads that are of a similar classify classification. Current wording allows the applicant to provide a temporary diversion to either a lower road classification and or construct a lower category road for diversion purposes. This does not sit well with the Council's permit rules on<br>• appropriate diversions and could result in a signed route of Al 3 traffic being diverted along country lanes. This should be removed or altered to identify a similar classification requirement for diversions. i.e. if the A13 (3 lane) section is closed, diversion to the A127 (2 lane) route should be made rather than the A1013 (single lane) routes.<br>• What constitutes an application for 12(8)? It should say using forms and accompanied by all information reasonably requested by the street authority.<br>• Article 12 needs to be limited to order limits. | response to Annex 1 of Appendix I provided above.<br>On the comments in the second paragraph, an amendment is made to the dDCO at Deadline 2 ensuring the diversion is suitable (see responses provided to the Port of Tilbury's Written Representation for further details).<br>In relation to article 12(8), "application" is given its ordinary and plan meaning. This is heavily precedented wording that Highways England, across its DCO portfolio, has not had any significant issue in implementing. An application will be made to the relevant street authority, and if they do not consider it sufficient, no provision in the DCO prevents that authority from requesting further information or refusing an application. It would not be appropriate to be prescriptive about what any application would need to contain but, given the fact specific nature of any application, better instead to proceed on the basis that the parties will work constructively and collaboratively at the relevant time to ensure the Council has the appropriate information it needs in order to determine the application. This is |

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| | | • Article 13(1) - There is no time limit on this provision so does that mean following completion that the undertaker maintains their rights under this section?<br>• Article 13(2) - Does the landowner have to evidence the damage or does the undertaker provide a before survey and then periodically assess for damage? needs to be expanded. | the basis upon which all National Highways DCOs have proceeded to date and it is considered that this is the correct and pragmatic approach.<br>In relation to article 12, appropriate controls are provided as the consent of the street authority is required for all exercises except where specifically named in Schedule 3 (which comprises streets inside the Order limits).<br>In relation to article 13, the Applicant has removed the ability to use this in connection with maintenance and so the issue raised is considered to be resolved. Compensation would be determined in accordance with the Compensation Code. No further provision is considered necessary. |
| Article 14 — | 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.<br>Article 14 relates to permanent stopping up of streets. Should 14(4)(e) be a new paragraph (5)? | | N/A |
| **13. Disapplication or amendment of legislation/ statutory provisions** | | | |

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| 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<br>• the purpose of the legislation/statutory provision<br>• the persons/body having the power being disapplied<br>• 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<br>• (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.<br>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. | Whilst it is not unusual to disapply certain legislative provisions, this amount of disapplied legislation is greater than in many other DCO's.<br>The Council requests that applicant explains the impact of the disapplication of statutory provisions, including the analysis which justifies this. In our opinion significant additional justification is required to explain the rationale for such a wide approach.<br>Despite this we don't disagree with the fact that primarily the DCO should take precedence, the Council's position is that we need to understand the impact better so we can assess whether any specific mitigation is required.<br>The Council is concerned about the disapplication of parts of the Wildlife and Countryside Act 1981. The uncertainty in the application (for example with the significant flexibility of order limits) means that it is going difficult to fully assess the potential impact on sites of special scientific interest. The requirements of the Wildlife and Countryside Act 1981 should therefore apply to avoid harm being caused to these sites. | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above. |

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| | Article 55 is headed the application of local legislation, but it is actually an article excluding the application of enactments, orders and byelaws where they are inconsistent with the order. | | |
| **14. Crown rights** | | | |
| Article 43 — | The word "take" should be removed from this article.<br>Consent under section 135 (1) and (2) should also be obtained from the Crown authority. | Thurrock Council have no additional comments to make on this section. | N/A |
| **15. Felling or lopping of trees and removal of hedgerows** | | | |
| **16. Trees subject to tree preservation orders** | | | |
| Articles 23 & 24 — | The guidance in section 22 of Advice Note 15 should be followed. If it hasn't been followed justification should be provided as to why this is the case.<br>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? | In relation to Article 23(1), to aid stakeholders in understanding the full impact of the scheme, a schedule and plan should be included identifying the relevant trees or shrubs.<br>In relation to Article 23(2), the industry best practice for tree work can be found in British Standard BS3998:2010. The DCO should reflect this.<br>At Article 23(4), in accordance with Advice Note 15 (paragraph 22 and good practice point 6) either a schedule and plan should be included identifying the relevant hedgerows should be included, or there should be | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above. |

