

**PLANNING ACT 2008**

**THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE)  
RULES 2010**

**APPLICATION BY NATIONAL HIGHWAYS FOR A DEVELOPMENT  
CONSENT ORDER IN RESPECT OF THE A122 (LOWER THAMES  
CROSSING)**

**RESPONSE TO APPLICANT'S DL 9 SUBMISSIONS**

**ON BEHALF OF**



**HIGH SPEED 1 LIMITED**

**Deadline 10 – 20 December 2023**

## Introduction

1. This is HS1 Limited's response to the Applicant's Hearing Actions Document ("HAD"), which it submitted at Deadline 9 [REP9-279]. In the HAD, the Applicant refers to HS1 Limited's proposed restriction on the exercise of compulsory powers under the DCO as the "Consent Provision". That terminology is also used in these submissions.

## Response to Applicant's submissions on Consent Provision

2. The Applicant's submissions on the Consent Provision are at paragraphs 3.2.3 – 3.2.16 of the HAD.
3. The Applicant's submissions misunderstand the nature of HS1 Limited's objection in relation to this issue. The Applicant argues that the protective provisions contain sufficient protection for HS1 Limited because HS1 Limited "*already enjoys adequate control over the construction of the authorised development and it is not clear why a right of consent over compulsory acquisition powers is considered to be necessary to achieve this*"<sup>1</sup>. This, however, misses the point. HS1 Limited does not seek the Consent Provision in order to control the design and construction of the Project. It seeks to control the exercise of powers to acquire and take temporary possession of its operational land. Such control is necessary to prevent serious detriment to its undertaking and, without it, serious detriment would arise.
4. The Applicant argues that it "*will only be acquiring interests in land that reflect the detailed design of the authorised development as constructed, which in turn HS1 can already exercise a right of consent over under the [protective] provisions*"<sup>2</sup>. However, without the Consent Provision the DCO will contain no controls on the Applicant's powers to acquire or temporarily possess HS1 Limited's land, so it would not be restricted to acquiring only such land. In other words, there is no legal linkage between the design approval and the acquisition power – the Order does not require the acquisition to be congruent with the working area, so a control is required to ensure that the approach of the Applicant is proportionate and – critically – that its undertaking is protected. If the Applicant wishes only to acquire land that reflects the detailed design of the authorised development, in relation to which HS1 Limited has a right of consent, it is difficult to see why it objects to a right of consent in relation to the acquisition of that land also being included.
5. The Applicant has presented no evidence, nor any valid argument to demonstrate, that serious detriment to HS1 Limited's undertaking will not arise absent the Consent Provision. Its only engagement with this point is an assertion that "*[a]s Protective Provisions are already provided in the Order there can be no serious detriment to HS1's undertaking*". This is plainly wrong. By this logic *any* form of protective provisions would be sufficient to prevent serious detriment from arising, whether or not they provided adequate (or, indeed, any) protection to the relevant statutory undertaker. Clearly, protective provisions must be in a suitable form and provide sufficient protection. Without the Consent Provision, HS1 Limited submits that the Examining Authority cannot conclude that serious detriment to its undertaking will not arise.
6. Further, as noted in HS1 Limited's submission at Deadline 8, such provisions are commonly included in DCOs for the benefit of Network Rail. The Applicant appears to accept this<sup>3</sup>. They are thus a well-precedented solution to this issue and have been held on multiple occasions since the Planning Act 2008 came into force to strike an appropriate balance between the protection of Network Rail as a statutory undertaker and the delivery of nationally significant infrastructure. HS1 Limited has the equivalent role in relation to the High Speed 1 line as Network Rail does in relation to most of the rest of the rail network in Britain, save that it is currently the only operator and infrastructure manager of a high speed rail network, which entails that it must apply greater levels of care in managing its estate. Therefore, at the very least, HS1 Limited submits that it should receive the same protection as Network Rail is routinely given.

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<sup>1</sup> HAD paragraph 3.2.7

<sup>2</sup> *ibid*

<sup>3</sup> See HAD paragraph 3.2.9, first sentence: "The Applicant is cognisant that there are many DCOs which include a consent provision in respect of land powers"

