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9 May 2024

Dear Mr Bartkowiak

A122 Lower Thames Crossing (Reference Number TR010032)

1 Response to Secretary of State letter from 19 April 2024

1.1.1 The Applicant is responding to the letter from the Secretary of State published on the 19 April 2024 requesting updates on a number of matters.

1.2 Crown Land Consents

1.2.1 It states within the Secretary of State's letter of 19 April 2024 that:

The Secretary of State notes the Applicant's response regarding Crown Land Consents. The Secretary of State invites comments from the Crown Estate and Duchy of Lancaster on whether they disagree with the Applicant on the matters relating to them and if this is the case, what steps are being taken to resolve the disagreement.

The Secretary of State notes the responses provided by the Applicant and the Estates team within the Department for Transport regarding the compulsory acquisition and temporary possession of land in the interests of HS1 Ltd. The Secretary of State notes that an agreement between the two parties is under negotiation.

In the event that it is not possible for the parties to reach an agreement by the conclusion of the decision stage, the Secretary of State invites comments from the Applicant on the impact of removing the relevant plots of land from the DCO.

The Secretary of State requests a final update on the issue of Crown Land Consents by the 9 May 2024.

1.2.2 The Applicant is continuing to engage with the Department for Transport and HS1 Ltd on the acquisition of their land and interests. Good progress has been made on resolving the outstanding issues and the Applicant's understanding is that the agreements to transfer the land can now progress towards conclusion. The Applicant hopes that these can be settled before the statutory deadline for a decision on the DCO application, although this cannot be guaranteed.

However, the Applicant wishes to emphasise its view that conclusion of such an agreement is *not* a precursor to the inclusion of the relevant plots of land in the DCO (if granted consent).

1.2.3 Whether or not the relevant plots of land can be included in the DCO is instead a matter engaged by section 135 of the Planning Act 2008:

- section 135(1) provides that a DCO may include provision authorising the compulsory acquisition of an interest in Crown land held by a party other than the Crown, provided that the relevant Crown authority consents to the acquisition; and
- section 135(2) provides that a DCO may include any other provision applying in relation to Crown land, or rights benefiting the Crown, only if the appropriate Crown authority consents to the inclusion of the provision.

1.2.4 Crown consent under section 135 is a matter for the relevant Crown body (in this case the Department for Transport, on behalf of the Secretary of State), and that body alone. In other words, there is no requirement under section 135 for consent to have also been obtained from any non-Crown body with an interest in the Crown land. The extent to which it is appropriate to interfere with their interests is a matter for the decision on the DCO application itself, taking into account any representations that party may have made. Should consent be granted, the acquisition of a third party's interests, and their rights to compensation, will be resolved in accordance with the Compensation Code, as supplemented by the provisions of the draft DCO.

1.2.5 It follows that inclusion (or otherwise) of plots held by the Secretary of State for Transport turns on whether section 135 consent is required for those plots, and if so whether it has been obtained at the appropriate time. The Applicant is currently in discussion with the Department for Transport (in its function as landowner) with a view to expeditiously resolving this matter.

1.2.6 The relevant plots in question are required both for the construction and operation of the Project, including permanent works. The relevant plots are therefore necessary for the delivery of the A122 Lower Thames Crossing. No alternative plots are available within the scheme, as applied for, to deliver the temporary and permanent works required.

1.2.7 In the event that the Secretary of State removed the relevant plots of Crown land from the DCO entirely (i.e. omitting all proposed consents and powers over those plots and rendering them outside of the scope of the project as consented) then, as noted above, it would not be possible to implement the project as applied for.

1.2.8 An alternative option may be to introduce a form of conditionality into the exercise of powers over land held by the Secretary of State for Transport, i.e. that the relevant DCO powers would be of no effect over the relevant Crown land until post-DCO approval is given by the Secretary of State for Transport, or until the relevant Crown land had been transferred to the Applicant (i.e. removing its Crown land status). This would require amendments to the relevant provisions of the draft DCO (including article 43) as it currently stands,

and would still (in any event) require section 135 Crown consent in respect of the amended draft DCO, before a decision on the DCO application was taken.