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| | | a requirement for consent from the local authority.<br>In relation to Article 24(1), Advice Note 15 (paragraph 22.3) sets out that it is not appropriate to include the power to fell trees subject to TPO or trees in a conservation area on a precautionary basis. Proper identification of affected trees will enable the ExA to give full consideration to the particular characteristics they gave rise to their designation and desirability of continuing such protection.<br>The details in schedule 7 are noted, however the provision of a plan identifying the TPOs will help understand the impact of this provision. This should also include trees in a conservation area. | |
| **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.<br>In the South Humber Energy Bank Centre DCO BEIS Secretary of State removed an article which sought to apply the s.78 and s.79 TCPA 1990 appeal provisions to the discharge of requirements and replaced it with a | Thurrock Council are broadly happy with this provision.<br>The Council had previously suggested to the applicant that certain approvals should be subject to an appeal to the Secretary of State, combined with deemed refusal provisions.<br>The applicant has adopted the appeal provisions, but not the deemed refusal provisions. | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above. |

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| | 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".<br>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.<br>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.<br>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 | It is the view of Thurrock Council that the 10 business day period for responding appears unnecessarily short. While there is precedent for the 10 business days (see A14 Cambridge to Huntington), we suggest a minimum of 20 days considering the scale of the scheme.<br>The Council suggest that the Control of Pollution provisions use their own statutory appeal process —this is something that the applicant needs to explain this further. The reference to the need for 'certainty and expeditious resolution' is not in our opinion sufficient. In Thurrock Council's opinion changing the appeal method makes it less rather than more certain. | |

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| | 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 explain why it is necessary for the provisions in the DCO to replace the existing appeal procedures under the Control of Pollution Act and explain any discrepancies between the procedures set out in the DCO and those that would normally apply. A direct comparison between the two may be helpful. | | |
| **18. Benefit of the Order** | | | |
| Article 7 — | Where this article is drafted so as to allow any transfer of benefit by the applicant (undertaker) to any other named person or category of person without the need for the Secretary of State's consent, then the applicant should provide full justification as to why a transfer to such person is appropriate. Where the purpose of the provision is to enable such person(s) to undertake specific works authorised by the DCO the transfer of benefit should be restricted to those works. If the provision seeks to permit transfer of compulsory acquisition powers the applicant should provide evidence to | The Council is concerned that proper due diligence to support the inclusion of those bodies listed in article 8(5) has not been carried out. | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above. |

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| | satisfy the Secretary of State that such person has sufficient funds to meet the compensation costs of the acquisition.<br>See 23 below in relation to references to arbitration in this article. | | |
| **19. Discharge of Water** | | | |
| Article 19 — | The applicant should be aware of and mindful of section 146 of the Planning Act 2008. | The Council's concern is about those who do not have an interest in land being used in connection with the Project, who are nevertheless being adversely affected impacted. For example with discharges into watercourses, which adversely impacts flooding some distance from the Project. It is our understanding that this situation compensation wouldn't be payable on the DCO as currently drafted (despite comment from the applicant that compensation provisions were adequate — a comment which has yet to be tested). Accordingly, we suggest that specific compensation provisions are provided.<br>In Article 19(8), it is not appropriate to have deemed consent provisions. Please see comments in Thurrock council's LIR. | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above. |
| **20. Temporary Possession** | | | |