7. HS1 Limited acknowledges that there are some examples of DCOs that do not contain a Consent Provision in favour of Network Rail, but it considers that these are very much an exception to the general rule. Based on publicly available information, it appears to HS1 Limited that in the two examples the Applicant refers to<sup>4</sup> there was relatively limited interaction with the rail network. HS1 Limited understands that, in the case of the Hinckley Point C Connection Project DCO (a decision from 2016), the relevant works involved the oversailing of the railway by an electricity cable, and in the (more recent) case of Hornsea Three the use of horizontal directional drilling to pass underneath the railway line. These cases appear to be quite different to the interaction between the HS1 network and the Project. As acknowledged by the Applicant, the Project “*will interface with the operational railway of HS1 in a number of locations*”<sup>5</sup>. Such significant interaction means that stronger protection is both appropriate and justified. As HS1 Limited noted in its submissions at Deadline 8, two recent projects promoted by the Applicant, the A1 Birtley to Coalhouse Improvement Scheme (“**Birtley to Coalhouse**”) and the A428 Black Cat to Caxton Gibbet Road Improvement Scheme (“**Black Cat to Caxton Gibbett**”), contain a Consent Provision in favour of Network Rail. In each case there is an interface with the East Coast Main Line, which is a national asset of particular importance like the High Speed 1 network. However, the Applicant has not explained why it considers that a Consent Provision was appropriate in those cases but is not appropriate here.
8. The Applicant notes that “*HS1 has not objected in principle to the Proposed Development*”. While this is correct, HS1 Limited has been consistently clear that it objects to the Project unless its interests are protected by suitable protective provisions. As the protective provisions offered by the Applicant are insufficient to protect its undertaking, HS1 Limited maintains its objection. Whether the objection is to the Project “in principle” is irrelevant to the point in issue. It is in fact rare for statutory undertakers to raise an “in principle” objection to infrastructure projects. HS1 Limited’s responsibility is to protect its undertaking. This is compatible “in principle” with the project, provided that the DCO includes protective provisions in the form HS1 Limited is seeking. Put another way, without the inclusion of the reasonable and precedented protection for HS1, it would have an in-principle objection as its land and undertaking would not be properly protected.
9. Finally, the Applicant states that “*[t]he rail Protective Provisions in the Order apply to both HS1 and Network Rail. Both rail parties are being treated exactly the same and therefore HS1’s assertion that they are being treated differently is wrong.*”<sup>6</sup> Here, the Applicant again misunderstands HS1 Limited’s point. HS1 Limited is contrasting the protective provisions offered by the Applicant in relation to this Project with those granted to Network Rail in relation to *other* projects promoted by the Applicant (and others), including Birtley to Coalhouse and Black Cat to Caxton Gibbett. HS1 Limited also notes that, in this case, Network Rail has also objected to the lack of a Consent Provision in the rail protective provisions<sup>7</sup>.
10. In summary, HS1 Limited submits that its proposed drafting is supported by precedent and represents an appropriate balance between the protection necessary for the High Speed 1 network and the powers the Applicant needs to deliver the Project.
11. Should the Examining Authority and/or Secretary of State disagree, however, HS1 Limited submits that the appropriate course of action would not be to delete the Consent Provision entirely, but rather to temper the consent provision by introducing a requirement for reasonableness in relation to HS1 Limited’s consent, as in the underlined text below:

*4.1 The undertaker shall not exercise the powers conferred by articles 21 (Authority to survey and investigate the land), 21 (Compulsory acquisition of land), 25 (Compulsory acquisition of rights), 28 (Power to override interests, rights and restrictions), 33 (Acquisition of subsoil or airspace only), 35 (Temporary use of land for carrying out the authorised development), 34 (Temporary use of land for maintaining authorised development) and 37 (Statutory undertakers) of the Order or the powers*

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<sup>4</sup> See HAD paragraphs 3.2.9 and 3.2.10

<sup>5</sup> HAD paragraph 3.2.3

<sup>6</sup> HAD paragraph 3.2.15

<sup>7</sup> See Statement of Common Ground between the Applicant and Network Rail [APP-111]

conferred by section 11(3) of the Compulsory Purchase Act 1965 in respect of any HS1 Property unless the exercise of such powers is with the consent of the Company.

4.2 The undertaker shall not in the exercise of the powers conferred by the Order prevent pedestrian or vehicular access to any HS1 Property, unless preventing such access is with the consent of the Company.

4.3 The undertaker shall not under the powers of the Order acquire or use or acquire new rights over any HS1 Property except with the consent of the Company.

4.4 Where the Company is asked to give its consent pursuant to this paragraph, such consent shall not be unreasonably withheld but may be given subject to reasonable conditions.

12. If this provision were included, in the unlikely event that HS1 Limited were to unreasonably withhold its consent, the matter could be determined using the dispute resolution process under Article 64 of the draft DCO. Where HS1 Limited had a reasonable objection to the exercise of compulsory powers, it is difficult to see how such exercise could be justified in any event. This is a complete answer to the Applicant's concerns in paragraphs 3.2.8 and 3.2.15 of the HAD.

### **Response to Applicant's submissions on form of Indemnity**

13. The Applicant's submissions on the form of the indemnity are at paragraphs 3.2.17 – 3.2.18 of the HAD.
14. The issue between the parties may be summarised as follows:

- a. The parties are agreed that the protective provisions should contain the following indemnity:

14.1 *The undertaker must pay to the Company all reasonable and properly incurred costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule (but subject always to the remaining provisions of this paragraph and to article 67 (no double recovery)) which may be occasioned to or reasonably incurred by the Company:*

*(a) by reason of the construction or maintenance of a specified work or a protective work or the failure of it by the undertaker or a person for whom it is responsible; or*

*(b) by reason of any act or omission of the undertaker or of any person in the undertaker's employ or of the undertaker's contractors whilst engaged upon a specified work or a protective work,*

*and the undertaker must indemnify and keep indemnified the Company from and against each and all losses, claims, demands, actions, proceedings, damages, matters, costs, expenses and liabilities whatsoever arising in any way from, in connection with or relating to a specified work or a protective work or any such failure, act or omission; save where the Company or its contractors have been negligent and the fact that any act or thing may have been done by the Company on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the engineer's supervision will not (provided it is done without negligence on the part of the Company or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this paragraph.*

14.2 *The indemnity in paragraph 14.1 shall include but shall not be limited to any losses, claims, demands, actions, proceedings, damages, matters, costs, expenses and liabilities which arise out of the works in respect of:*

*(a) any disruption caused to High Speed 1 during the period of the authorised development;*

*(b) any claims for personal injury or death to/concerning employees or third parties;*

*(c) any loss, damage or environmental damage (to include pollution, contamination, the presence of hazardous substances or waste, and nuisance) to High Speed 1 and/or HS1*

*Property whether temporary or permanent or to any adjoining or neighbouring property (whether real or personal) belonging to, used by or in the possession of HS1 and/or any third parties or for which HS1 or any such third parties are responsible or liable;*

*(d) any environmental damage;*

*(e) any financial loss claims brought against HS1, any HS1 Group Company, any train or freight operating company, or any infrastructure manager, whether or not loss or damage to material property is suffered or incurred;*

*(f) the carrying out of the specified works, or the failure of any such works*

*(g) any act, omission or neglect on the part of the undertaker, or any person involved in the carrying out of a specified work.*