1.3 Whitecroft Care Home

1.3.1 It states within the Secretary of State's letter of 19 April 2024 that:

The Secretary of State notes the continuing discussions between the Applicant and the operators of Whitecroft Care Home. Both parties have stated that a voluntary acquisition agreement is unlikely to be reached by the close of the decision period.

The Secretary of State requests a final update on the discussions between the Applicant and the operators of Whitecroft Care Home by the 9 May 2024 and requests that they set out the proposed approach if an agreement cannot be reached.

1.3.2 Further to the update provided within the Applicant's response of 11 April 2024 ([Response to Secretary of State letter from the 28 March 2024](#)) the Applicant has continued to liaise with Whitecroft Care Home to agree Heads of Terms and arrange for the Applicant's valuer to visit the Care Home in readiness for negotiations to commence formally on market value. As mentioned previously both parties are working closely together to maintain progress. Although it is unlikely that the parties will reach a final agreement prior to the end of the statutory DCO decision-making period, good progress is being made such that a satisfactory solution can be achieved prior to the start of any construction works that would impact the care home.

1.3.3 As a final agreement is unlikely to be achieved prior to the end of the DCO decision-making period, the Applicant refers to its previous response submitted in the Applicant's post hearing submission for ISH14 (Annex A.8.7 [REP8-114](#)). In this response the Applicant set out how Article 30 of the draft Development Consent Order could be amended, if considered necessary, to include a new sub paragraph as follows:

(5) In respect of Plots 28/08, 29/253, 29/254, 29/258, 29/259, 29/260 and 29/261 shown in the land plans, and without limitation to the powers under article 35, section 8 of and Schedule 2A to the 1965 Act must be construed to ensure-

(a) the freehold owner of those plots may serve a notice to require the undertaker to acquire a landowner's interest in respect of The Whitecroft Care Home ("the Care Home") where any part of the authorised development has begun; and

(b) the undertaker must accept a notice served under paragraph (a) and thereafter serve notice of entry under section 11 (powers of entry) of the 1965 Act or a declaration under section 4 (execution of declaration) of the 1981 Act in respect of land and interests in those plots and the Care Home owned by the landowner as though it were an acceptance for the purposes of paragraph 11 of Schedule 2 to the 1965 Act.

- 1.3.4 The Care Home owners response at Deadline 9A ([REP9A-143](#)) stated that the additional wording within the draft Development Consent Order would achieve the outcome they are seeking.
- 1.3.5 The Applicant considers that this additional wording within the draft Development Consent Order would provide an agreed way forward and should not prevent development consent being granted.

1.4 Protective Provisions

- 1.4.1 It states within the Secretary of State letter from the 19 April 2024 that:

The Secretary of State notes that the Applicant has yet to agree protective provisions with several parties, including: Network Rail, Port of Tilbury London Limited, Port of London Authority and HS1 Ltd.

The Secretary of State requests an update on the status of all these protective provisions from the Applicant and, in respect of their protective provisions, from Network Rail, Port of Tilbury London Ltd., Port of London Authority and HS1 Ltd. by 9 May 2024.

- 1.4.2 National Highways is continuing to engage with the parties identified by the Secretary of State, and an update on the status of the protective provisions is set out below in Table 1.1.

Table 1.1 Protective Provisions status update

Interested Party	Status update
Network Rail	<p>Following the Applicant’s submission dated 11 April 2024, the Applicant has prepared a drafting amendment to restrict the exercise of powers over plots of operational land identified as being subject to freehold (23-77, 44-123, 44-24, 44-45 and 44-53). This drafting amendment has been inserted at paragraph 46 (1) within Part 4 of Schedule 14 of the draft Development Consent Order accompanying this letter [Document Reference 3.1 (v.14.0)].</p> <p>Two further affected land parcels were identified in the submission dated 11 April 2024 (42-82, 42-95), associated with an existing bridge on the M25. On further review, the Applicant considers that the drafting in the Book of Reference [REP9-116] limits the powers to the bridge, central reservation and highway, and excludes the railway track and verge, and as such further restriction of the powers is not necessary.</p> <p>As set out in the 11 April 2024 submission, there are three principal areas of disagreement with regards to the Protective Provisions for railways, namely (i) the ‘consent provisions’, (ii) the terms of the indemnity being offered to Network Rail and (iii) whether the Applicant should be required to notify Network Rail before any application to the Secretary of State under article 8 for consent to transfer the benefit of the DCO to another party is made. The</p>