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| Articles 35 & 36 — | Temporary possession is not itself compulsory acquisition.<br>Articles giving temporary possession powers will be considered carefully to check whether or not they allow temporary possession of any land within the Order limits, regardless of whether or not it is listed in any Schedule to the DCO which details specific plots over which temporary possession may be taken for specific purposes listed in that Schedule. If they do, then the applicant should justify why those wider powers (which also allow temporary possession of land not listed in that Schedule) are necessary and appropriate and explain what steps they have taken to alert all landowners, occupiers, etc. within the Order limits to this possibility.<br>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 | The Council agrees with the comments of the ExA.<br>In relation to Article 35(1), see points on time limits at Article 27. 8 years is an unacceptable period of time to create uncertainty over such a large area of land.<br>Further justification should be provided in relation to the power at 35(a)(ii) to temporarily possess Order Land that isn't specifically set out in Schedule 11. Consideration to be given to:<br>• limiting the land to which this provision applies<br>• limiting the categories of work to which this provision will apply.<br>Notification — General:<br>The Council considers that owners should be made aware at the outset if their land may be subject to temporary acquisition; when this might occur; how many times (the extent to which an AA can take entry, pull out and re-enter is the subject of some debate — but we are sure there is a precedent for it), for how long; and what will be returned at the end of that period (i.e. demolition of buildings etc.).<br>The applicant has indicated that it would not wish to use this approach on the basis that "There is a risk that, | This duplicates Annex 1. The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above. |

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| | any separate power under the DCO to compulsorily acquire it.<br>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:<br>• 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?<br>• 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?<br>• Powers of temporary possession are sometimes said to be justified because they are in the interests of landowners, whose land would | by setting estimated timescales, the applicant will create expectations that cannot subsequently be met and may even be required to serve notice of temporary possession, which would incur further delay, cost and frustration for landowners."<br>The Council considers the balance here is in favour of providing as much information as possible. This allows for owners to prepare and to better mitigate any losses. We therefore suggest that the Explanatory Memorandum makes a commitment to: (a) outlining estimated timescales as accurately as possible to landowners when notices are given; and (b) keeping them updated as to evolving timescales.<br>The same principal points set out at Article 35 below, apply to maintenance period at Article 36.<br>At Article 35(2), the Council do not consider the 28 day notice period sufficient, given that possession can potentially be for a significant period.<br>The Council notes that the recent Lake Loathing (Lowestoft) Third Crossing Order 2020 includes a three-month notice period. Therefore, it not accepted that the Council are holding the dDCO to a higher standard than | |

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| | 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?<br>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"? | other DCOs or that a 3 month period is inconsistent with a desire to ensure NSIPs are expeditiously delivered — as has been suggested by the applicant.<br>Instead, this simply requires an appropriate level of planning and co-ordination to ensure that notices are served on time to allow this. It is not for the Council to evidence why a 3 month period is justified, but instead for the applicant to justify why it cannot in this case provide a longer period than 28 days.<br>Further, this would also appear likely to increase the likelihood of increased compensation - where a land owner has increased notice, there will clearly be cases where this gives them a better opportunity to mitigate any losses.<br>At Article 35(3), Council expects principle that safety issues may negate the requirement for a notice period to be served.<br>The Council suggests further wording be provided in either the DCO or the EM to explain what these safety concerns might be, to ensure that the definition is not to broadly interpreted.<br>In relation to Articles 35(5),(7) and (8), the applicant is required at 35(5) to | |

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| | | restore the land to the reasonable satisfaction of the owner. However, the wording at 35(8) does not stop the applicant giving up possession of the land.<br>The Council considers that the applicant should be required to comply with the requirement prior to giving up temporary possession of the land.<br>In relation to Article 35(11), The Council will be carrying out a review of the extent of the land included within Schedule 10 and may have further comments accordingly.<br>Article 35(13) allows multiple temporary possessions. The Council has reservations about this provision.<br>It recognises that, in some cases, two shorter entries may be better thana prolonged stay. But the applicant should provide further justification for the inclusion of this power.<br>If the power remains, all the points set out in this section are more poignant — i.e. notice periods, extent of land which the provision covers etc.<br>In relation to Article 36(1), the Council does not take issue with the principle of this provision, but the Council is not satisfied that the applicant has taken all steps reasonably possible to reduce the area of land. | |