*14.3 During the period of the authorised development, the undertaker shall procure the undertaker's contractor is insured against the liabilities referred to herein for not less than £155,000,000 (one hundred and fifty five million pounds) for any one loss and shall provide details of such insurance upon request by the Company.*

*14.4 The Company must:*

*(a) give the undertaker written notice of any such claims or demands as soon as reasonably possible after the Company became aware of any such claims or demands;*

*(b) not admit liability or make any offer to settle or settle or compromise any such claim or demand without the prior consent of the undertaker(which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand);*

*(c) take all reasonable steps to mitigate any liabilities relating to such claims or demands; and*

*(d) keep the undertaker informed in relation to the progress of any such claims and demands and pay due regard to the undertaker's reasonable representations in relation to them.*

b. The Applicant argues that the following restriction should also be included:

*14.5 In no circumstances is the undertaker liable to the Company under paragraph 14.1 for any indirect or consequential loss or loss of profits, except that the sums payable by the undertaker under that paragraph include a sum equivalent to the relevant costs in circumstances where:*

*(a) the Company is liable to make payment of the relevant costs pursuant to the terms of an agreement between the Company and a train operator; and*

*(b) the existence of that agreement and the extent of the Company's liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in writing to the undertaker, but not otherwise.*

*14.6 Subject to the terms of any agreement between the Company and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, the Company must promptly pay to each train operator the amount of any sums which the Company receives under paragraph 14.1 which relates to the relevant costs of that train operator.*

*14.7 The obligation under paragraph 14.5 to pay the Company the relevant costs is, in the event of default, enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator under paragraph 14.6*

HS1 Limited opposes the inclusion of the restriction.

15. The DCOs in a number of other projects that the Applicant has itself promoted include the indemnity sought by HS1 Limited, including Birtley to Coalhouse and Black Cat to Caxton Gibbett. Indeed, this is Network Rail's standard requirement and is included in almost all confirmed DCOs.
16. The Applicant has offered no justification at all as to why the circumstances of this project make different provision appropriate. HS1 Limited submits that this is because there is no justification for watering down the indemnity in this way. As noted in its Deadline 8 submissions, HS1 Limited considers that the starting point for consideration of this issue must be that any losses it suffers would not have occurred but for the Applicant's project and that the Applicant should, therefore, indemnify those losses.
17. The Applicant acknowledges that the Project "*will interface with the operational railway of HS1 in a number of locations*"<sup>8</sup>. The High Speed 1 network is the UK's only high speed railway and is nationally significant infrastructure in its own right. It provides international rail services between the UK and continental Europe and is reputationally important to the UK. Losses caused by the Applicant's works could be extensive and there exists a greater risk of such losses actually occurring due to the extensive works required in proximity to a railway line in constant use by high speed trains. HS1 Limited will obtain no benefit from the Applicant's Project. The Applicant has offered no explanation as to why it refuses to indemnify in full losses that it is responsible for, other than to state that it "*cannot agree*" to offer such an indemnity and that is "*at [its] discretion to seek to limit the scope of the indemnity*". No justification is given for why the specific provisions proposed by the Applicant are appropriate in this case.
18. The Applicant states that "*[e]xpress provision has been included in limbs 14 (a) and (b) to enable HS1 to claim for loss of profits*". HS1 Limited assumes that this is in fact a reference to the following wording, which appears at 14.5(a) and (b) of the Applicant's proposed drafting:
- ... the sums payable by the undertaker under that paragraph include a sum equivalent to the relevant costs in circumstances where:*
- (a) the Company is liable to make payment of the relevant costs pursuant to the terms of an agreement between the Company and a train operator; and*
- (b) the existence of that agreement and the extent of the Company's liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in writing to the undertaker, but not otherwise.*
19. As can be seen, this is not "*[e]xpress provision ... to enable HS1 to claim for loss of profits*". It is a means by which HS1 can reclaim sums that it would itself have to pay to train operators and refers to "costs". There is no reference at all to a loss of profits claim by HS1 Limited.
20. The Applicant also states that "*[i]t is not industry standard in DCOs for third parties to be able to claim for indirect and consequential loss and loss of profits*". It is entirely unclear what the Applicant means by "industry standard" in this context. The "industry standard" for the protection of railway undertakers is the indemnity normally provided to Network Rail in DCO protective provisions, which is in the form sought by HS1 Limited here. That wording is also contained in Network Rail's standard asset protection agreements, which are regulated by the Office of Rail and Road and are subject to statutory consultation. HS1 Limited submits that it should also receive this industry standard protection in the protective provisions for this Project.
21. The Applicant's inability to offer a properly reasoned explanation of its position demonstrates the weakness of its argument on this point. In fact, where very similar arguments were raised by the Applicant in the Birtley to Coalhouse examination, both the Examining Authority and the Secretary of State concluded that the restriction argued for by the Applicant here should not be included in the DCO<sup>9</sup>. It is surprising that the Applicant seeks to argue this point again here without offering any explanation as to why the circumstances of this case are different from those in Birtley to Coalhouse. The

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<sup>8</sup> HAD paragraph 3.2.3

<sup>9</sup> See the Examining Authority's Report of Findings and Conclusions and Recommendation to the Secretary of State for Transport at paragraphs 9.6.29 – 9.6.41, available here: [TR010031-001346-201021 ExA Report Final.pdf \(planninginspectorate.gov.uk\)](https://www.planninginspectorate.gov.uk/tr010031-001346-201021/ExA_Report_Final.pdf) and the Secretary of State for Transport's decision letter at paragraphs 81-85, available here: [TR010031 Secretary of State Decision Letter \(planninginspectorate.gov.uk\)](https://www.planninginspectorate.gov.uk/tr010031/Secretary_of_State_Decision_Letter)

circumstances of this case support HS1 Limited's position more strongly, as in Birtley to Coalhouse Network Rail was to obtain some benefit from the DCO (the replacement of Allerdene Bridge), whereas HS1 Limited will obtain no benefit from this Project. HS1 Limited therefore submits that the same conclusion should be reached in this case as in Birtley to Coalhouse, and the restriction should not be included.