	<p>Applicant's position on these positions is set out in that submission. The Applicant has not progressed this discussion further with Network Rail, and does not consider that agreement will be reached in respect of any of these matters.</p> <p>The Applicant would highlight that following its submission on 11 April 2024 the Secretary of State published guidance on the "Content of a Development Consent Order" which sets out in relation to Protective Provisions that, "<i>They [i.e. protective provisions] should also not simply negate other provisions of the DCO, particularly concerning proposed compulsory acquisition of statutory undertakers' land.</i>" This is, in the Applicant's view, a clear statement that Government policy supports the Applicant's resistance to a consent provision in relation to compulsory acquisition and the Applicant would request that guidance is followed in this instance.</p>
<p>Port of Tilbury London Limited</p>	<p>The Applicant has continued to have productive conversations with the Port of Tilbury London Limited (PoTLL) regarding both the Protective Provisions and the Framework Agreement, and anticipates that negotiations on the Framework Agreement can be concluded within the decision period.</p> <p>The Applicant has agreed to make further amendments to the Protective Provisions, which are included within Part 10 of Schedule 14 of the draft Development Consent Order accompanying this letter [Document Reference 3.1 (14)]. Subject to the completion of the Framework Agreement negotiations, these Protective Provisions now reflect a position that is agreed between National Highways and PoTLL.</p> <p>The Applicant understands that PoTLL intend to submit an amended form of Protective Provisions, reflecting their preferred position should negotiations relating to the Framework Agreement not conclude.</p>
<p>Port of London Authority</p>	<p>The Protective Provisions are, with the exception of paragraph 99(5), (6) and 104, agreed with the Port of London Authority (PLA). As set out in the Applicant's 11 April 2024 submission, these outstanding matters are considered to be matters for adjudication by the Secretary of State. The Applicant wishes to confirm that a voluntary land agreement is not being progressed because there is an in-principle disagreement relating to compensation (which is not a matter relevant to the grant of development consent) and because, as explained in the Applicant's Closing Submissions [REP10-021], the PLA have put forward a number of provisions which conflict with the agreed Protective Provisions. The Applicant's position relating to paragraphs 99(5) and (6) is set out in its submission made on 11 April 2024, and the Applicant would highlight that the Port of Tilbury London Limited's proposed</p>

	<p>solution (i.e., deletions suggested at paragraph 2.9 to 2.10 of [REP9A-142]) rather than the insertion of an onerous and inappropriate arbitration schedule as suggested by the PLA (not contained in any Strategic Road Network DCO to date) is to be preferred if the Secretary of State is not minded to agree with the Applicant that paragraph 99(5) and (6) are appropriate, acknowledge the Secretary of State's position in relation to ports and roads and merely reflect the provisions of Port of London Authority Act 1968.</p>
HS1 Ltd	<p>Agreement regarding Protective Provisions with HS1 Limited has been reached on all matters save in two key respects, as set out in the Applicant's 11 April 2024 submission. The Applicant does not anticipate that agreement will be reached with HS1 in relation to these issues, and they are considered to be matters for adjudication by the Secretary of State.</p>

1.5 Essex Wildlife Trust Offsite Mitigation

1.5.1 It states within the Secretary of State letter from the 19 April 2024 that:

The Secretary of State notes the continuing discussions between the Applicant and the Essex Wildlife Trust. Both parties have stated that an agreement is likely to be reached soon and that an MOU is outstanding regarding work on the barn owl nest box project. 15.

The Secretary of State requests a final update on the discussions regarding the legal agreement and the MOU between the Applicant and Essex Wildlife Trust by the 9 May 2024, and requests that they set out the proposed approach if an agreement cannot be reached.