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| | | The Council considers that the area covered by this power can be reduced. This would remove the uncertainty for those landowners. Wherever the applicant can reasonably rule out a need for maintenance on an area of land. that area land should be excluded from this provision.<br>At Article 36(3), the Notice period is considered insufficient. See comments at Article 35(2).<br>For Article 36(8). please see comments at 18(3) which apply equally to this provision.<br>In relation to Article 36(11), the Council will be carrying out a review of the extent of the proposed Order Land and may have further comments accordingly.<br>In respect of Article 36(13), see actions at Article 27, which are in addition to the maintenance period.<br>Further justification to be provided:<br>As per actions at 36(1). power to be limited to specific areas.<br>Necessity for 5 year period (as opposed to any permanent right of maintenance) to be justified. This should include assessment of whether areas of land can have a lower time limit. | |

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| | | Rights of land owner during the maintenance period to carry out activity on the land to be clarified. | |
| **21. Arbitration** | | | |
| Article 64 | Whilst arbitration provisions have been a dynamic field of practice in dDCO drafting, recent decisions suggest that it is unlikely that a consenting Secretary of State will allow the arbitration provision wording to apply arbitration to decisions s/he, or, if relevant the Marine Management Organisation ('MMO') may have to make on future consents or approvals within their remit.<br>By way of example:<br>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:<br>*Any matter for which the consent or approval of the Secretary of State or the Marine Management Organisation is required under any* | The Council agrees with the comments made by the ExA. It is for this reason that the Councils consenting provisions are subject to appeal to SoS rather than arbitration. This is because decisions which are normally required by Parliament to be made by a public body, should not be given to a private arbitrator. | The amendment referenced was made at Deadline 1. On the discharging authority, the Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above. |

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| | *provision of this Order shall not be subject to arbitration.*<br>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 DC0s. The Hornsea ExA recommendation report at 20.5.9 details the reasons for removal from the transfer of benefit article. and at 20.5.17 — 20.5.24 regarding removal from the DMLs. The Thanet Extension, East Anglia ONE North and East Anglia TWO Examinations addressed similar considerations. Whilst these are all energy cases, the same point appears to apply, that an arbitration provisions should not apply to the exercise of decision-making powers by a duly constituted and authorised public authority or Minister of the Crown.<br>It should also be noted that the Secretary of State removed the following from the arbitration clause in both DCOs:<br>*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* | | |

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| | *Resolution for appointment of an arbitrator.* | | |
| **22. Defence to proceedings in respect of statutory nuisance** | | | |
| Article 58 — | Are the controls on noise elsewhere in the DCO sufficient to justify the defence being provided by this article to statutory nuisance claims relating to noise?<br>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. | This article sets out the scope of the defence to proceedings in respect of statutory nuisance. It remains the Council's position that the purpose of this section is only to provide the statutory defence to nuisance where it is demonstrated that the nuisance is likely to be caused and it is not practicable to mitigate against it. In those situations the greater good of undertaking the project justifies the nuisance being caused. However, it is not appropriate to have a blanket defence as this discourages appropriate steps to reduce nuisance. It is also contrary to precedent from other highways DCOs. This is a long-term project and the impacts on local residents need to be carefully considered.<br>If the applicant states that it is required, due to the scale of the project, the applicant needs to demonstrate why is it required. | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above. |
| **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 | This is a question for the MMO. | N/A. |

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| | Marine Management Organisation (`MMO') decisions on discharge of conditions in a deemed marine licence.<br>By way of example:<br>The Secretary of State for BEIS removed drafting in the Norfolk Vanguard Offshore Windfarm DCO and the Hornsea Three Offshore Wind Farm DMLs creating a bespoke appeal procedure against MMO decisions on discharge of conditions. The ExA recommendation report for Hornsea Three provides reasons at 20.5.25 — 20.5.29. | | |
| **24. Powers in relation to relevant navigation and watercourses** | | | |
| Article 18 | This article permits the undertaker to, among other things, remove or relocate any moorings so far as it may be reasonably necessary for the purposes of carrying out and maintaining the authorised development, regardless of any interference with any private rights. It appears that this could permit the relocation of a houseboat? This could represent interference with HRA rights with no apparent mechanism for the person affected to challenge the applicant's decision that the interference is reasonably | The Council is concerned that even is loss is to be compensated, this might not be provided in a timely manner and this could negatively impact the those affected. The Council suggests that the establishment of a separate compensation scheme would be more appropriate. | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above. |