### **Matters for determination**

22. Other than the matters addressed by HS1 Limited's submissions at Deadline 8 and in this document, and the Applicant's submissions in the HAD, HS1 Limited understands that protective provisions in the form annexed to these submissions are agreed. The matters for determination are, therefore, as follows:

- a. Whether to include the following wording (with or without the words in square brackets), as HS1 Limited argues, or exclude it, as the Applicant argues:

*4.1 The undertaker shall not exercise the powers conferred by articles 21 (Authority to survey and investigate the land), 21 (Compulsory acquisition of land), 25 (Compulsory acquisition of rights), 28 (Power to override interests, rights and restrictions), 33 (Acquisition of subsoil or airspace only), 35 (Temporary use of land for carrying out the authorised development), 34 (Temporary use of land for maintaining authorised development) and 37 (Statutory undertakers) of the Order or the powers conferred by section 11(3) of the Compulsory Purchase Act 1965 in respect of any HS1 Property unless the exercise of such powers is with the consent of the Company.*

*4.2 The undertaker shall not in the exercise of the powers conferred by the Order prevent pedestrian or vehicular access to any HS1 Property, unless preventing such access is with the consent of the Company.*

*4.3 The undertaker shall not under the powers of the Order acquire or use or acquire new rights over any HS1 Property except with the consent of the Company.*

*[4.4 Where the Company is asked to give its consent pursuant to this paragraph, such consent shall not be unreasonably withheld but may be given subject to reasonable conditions.]*

- b. Whether to include the following wording, as the Applicant argues, or exclude it, as HS1 Limited argues:

*14.5 In no circumstances is the undertaker liable to the Company under paragraph 14.1 for any indirect or consequential loss or loss of profits, except that the sums payable by the undertaker under that paragraph include a sum equivalent to the relevant costs in circumstances where:*

*(a) the Company is liable to make payment of the relevant costs pursuant to the terms of an agreement between the Company and a train operator; and*

*(b) the existence of that agreement and the extent of the Company's liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in writing to the undertaker, but not otherwise.*

*14.6 Subject to the terms of any agreement between the Company and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, the Company must promptly pay to each train operator the amount of any sums which the Company receives under paragraph 14.1 which relates to the relevant costs of that train operator.*

*14.7 The obligation under paragraph 14.5 to pay the Company the relevant costs is, in the event of default, enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator under paragraph 14.6*

## **Annex 1 – HS1 Limited Protective Provisions**



## SCHEDULE 14

Article 59

## PROTECTIVE PROVISIONS

## PART 4

## FOR THE PROTECTION OF RAILWAY INTERESTS

*Application*

- 1 The following provisions of this Part of this Schedule have effect, unless otherwise agreed in writing between the undertaker and the Company.

*Interpretation*

- 2 In this Part of this Schedule

**Business Day** means a day other than a Saturday or a Sunday on which banks are open generally for business in the City of London

**CDM Regulations** means the Construction (Design and Management) Regulations 2015

**Company** means HS1

**concession agreement** means the agreement between the Secretary of State for Transport and HS1 Limited for the design, construction, financing, operation, repair and maintenance of High Speed 1 as amended and restated on 5 July 2022 and as may be further amended, restated or supplemented from time to time

**construction** includes execution, placing, alteration, testing and commissioning (and, where relevant, the removal, alteration, re-carrying out after testing/commissioning or re-testing/commissioning) and reconstruction and **construct** and **constructed** have corresponding meanings

**contamination** means the presence of any substance at, in, on or under any given property, that is capable of causing harm to the environment

**emergency** means any fouling of the line, any plant and/or equipment failing and/or falling within the fence, anything touching the overheads, any breach of the security fence, or any activity which adversely affects the stability or safety of any earthwork or structure (including track, overheads and/or stanchions)

**engineer** means an engineer appointed by the Company for the purposes of this Order

**environment** means any one or more of:

- (a) air (including air within natural or manmade structures, above or below ground);
- (b) water (including water under or within land, or in drains or sewers, and surface, ground, coastal and inland waters);

(c) land (including surface land, sub-surface strata, land under water and natural and man-made structures); and

(d) living organisms (including humans) including the ecological systems of which they form part, and, in the case of man, his senses and his property

**High Speed 1** means the high speed rail link between St Pancras in the London Borough of Camden and the Channel Tunnel Portal at Castle Hill, Folkestone, Kent and the international stations at St Pancras, Stratford and Ebbsfleet and Ashford and all associated track, facilities and installations, including the Waterloo Connection and the maintenance depots at Temple Mills and Singlewell

**HS1** means High Speed One (HS1) Limited (company number 06045862, whose registered office is at 5th Floor, Kings Place, 90 York Way, London N1 9AG) and any HS1 Group Company which holds property for railway purposes

**HS1 Group Company** means any subsidiary or holding company of HS1 or of another subsidiary or holding company of HS1, as "**subsidiary**" and "**holding company**" are understood within section 1159, Companies Act 2006, but on the basis that the holding of not less than one quarter of voting rights shall be deemed to satisfy the condition in section 1159(1)(a)

**HS1 Property** means any land (whether freehold or leasehold), easement, property interest, railway, infrastructure, structure (or any part of any of the foregoing) including works, apparatus or equipment, leased, owned, held or used by HS1 for the purposes of High Speed 1 that may be affected by the authorised development

**network licence** means the network licence, as the same is amended from time to time, granted to HS1 by the Secretary of State in exercise of powers under section 8 (licences) of the Railways Act 1993<sup>1</sup>

