



Application by National Highways for an Order Granting Development Consent for A428 Black Cat to Caxton Gibbet Improvements

The Examining Authority's commentaries and proposed changes to the draft Development Consent Order (dDCO) Issued on Friday 14 January 2022

This document sets out the Examining Authority's (ExA) commentaries and proposed changes to the latest version of the dDCO [REP6-002] and the corresponding Explanatory Memorandum [REP6-004]. Comments and responses are due on **Deadline 9, 25 January 2022**.

Column 1 of the table sets out the unique reference number to each section. Column 2 of the table indicates which Interested Parties (IPs) and other persons specific comments or questions are directed to. Please provide a substantive comment or response to the sections directed at you, or indicate why that section is not relevant to you. You may also respond to sections that are not directed at you, should the section be relevant to your interests. Column 3 sets out the ExA's relevant commentary, proposed changes or questions as relevant.

If you are responding to a small number of sections, your response in a letter will suffice. If you are responding to a larger number of sections, it will assist the ExA if you use a table based on this one to set out your responses. An editable version of this table in Microsoft Word is available on request from the case team: please contact A428.Blackcat@planninginspectorate.gov.uk and include 'A428 Black Cat to Caxton Gibbet' in the subject line of your email.

If you have made a comment or provided a response previously, elsewhere in other submissions, such as a Local Impact Report, Written Representation, responses to ExA's Written Questions or the oral summary of the case presented at a Hearing, you are requested to provide a summary response addressing specifically the matters raised in the section and list the other relevant submissions where more detailed information can be found, clearly identifying the EL reference number and specific sections and paragraphs.

Responses and comments are due by Deadline 9, 25 January 2022



List of abbreviations

BEIS	Department for Business, Energy and Industrial Strategy	LHA	Local Highway Authority
Cambridgeshire Councils	Cambridgeshire County Council, South Cambridgeshire District Council, and Huntingdonshire District Council	NFU	National Farmers Union
CA	Compulsory Acquisition	NH	National Highways (the Applicant)
D	Examination Deadline [PD-007, Annex A)	NPS NN	National Networks National Policy Statement
dDCO	Draft Development Consent Order	NPPF	National Planning Policy Framework
EA	Environment Agency	NSIP	Nationally Significant Infrastructure Project
EL	Examination Library	PRoW	Public Rights of Way
EM	Explanatory Memorandum	PA2008	The Planning Act 2008
EMP	Environmental Management Plan	R	Requirement
ES	Environmental Statement	S	Section (in relation to legislations and regulations)
ExA	Examining Authority	SoS	Secretary of State
HE	Highways England (the Applicant, as known previously)	TP	Temporary Possession
HistE	Historic England	WQ	Examining Authority's Written Questions
LA	Local Authority		



Examination Library

References in these questions set out in square brackets (eg [APP-010]) are to documents catalogued in [the Examination Library](#). The Examination Library will be updated regularly as the Examination progresses.



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Q4.1. GENERAL AND OVERARCHING		
Q4.1.1 Contents		
Q4.1.1.1	Applicant	<p>Applicant’s confirmation of final review for D10</p> <p>a) Check internal references, statutory citations and references and legal footnotes and update as required.</p> <p>b) Review additions to the dDCO ensuring that the titles and numbering of all provisions remains consistent throughout and with the Table of Contents.</p> <p>c) Follow best practice in Planning Inspectorate Advice Notes 13 and 15 and (as relevant) guidance on statutory instrument drafting from the Office of the Parliamentary Counsel (June 2020). ExA notes Applicant’s previous response [REP1-022, Appendix to Q.1.7.1.1].</p>
Q4.1.1.2	Local Authorities	<p>Discharging requirements and conditions</p> <p>No amendments proposed with regards to the provision that the discharging authority for all requirements is the SoS, acknowledging that the SoS would consult with the relevant LA in relation to Requirements that would be of relevance to that LA [REP1-021] [REP1-022] [REP3-007] [REP3-039] [REP5-015], subject to further comments if any, from other parties.</p>
Q4.2. PART 1 PRELIMINARY		
Q4.2.1 Article 1 Citation and commencement		
		No amendments proposed by the ExA at this stage.
Q4.2.2 Article 2 – Interpretation		
Q4.2.2.1	All Parties Applicant	<p>Definition of commence and pre-commencement work</p> <p>ExA notes the proposed amendment to the definition of “<i>commence</i>”, the inclusion of a definition of “<i>pre-commencement work</i>”, and a pre-commencement plan [REP6-028] included in Schedule 10 of Documents to be Certified.</p>