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| | necessary, to the extent that the undertaker considers it to be necessary or reasonably convenient. Notwithstanding precedent cited in the EM, consideration needs to be given to the acceptability of this. | | |
| **25. Suspension of road user charging** | | | |
| Article 46 | Article 46(1) provides that the SoS may suspend the operation of any road user charge imposed under article 45 if they consider it necessary to do so in the event of an emergency... However, 46(7) defines "emergency" as any circumstance which the undertaker considers is likely to cause danger... Should 46(7) say SoS instead of undertaker? Or should 46(1) refer to the undertaker instead of the SoS? | Thurrock Council agrees with the ExA's proposed amendment. | This amendment was made at Deadline 1. |
| 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 | The Council is concerned about the concept of preliminary works. It appears to have been included so as to satisfy the requirement to 'begin' rather than 'commence' the DCO within 5 years (requirement 2). The purpose of this appears to be to preserve the DCO with minimal works. This provides greater uncertainty, as if consented, the longer it takes the applicant to develop the scheme, the greater the time the uncertainty | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above. |

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| | | created by the order will impact residents.<br>In addition we have not been consulted on this document (ES Appendix 2.2, Annex C). In our opinion the proposed preliminary works could have quite significant environmental effects (they involve vegetation clearing). If they were part of the EMP (Second Iteration) we would have to be consulted, so we need to make sure we are happy with them. | |
| 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. | There is uncertainty the in this requirement due to the SoS be able to approve amendments if they don't give rise to materially new or materially different environmental effects in comparison with those reported in the environmental statement. This means that the design could change, and not take into account non-environmental effects, such as new land ownership. It could lead to changes in assumed construction and methodologies that were used to assess impacts in the ES that make such assessments invalid. It could also include adverse effects on businesses. | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184] as well as the Applicant's response to Annex 1 of Appendix I provided above. |
| Requirements 4, 5, 10,11 | The phrase "substantially in accordance with" is uncertain and imprecise. | Thurrock Council does not object to the use of the phase "substantially in accordance with". Alternatively, it could be worded to 'reflect' a particular | Agreed. |

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| | | outline plan, or be 'in accordance' with a strategy document. as has been done in other DCOs (such as the A14 Cambridge to Huntington). | |
| 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? | In Thurrock Council's opinion this is sufficiently clear. | |
| Requirement 9 | Is the phrase "reflecting the relevant mitigation measures" sufficiently certain? | Whilst the Council does not have any specific objections, it could be altered so that documents are 'in accordance with', or 'incorporates the relevant mitigation measures in document....'. | The Applicant's position is set out in its responses to Annex A of the agenda for Issue Specific Hearing 2 [ISH2 Discretionary Submission Annex A Responses] and [REP1-184]. |
| 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.<br>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 | Thurrock Council have agreed the location and broad design of the traveller's site. This is covered in Design Principles, a secured Indicative Plan and the Requirement 13. | Agreed. |

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| | 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.<br>Should there also be a requirement to replace like for like the facilities and number of pitches on the existing site?<br>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.<br>Should there be a further provision in the DCO granting a specific planning permission for use of works number 7R as a traveller site to ensure that it will remain as a traveller site in perpetuity and to ensure that it is controlled by the appropriate conditions. Or if this is not permissible (see comments above) then should there be a requirement to submit a planning permission application to the LPA? | | |
| Requirement 15 Thurrock Flexible Generation Plant | It is not clear why this work is only necessary if the Thurrock Flexible Generation Plant Development Consent Order 2022 is commenced. | The Council is unclear why this is only necessary if the Flexible Generation Plant Development Consent Order 2022 is commenced. Further explain is | These matters are addressed in the Applicant's response to Annex 1 of Appendix I. Please see above. |