**plans** includes sections, designs, design data, software, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), staging proposals, programmes and details of the extent, timing and duration of any proposed occupation of HS1 Property

**protective works** means any works specified by the engineer under paragraph 0

**property agreement** means the Surplus Land Agreement to be entered into between the Company and the undertaker

**railway operational procedures** means procedures specified under any access agreement (as defined in the Railways Act 1993<sup>2</sup>) or station lease

**specified work** means so much of any of the authorised development as is, or is to be, situated upon, across, under, over or within 15 metres of, or may (or whose maintenance may) in any way adversely affect, HS1 Property

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<sup>1</sup> 1993 c.43

<sup>2</sup> 1993 c.43

## HS1

3.1 Where under this Part of this Schedule the Company is required to give its consent, agreement or approval in respect of any matter, that consent, agreement or approval is subject to the condition that the Company must comply with any relevant railway operational procedures, any obligations under statute and the concession agreement.

3.2 In so far as any specified work or the acquisition or use of HS1 Property or rights over HS1 Property is or may be subject to railway operational procedures, the Company must:

- (a) co-operate with the undertaker and use its reasonable endeavours to avoid delay and secure conformity as between any plans approved by the engineer and requirements emanating from those procedures; and
- (b) use its reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised development under this Order.

## 4

4.1 The undertaker shall not exercise the powers conferred by articles 21 (Authority to survey and investigate the land), 21 (Compulsory acquisition of land), 25 (Compulsory acquisition of rights), 28 (Power to override interests, rights and restrictions), 33 (Acquisition of subsoil or airspace only), 35 (Temporary use of land for carrying out the authorised development), 34 (Temporary use of land for maintaining authorised development) and 37 (Statutory undertakers) of the Order or the powers conferred by section 11(3) of the Compulsory Purchase Act 1965 in respect of any HS1 Property unless the exercise of such powers is with the consent of the Company.

4.2 The undertaker shall not in the exercise of the powers conferred by the Order prevent pedestrian or vehicular access to any HS1 Property, unless preventing such access is with the consent of the Company.

4.3 The undertaker shall not under the powers of the Order acquire or use or acquire new rights over any HS1 Property except with the consent of the Company.

5 Where the Company is asked to give its consent pursuant to this clause, such consent shall not be unreasonably withheld but may be given subject to reasonable conditions.

5.1 The undertaker must, before commencing construction of any specified work, supply to the Company proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration under article [64] (arbitration).

5.2 The approval of the engineer under paragraph 5.1 must not be unreasonably withheld, and if by the end of the period of 30 Business Days beginning with the date on which such plans have been supplied to the Company the engineer has not intimated disapproval of those plans and the grounds of disapproval the undertaker may serve upon the engineer written notice requiring the engineer to intimate approval or disapproval within a further period of 10 Business Days beginning with the date upon which the engineer receives written notice from the undertaker and if, by the expiry of the further 10 Business Days period specified in the written notice the engineer has not intimated approval or disapproval, the engineer is deemed to have refused the plans as submitted and the undertaker shall be entitled to refer the dispute for arbitration in accordance with the provisions of article 64 of this Order. Where the engineer notifies the undertaker that it withholds its approval under paragraph 5.2 and gives its reasons, the undertaker shall resubmit such plans amended to

address the engineer's reasons as soon as practicable and the provisions of this paragraph 5 shall apply to the revised plans.

- 5.3 The undertaker shall ensure compliance with any conditions imposed by the engineer if and when approving any given plans.
- 5.4 If the Company gives notice to the undertaker that it desires itself to construct any part of a specified work or protective work (including in either case some or all of the requisite design) which in the reasonable opinion of the engineer will or may affect the stability of HS1 Property or the safe operation of traffic on the railways of the Company then, if the undertaker desires such part of the specified work to be constructed and subject to paragraph [5.3], the Company must construct it (together with any adjoining part of the specified work which the undertaker reasonably requires to be constructed with that work with all reasonable dispatch on behalf of and to the reasonable satisfaction of the undertaker in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision (where appropriate and if given) of the undertaker.
- 5.5 When signifying approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in the engineer's reasonable opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of HS1 Property or the continuation of safe and efficient operation of the railways of the Company or the services of operators using the same (including any relocation de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes must be constructed by the Company, or by the undertaker, if the Company so desires, and such protective works must be carried out at the expense of the undertaker in either case without unnecessary delay and the undertaker must not commence the construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to the engineer's reasonable satisfaction.
- 5.6 Without prejudice to the provisions of paragraph 5.5, in a case of emergency the Company may elect to carry out itself any protective works or any alteration or addition (or other work) as may be specified under paragraph [9], in which case such work shall be carried out by the Company with all reasonable dispatch.
- 5.7 If, in any case, the carrying out of the specified works requires the diversion or other alteration of any road or the alteration, removal, replacement or protection of any apparatus belonging to third parties (including mains, sewers, pipes, drains and cables), the undertaker shall be responsible for:
- (a) obtaining all requisite consents and approvals for such works;
  - (b) ensuring such works do not significantly impact on any access or any use of any utilities by the Company; and
  - (c) meeting any and all costs, fees, charges and expenses associated with such works, including any compensation or other amounts payable to third parties.

## 6

- 6.1 Any specified work and any protective works to be constructed by virtue of paragraph 5.5 must, when commenced, be constructed:

- (a) without unnecessary delay in accordance with the plans approved or deemed to have been approved or settled under paragraph 5;
- (b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;
- (c) in such manner as to cause as little damage as is reasonably possible to HS1 Property; and
- (d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of the Company or the traffic on it and the use by passengers of HS1 Property

6.2 The undertaker shall forthwith halt the carrying out of any specified work or protective work or do anything reasonably required by the engineer (including the carrying out of emergency works) to ensure the safety, security, stability, operation or maintenance of High Speed 1. The engineer shall notify the undertaker of the action required to be taken by the undertaker in order to rectify the situation. The undertaker shall be entitled to recommence performance of the specified work or protective work provided that they are in accordance with such action as the engineer required the undertaker to take.