1.5.2 The Applicant has sent the finalised Water Vole Agreement to Essex Wildlife Trust (EWT) with a request for engrossments. EWT has today (08 May) advised that the content is agreed and is on track to be signed by its Board of Directors (at their next sitting) by the end of May 2024.

1.5.3 The Applicant issued the draft Barn Owl agreement to the EWT on the 05 May. The draft agreement accommodates all requests made by the EWT and EWT has advised that unlike the Water Vole agreement, the Barn Owl agreement does not require board approval and can instead be signed by their Conservation Manager once reviewed.

1.5.4 In summary, the Applicant is confident that agreement to the terms of both agreements will be reached in the next few days and as such, a proposed alternative approach will not be required.

1.5.5 In the event that the agreement is not concluded, contrary to the strong expectation of the Applicant, the Applicant would note that in relation to barn owl resting roosts, the DCO already secures a requirement for the delivery of

the related works. In particular, the Register of Environmental Actions and Commitments (REAC) Item TB010 in the Code of Construction Practice sets out:

“Alternative breeding sites (nest boxes) would be provided >1.5km away from the Project boundary and other major roads, within an appropriate setting and in compliance with Barn Owl Trust advice (2015). A replacement ratio of two boxes for one lost site would be provided. The number of boxes required would be informed by pre-construction surveys. A minimum of 12 artificial nest boxes would be installed.”

1.5.6 As the Environmental Management Plan (EMP) submitted under paragraph 4 of Schedule 2 to the DCO must reflect the mitigation measures in the REAC (including TB010), the EMP would have to set out how the barn owl resting sites required therein would be secured. The Secretary of State is proposed to have a discharging function under Requirement 4 and so can be satisfied that appropriate measures have been secured at that point. If the REAC measure cannot be fulfilled, Requirement 4 could not be discharged and the relevant part of the authorised development would not commence.

1.5.7 No equivalent REAC commitment currently exists in respect of water vole translocation. Should the Secretary of State consider it necessary (notwithstanding the imminent expected completion of the relevant agreement), the Applicant would accept the following new REAC commitment in respect of water voles:

“Water vole habitat that would be lost due to construction would be removed in line with the provisions of the draft water vole conservation licence application v2.0 [REP8-078] unless otherwise agreed with the Secretary of State, following consultation with Natural England. Translocation sites would be selected in areas which are outside of the Order Limits or which are unaffected by the Project’s construction or operation and that are unoccupied by water vole. Where practicable, translocation sites would be chosen that have the potential to integrate with extant fragmented colonies of water vole as recolonisation occurs. This will strengthen the overall meta-population structure. To ensure that there is sufficient habitat for any translocated water voles, a translocation site which must be at least twice the length of suitable watercourse being lost must be identified in a relevant EMP2 submitted to the Secretary of State under Requirement 4(2).”

1.5.8 The Applicant highlights that article 62 of the draft DCO contains a mechanism to enable amendments to “certified documents” such as the REAC, should any decision to grant development consent by the Secretary of State require such an amendment to be made as a component of that decision:

“(1) As soon as practicable after the making of this Order, the undertaker must submit copies of each of the plans and documents set out in Schedule 16

(documents to be certified) to the Secretary of State for certification that they are true copies of those plans and documents.

(2) Where any plan or document set out in Schedule 16 requires to be amended to reflect the terms of the Secretary of State's decision to make the Order, that plan or document in the form amended to the Secretary of State's satisfaction is the version of the plan or document required to be certified under paragraph (1)..."

1.6 Correction to General Arrangement Sheet 4

1.6.1 The Applicant has identified an error on Sheet 4 of the General Arrangement drawings (within Volume B) [REP9-028]. Thong Lane car park was removed following discussions at ISH9 at Deadline 7 as set out as Hearing Action Point 18, section 5 of Deadline 7 Hearing Actions [[REP7-185](#)]. This amendment was inadvertently reversed as part of the updates at Deadline 9.

1.6.2 The Applicant has amended Sheet 4 of the General Arrangement drawings to correct this error, and includes an updated General Arrangement Plan (Volume B) in both clean and tracked changes versions with this submission.