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| | 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. | needed to that the Council can fully assess the impacts. | |
| 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?<br>Is it clear that the Secretary of State is content with the extent of the discharging powers provided to them by the Order?<br>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?<br>Is there any argument that persons other than the Secretary of State (including local and other public | This highlights two key areas of concern for the Council; deemed consent and the relevant discharging authority.<br><u>Deemed consent</u><br>Deemed consent is found in:<br>A12- Temporary closure. alteration. diversion and restriction of use of streets<br>A17- traffic regulation local roads<br>A19 - discharge of water (not the council)<br>A21- authority to survey and investigate the land<br>Requirement 13 — travellers site<br>The Council considers that deemed consent in this situation would not be | This is a copy and paste f matters raised in Annex 1. These matters are addressed in the Applicant's response to Annex 1 of Appendix I. Please see above. |

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| | authorities) should be the discharging authorities for any particular requirements and if so which ones? | in the public interest, despite numerous highways DCOs containing these provisions. The Council understands the need to ensure there isn't any unnecessary delay. However inflexible deemed consent provisions will result in unnecessary delay.<br>In the Council's opinion, the public interest and the interests of the applicant would be better served if there was the ability for the parties to agree a mutually agreed extension of time (which we would be prepared to cap at a maximum of 3 months). This would avoid unnecessary appeals and also avoid delay by having to refuse applications that could have been approved if a short extension could have been agreed.<br>The Council note the applicant's position that there is no need for this, as the Council can simply refuse consent and the applicant can then submit a further application when ready. However in our opinion this would be more less efficient.<br>The provisions were deemed refusal rather than deemed consent. This will continue to incentivise the Council to work within the specified timeframes, but avoid the risk of decisions being deemed as having consent when they | |

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| | | have not been considered by either the Secretary of State or the Council.<br><br><u>Discharging Authority and Local Authority Consultation</u><br><br>The applicant is strongly of the view that the DCO requirements (currently set out in Schedule 2 of the draft DCO) should largely be discharged by the Secretary of State. It is the Council's position that Requirements 3 (detailed design), 4 (Construction and Handover EMPs), 5 (landscaping and ecology), 6 — (contaminated land), 8 (surface and foul water drainage at a local level (with the Environment Agency responsible for those elements not at a local level), 9-historic environment, 10 (traffic management), 11 (construction travel plans), 12 (fencing), 14 traffic monitoring, 16 — carbon and energy management plan and 17 (amendments to approved details) should be discharged by the relevant local planning authority, with any appeal going to the Secretary of State. Whilst it is not uncommon for transport DCOs to have the Secretary of State as the discharging authority, it is by no means universal (there are at least four other transport DCOs where this is not the case). In addition, the Council are not aware of any other | |

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| | | Secretary of State (for example DHLUC, DEFRA or BEIS) being the discharging authority in connection with non-transport DCOs. In relation to this scheme, the Council is the local highways authority for 70% of the route. Accordingly the applicant's concerns regarding co-ordinated discharge of functions is not well founded in relation to this LTC scheme.<br><br>In the Council's view, locally elected local authorities, who are experienced in discharging similar planning conditions, should be the discharging authority. It is precisely because of the complexity of the project that a detailed understanding of the locality, including the local highway network, is required. It is accepted that changes to local highway sections will need to consider the impact of those changes on trunk road sections (and vice versa), and accordingly it is suggested that the relevant planning authority will discharge requirements in consultation with relevant parties, such as the applicant and other key stakeholders. The current proposal, of the Secretary of State being the discharging authority, after consulting the Council. is likely to lead to unnecessary expenditure as the relevant local | |

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| | | planning authority will have to commit significant resources to explaining to the Secretary of State the impact of proposals.<br>A number of the requirements (as currently drafted) refer to consultation with the relevant planning authority. There are no details in the draft DCO as to how long this consultation will be or how it will take place. However, it is understood from the applicant verbally that the consultation period will be four weeks, with the ability to extend to 6 weeks. Accordingly, the Council contends that the setting of 8-week discharge period for the Secretary of State and then only allowing only 4-6 weeks for consultation with local planning authorities is not appropriate or fair, as it does not take into account the complexities of the individual matters being discharged. | |

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