6.3 If any damage to HS1 Property or any such interference or obstruction is caused by the carrying out of, or in consequence of the construction of, a specified work by the undertaker or any person for whom the undertaker is responsible or a protective work carried out by the undertaker or any person for whom the undertaker is responsible, the undertaker must, regardless of any such approval, make good such damage and must pay to the Company all expenses properly and reasonably incurred by the Company and compensation for any direct loss which it may sustain by reason of any such damage, interference or obstruction.

6.4 If the carrying out of the specified works or the protective works or any act, omission, neglect or default on the part of the undertaker or any person for whom the undertaker is responsible, results in any contamination, or disturbs or causes to be disturbed any existing contamination in addition to any other rights:

- (a) the Company may give the undertaker a notice specifying the remedial action it reasonably requires and a reasonable period for the undertaker to do it; and
- (b) the undertaker shall undertake the remedial action within the stated period at its own costs and to the Company's reasonable satisfaction.

If the undertaker does not complete the remedial action within the stated period, the Company may do so and the undertaker shall pay the costs which the Company incurs in doing so plus 7% on account of overheads (on demand and as a debt) PROVIDED THAT any such delay could have been avoided by the undertaker acting reasonably.

6.5 Nothing in [this Part of] this Schedule imposes any liability on the undertaker with respect to any damage, costs, expenses or loss attributable to the negligence of the Company or its servants, contractors or agents, or any liability on the Company with respect of any damage, costs, expenses or loss attributable to the negligence of the undertaker or the undertaker's employees, contractors or agents.

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## 7.1 The undertaker must:

- (a) at all times afford reasonable facilities to the engineer for access to a specified work or protective work during its construction; and
- (b) supply the engineer with all such information as the engineer may reasonably require with regard to a specified work or protective work or the method of constructing it.

8 The Company must at all times afford reasonable facilities to the undertaker and the undertaker's agents for access to any works carried out by the Company under [this Part of] this Schedule during their construction and must supply the undertaker with such information as the undertaker may reasonably require with regard to such works or the method of constructing them.

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9.1 If any permanent or temporary alterations or additions to HS1 Property are reasonably necessary in consequence of the construction of a specified work or a protective work, or during a period of 12 months after the completion of that work in order to ensure the safety of HS1 Property or the continued safe operation of the railway of the Company, such alterations and additions may be carried out by the Company and if the Company gives to the undertaker reasonable notice of its intention to carry out such alterations or additions (and the notice must specify details of alterations and additions including the costs of carrying out, and in the case of any permanent alterations or additions, maintaining, working and, when necessary, renewing such alterations or additions), the undertaker must pay to the Company the reasonable cost of those alterations or additions including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be properly and reasonably incurred by the Company in maintaining, working and, when necessary, renewing any such alterations or additions provided the undertaker acting reasonably approves the costs contained in the notice provided under this paragraph prior to the works being carried out.

9.2 If during the construction of a specified work or a protective work by the undertaker, the Company gives notice to the undertaker that the Company desires itself to construct that part of the specified work or protective work which in the opinion of the engineer acting in good faith is endangering the stability of HS1 Property or the safe operation of traffic on the railways of the Company then, if the undertaker decides that part of the specified work or protective work is to be constructed, the Company must assume construction of that part of the specified work or protective work and the undertaker must, regardless of any such approval of a specified work or protective work under paragraph 4.5, pay to the Company all expenses properly and reasonably incurred by the Company and compensation for any direct loss which it may suffer by reason of the execution by the Company of that specified work or protective work provided that the undertaker is not liable under this clause for any injury, loss, damage, costs arising from the negligence of the Company or any person for whom it is responsible in respect of any specified or protective works under.

9.3 If the cost of maintaining, working or renewing railway property is reduced in consequence of any such alterations or additions a capitalised sum representing such saving is to be notified to the undertaker by the Company as soon as reasonably practicable and is to be set off against any sum payable by the undertaker to the Company under this paragraph.

9.4 The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 10 provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

- 9.5 Other than as expressly set out in this Schedule, the Company shall have no liability to the undertaker arising out of or in consequence of any works to which this Schedule applies save where the Company or its contractors have been negligent. This applies whatever the manner in which liability might otherwise have arisen (whether for breach of contract, in tort, for breach of statutory duty or otherwise) and whether such liability would otherwise have arisen in respect of losses, damages, costs, liabilities, injuries, actions, claims, proceedings or matters suffered or incurred by or brought against the undertaker (including, without limitation, in respect of any works carried out pursuant to paragraphs 5.5, 5.7 or 9.2 of this Schedule) as a consequence of any act or omission of the Company or otherwise.
- 9.6 Where the Company has liability to the undertaker under this Schedule, the Company shall use best endeavours to pursue its appointed consultant(s) and contractor(s) in respect of the remedying of any defects in the relevant works in accordance with the terms of their appointments. To the extent that the Company recovers any monies from such consultant(s) or contractor(s) the Company shall pay or apply such monies as can, in its reasonable opinion, be apportioned to the relevant works:
- (a) first in meeting its own costs, liabilities and losses (current, anticipated or otherwise) (if any);
  - (b) any balance then being paid to the undertaker.
- 10 The undertaker must repay to the Company all fees, costs, charges and expenses properly and reasonably incurred by the Company:
- (a) in constructing any part of a specified work on behalf of the undertaker as provided by paragraph 4.5 or in constructing any protective works under the provisions of paragraph 4.6 including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;
  - (b) in respect of the approval by the engineer, acting in good faith, of plans submitted by the undertaker and the supervision by the engineer of the construction of a specified work or a protective work;
  - (c) in respect of the employment or procurement of the services of any inspectors, signallers, watchkeepers and other persons whom it is reasonably necessary to appoint for inspecting, signalling, watching and lighting HS1 Property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work or a protective work;
  - (d) in respect of any special traffic working resulting from any speed restrictions which may in the reasonable opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work or a protective work or from the substitution or diversion of services which may be reasonably necessary for the same reason; and
  - (e) in respect of any additional temporary lighting of HS1 Property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work or a protective work,
- provided that the undertaker is not liable for any injury, loss, damage, costs nor is the undertaker required to repay any sums under paragraphs (a) to (e) which arise from, or in

connection with, the Company in carrying out any specified works or protective works negligently.