1.7 Revised draft Development Consent Order

1.7.1 As set out in section 1.4 above, following further engagement with Network Rail and agreement with the Port of Tilbury London Limited, the Applicant has made further revisions to the Protective Provisions contained in the draft Development Consent Order which accompanies this submission. In addition, a change was required as a result of the revised General Arrangements and this has meant a change to the version number referenced in Schedule 16 to the dDCO. Annex A to this letter sets out an explanation for each change.

Yours sincerely

Dr Tim Wright

Head of Consents – Lower Thames Crossing

Annex A: Explanation of changes (Secretary of State Consultation 2)

Provision	Amendment	Description of amendment												
<p>Paragraph 46 of Schedule 10 (Protective Provisions for Network Rail)</p>	<p>(2) Sub-paragraph (3) applies in respect of the land comprised in the plots listed in the second column of the table provided in sub-paragraph (4) only.</p> <p>(3) In respect of the plots of land to which this sub-paragraph applies, the provisions of article 25 (compulsory acquisition of land) of this Order apply in respect of the specified airspace of the land only.</p> <p>(4) In this paragraph, the ‘specified airspace of the land’ means airspace situated above the height specified in the third column of the table below.</p> <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 10px;"> <thead> <tr> <th style="text-align: center;"><i>(1) Location</i></th> <th style="text-align: center;"><i>(2) Plot Reference Number shown on Land Plan</i></th> <th style="text-align: center;"><i>(3) Height above the level of the surface of the land</i></th> </tr> </thead> <tbody> <tr> <td>Franks Farm</td> <td>44-24, 44-45 and 44-53</td> <td>7800 mm</td> </tr> <tr> <td>FP252</td> <td>42-123</td> <td>7500 mm</td> </tr> <tr> <td>Tilbury Viaduct</td> <td>23-77</td> <td>6800 mm</td> </tr> </tbody> </table>	<i>(1) Location</i>	<i>(2) Plot Reference Number shown on Land Plan</i>	<i>(3) Height above the level of the surface of the land</i>	Franks Farm	44-24, 44-45 and 44-53	7800 mm	FP252	42-123	7500 mm	Tilbury Viaduct	23-77	6800 mm	<p>This amendment clarifies that the exercise of powers over plots of operational railway land identified as being subject to freehold acquisition (23-77, 44-123, 44-24, 44-45 and 44-53) is constrained to particular heights above the operational railway.</p>
<i>(1) Location</i>	<i>(2) Plot Reference Number shown on Land Plan</i>	<i>(3) Height above the level of the surface of the land</i>												
Franks Farm	44-24, 44-45 and 44-53	7800 mm												
FP252	42-123	7500 mm												
Tilbury Viaduct	23-77	6800 mm												
<p>Part 10 of Schedule 10 (Protective Provisions for Port of Tilbury)</p>	<p>Amendments to incorporate:</p> <ul style="list-style-type: none"> - References to the acquisition of land or rights have been supplemented by a reference to “impose” to ensure that the imposition of restrictive covenants is caught by the relevant provisions. - A new provision in paragraph 132(8) to regulate the application of article 66. - A new provision in paragraph 133(2) to confirm that preliminary works are caught by Requirement 6(1) and that specific REAC measures will apply. 	<p>These amendments have been agreed by the Applicant and the Port of Tilbury London Limited. The Applicant can confirm that where a Framework Agreement is completed, this iteration of the Protective Provisions reflects the agreed position between the parties on the protective provisions required by Port of Tilbury London Limited. The Applicant is aware that that the Port of Tilbury London Limited will submit</p>												

	<ul style="list-style-type: none"> - Amendments to paragraph 140 to clarify the extent of consultation required in connection with any environmental permits or the use of article 68 of the dDCO. - Amendments to paragraph 146 to ensure that the Port of Tilbury has appropriate involvement where an appeal under article 65 is made. 	a "without Framework Agreement" iteration of the Protective Provisions, but considers that productive discussions will enable the completion of that agreement prior to the end of the decision period.
Schedule 16	Updated revision reference for the General Arrangements (Volume B)	Revision reflects the revised General Arrangements submitted alongside this submission.