10.2 In this paragraph:

**EMI** means, subject to paragraph 10.3, electromagnetic interference with the Company's apparatus generated by the operation of the authorised development where such interference is of a level which adversely affects the safe operation of the Company's apparatus;

**Company's apparatus** means any lines, circuits, wires, apparatus or equipment (whether or not modified or installed as part of the authorised development) which are owned or used by the Company for the purpose of transmitting or receiving electrical energy or of radio, telegraphic, telephonic, electric, electronic or other like means of signalling or other communications.

10.3 This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to the Company's apparatus carried out after approval of plans under paragraph 5.1 for the relevant part of the authorised development giving rise to EMI (unless the undertaker has been given notice in writing before the approval of those plans of the intention to make such change).

10.4 Subject to paragraph 10.6, the undertaker must in the design and construction of the authorised development take all measures necessary to prevent EMI and must establish with the Company (both parties acting reasonably) appropriate arrangements to verify their effectiveness.

10.5 In order to facilitate the undertaker's compliance with paragraph 10.4:

- (a) the undertaker must consult with the Company as early as reasonably practicable to identify all of the Company's apparatus which may be at risk of EMI, and must continue to consult with the Company (both before and after formal submission of plans under paragraph 5.1) in order to identify all potential causes of EMI and the measures required to eliminate them;
- (b) the Company must make available to the undertaker all information in the possession of the Company reasonably requested by the undertaker in respect of the Company's apparatus identified under paragraph (a); and
- (c) the Company must allow the undertaker reasonable facilities for the inspection of the Company's apparatus identified under paragraph (a).

10.6 In any case where it is established that EMI can only reasonably be prevented by modifications to the Company's apparatus, the Company must not withhold or delay its consent unreasonably to modifications of the Company's apparatus, but the means of prevention and the method of their execution must be selected at the reasonable discretion of the Company, and in relation to such modifications paragraph 5.1 has effect subject to this paragraph.

10.7 If at any time prior to the completion of the authorised development and regardless of any measures adopted under paragraph 10.4, the testing or commissioning of the authorised development causes EMI then the undertaker must immediately upon receipt of notification by the Company of such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as reasonably practicable after it has been issued) forthwith cease to use (or procure the cessation of use of) the undertaker's apparatus causing such EMI until all measures necessary have been taken to remedy such EMI by way of modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in paragraph 10.6) to the Company's apparatus.



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- 10.8 In the event of EMI having occurred
- (a) the undertaker must afford reasonable facilities to the Company for access to the undertaker's apparatus in the investigation of such EMI;
  - (b) the Company must afford reasonable facilities to the undertaker for access to the Company's apparatus in the investigation of such EMI; and
  - (c) the Company must make available to the undertaker any additional material information in its possession reasonably requested by the undertaker in respect of the Company's apparatus or such EMI.
- 10.9 Where the Company approves modifications to the Company's apparatus under paragraphs 10.6 or 10.7:
- (a) the Company must allow the undertaker reasonable facilities for the inspection of the relevant part of the Company's apparatus; and
  - (b) any modifications to the Company's apparatus approved under those paragraphs must be carried out and completed by the undertaker in accordance with paragraph 6.
- 10.10 If any changes in operation of High Speed 1 causes EMI (whether or not measures have been adopted pursuant to paragraph 10.4) then the undertaker shall as quickly as reasonably practicable after notification by the Company of EMI take all measures necessary to remedy the same by way of modification to the source of such EMI or (as the case may be) further protective works or modification to the specified works or the Company's apparatus (subject to the Company's approval under paragraph 10.6).
- 10.11 To the extent that it would not otherwise do so, the indemnity in paragraph 14.1 applies to the costs and expenses reasonably incurred or losses suffered by the Company through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to the Company's apparatus) or in consequence of any EMI to which paragraph 10.8 applies.
- 10.12 For the purpose of paragraph 9(a) any modifications to the Company's apparatus under this paragraph are deemed to be protective works referred to in that paragraph.
- 10.13 In relation to any dispute arising under this paragraph the reference in article [64] (arbitration) to a single arbitrator to be agreed between the parties is to be read as a reference to an arbitrator being a member of the Institution of Engineering and Technology to be agreed.
- 11 If at any time after the completion of a specified work or a protective work, not being a work vested in the Company, the Company gives notice to the undertaker informing it that the state of maintenance of any part of the specified work or protective work appears to be such as adversely affects the operation of HS1 Property, the undertaker must, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work or protective work in such state of maintenance as to not adversely affect HS1 Property.
- 12 The undertaker must not provide any illumination or illuminated sign or signal on or in connection with a specified work or a protective work in the vicinity of any railway belonging to the Company unless the undertaker has first consulted the Company and the undertaker must comply with the Company's reasonable requirements for preventing confusion between such illumination or

illuminated sign or signal and any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway.

- 13 Any additional expenses which the Company may properly and reasonably incur in altering, reconstructing or maintaining HS1 Property under any powers existing at the making of this Order by reason of the existence of a specified work or a protective work must—provided that 7 days’ previous written notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker—be repaid by the undertaker to the Company.

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- 14.1 The undertaker must pay to the Company all reasonable and properly incurred costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule (but subject always to the remaining provisions of this paragraph and to article 67 (no double recovery)) which may be occasioned to or reasonably incurred by the Company:

- (a) by reason of the construction or maintenance of a specified work or a protective work or the failure of it by the undertaker or a person for whom it is responsible; or
- (b) by reason of any act or omission of the undertaker or of any person in the undertaker’s employ or of the undertaker’s contractors whilst engaged upon a specified work or a protective work,

and the undertaker must indemnify and keep indemnified the Company from and against each and all losses, claims, demands, actions, proceedings, damages, matters, costs, expenses and liabilities whatsoever arising in any way from, in connection with or relating to a specified work or a protective work or any such failure, act or omission; save where the Company or its contractors have been negligent and the fact that any act or thing may have been done by the Company on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the engineer’s supervision will not (provided it is done without negligence on the part of the Company or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this paragraph.

- 14.2 The indemnity in paragraph 14.1 shall include but shall not be limited to any losses, claims, demands, actions, proceedings, damages, matters, costs, expenses and liabilities which arise out of the works in respect of:

- (a) any disruption caused to High Speed 1 during the period of the authorised development;
- (b) any claims for personal injury or death to/concerning employees or third parties;
- (c) any loss, damage or environmental damage (to include pollution, contamination, the presence of hazardous substances or waste, and nuisance) to High Speed 1 and/or HS1 Property whether temporary or permanent or to any adjoining or neighbouring property (whether real or personal) belonging to, used by or in the possession of HS1 and/or any third parties or for which HS1 or any such third parties are responsible or liable;
- (d) any environmental damage;
- (e) any financial loss claims brought against HS1, any HS1 Group Company, any train or freight operating company, or any infrastructure manager, whether or not loss or damage to material property is suffered or incurred;

- (f) the carrying out of the specified works, or the failure of any such works
  - (g) any act, omission or neglect on the part of the undertaker, or any person involved in the carrying out of a specified work.
- 14.3 During the period of the authorised development, the undertaker shall procure the undertaker's contractor is insured against the liabilities referred to herein for not less than £155,000,000 (one hundred and fifty five million pounds) for any one loss and shall provide details of such insurance upon request by the Company.
- 14.4 The Company must:
- (a) give the undertaker written notice of any such claims or demands as soon as reasonably possible after the Company became aware of any such claims or demands;
  - (b) not admit liability or make any offer to settle or settle or compromise any such claim or demand without the prior consent of the undertaker(which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand);
  - (c) take all reasonable steps to mitigate any liabilities relating to such claims or demands; and
  - (d) keep the undertaker informed in relation to the progress of any such claims and demands and pay due regard to the undertaker's reasonable representations in relation to them.
- 15 The Company must, on receipt of a request from the undertaker, from time to time, provide the undertaker free of charge with a written breakdown of the estimates of the costs, charges, expenses, and other liabilities for which the undertaker is or will become liable under [this Part of] this Schedule (including the amount of the relevant costs mentioned in paragraph 14 and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made under [this Part of] this Schedule (including any claim relating to those relevant costs).
- 16 In the assessment of any sums payable to the Company under [this Part of] this Schedule there must not be taken into account any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by the Company if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by the undertaker under [this Part of] [this Schedule] or increasing the sums so payable.
- 17 The undertaker and the Company may, subject in the case of HS1 to compliance with the terms of the concession agreement, enter into, and carry into effect, agreements for the transfer to the undertaker of:
- 17.1 any HS1 Property shown on the works plans or land plans and described in the book of reference;
  - 17.2 any lands, works or other property held in connection with any such railway property; and
  - 17.3 any rights and obligations (whether or not statutory) of the Company relating to any HS1 Property or any lands, works or other property referred to in this paragraph.
- 18 Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part 1 (the provision of railway services) of the Railways Act 1993.

- 19 Unless and to the extent agreed otherwise in writing by the parties, to the extent that the protective works and the specified works constitute a single project for the purposes of the CDM Regulations, the undertaker is to act as the only client for the purposes of the CDM Regulations and is to indemnify HS1 from and against any, each and all reasonably foreseeable and properly mitigated losses, claims, demands, actions, proceedings, damages, costs, expenses and liabilities arising directly from, in connection with or out of any breach (by the undertaker) of the CDM Regulations provided that HS1 [and the SoS] shall [each] comply with all health and safety laws and with its [respective] obligations under the CDM Regulations, and shall (without prejudice to the generality of the aforesaid) provide all information required by the undertaker in a timely manner and co-operate with the undertaker so as to enable the undertaker to fulfil its duties as the client.
- 20 The undertaker must give written notice to the Company if any application is proposed to be made by the undertaker for the Secretary of State's consent under article 8 (transfer of benefit of Order) of this Order in relation to HS1 Property or any specified works and any such notice must be given no later than 10 Business Days before any such application is made and must describe or give (as appropriate)-
- (a) the nature of the application to be made;
  - (b) the extent of the geographical area to which the application relates; and
  - (c) the name and address of the person acting for the Secretary of State to whom the application is to be made.
- 21 The undertaker must no later than 20 Business Days from the date that the documents referred to in article 62 (certification of plans, etc.) are submitted to and certified by the Secretary of State in accordance with article 62, provide a set of those documents to the Company in a digital format reasonably specified by the Company.
- 22 Any notice:
- 22.1 from the undertaker which may be provided to the Company under this Part may be given by a contractor of the undertaker; and
  - 22.2 from the Company which may be provided to the undertaker, may be provided to the contractor of the undertaker,
- provided the undertaker has provided written notification of the contractor to the Company.