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		No further amendments proposed by the ExA at this stage [REP1-022, Q1.7.2.1] [REP4-037, Q2.7.2.1] [REP1-051] [REP3-007] [REP4-056] [REP6-033]; awaiting responses to WQ3.
		Definition of maintain No amendments proposed by the ExA [REP1-022, Q1.7.2.2] [REP4-037, Q2.7.2.2].
Q4.2.2.2	Applicant	Definition of Secretary of State Include in the EM, the explanation and reference to the joint letter dated 30 July 2021 confirming that the SoS for Transport would be the sole decision maker for the Proposed Development, taking account of comments from SoS for BEIS [REP1-022, Q1.7.2.3].
		Article 2(4) and 2(5) No amendments proposed by the ExA [REP1-022, Q1.7.3.1] [REP4-037, Q2.7.3.1].
Q4.2.2.3	All Parties	Definition of tree constraints plan Provide comment, if any. No amendments proposed by the ExA, subject to comments from other parties.
Q4.2.2.4	Applicant All Parties	Definition of adjacent land ExA notes the Applicant's responses [REP1-022, Q1.7.3.3] [REP4-037, Q2.7.3.3] regarding the reasons for the necessity of the provision relating to land adjacent to order limits, as provided for under S120 of PA 2008. At this stage, the ExA remains unconvinced that powers so widely drawn would be reasonable for the purposes described by the Applicant. The ExA notes that the provision relating to " <i>land within or adjacent to the Order limits</i> " appears in Article 4 – Development consent etc. granted by the Order, to " <i>adjacent land</i> " appears in Article 22 – Protective work to buildings, and to " <i>any land which is adjacent to, but outside the Order limits</i> " appears in Article 23 – Authority to survey and investigate the land. a) The ExA proposes a definition for " <i>land adjacent to the order limits</i> " to be added to Article 2, in line with the wording provided by the Applicant based on the A303 Sparkford to Ilchester Dualling made DCO:

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		<p><i>"land adjacent to the Order limits" means that land which is necessary to carry out the development of the authorised development or ensure the safe construction of any section or part of the authorised development;"</i></p> <p>b) ExA proposed related change of wording in Article 4 as follows: <i>"4. – (2) Any enactment applying to land within or adjacent to the Order limits <u>or where reasonably necessary land adjacent to the Order limits</u> has effect subject to the provisions of this Order."</i></p> <p>c) ExA proposes related change of wording in Article 23. Additionally, the ExA proposes a further amendment to remove from Paragraph (1) the words <i>"operation or maintenance"</i> to tighten the scope of this provision to only the construction period rather than for the life span of the Proposed Development. If the Applicant believes surveys would be required for operation and maintenance purposes then provide examples of the types of surveys and supporting justification. <i>"23. – (1) The undertaker may for the purposes of the construction, operation or maintenance of the authorised development enter on— (a) <u>any</u> land shown within the Order limits; and (b) where reasonably necessary, <u>any</u> land which is adjacent to, but outside the Order limits, and—"</i></p> <p>d) Applicant, would similar change of wording be applicable to Article 22? Explain with reasons and provide suitable wordings.</p> <p>Also refer to Q4.3.1.1 and Q4.5.2.1.</p>
<p>Q4.2.3 Article 3 – Disapplication of legislative provisions</p>		
<p>Q4.2.3.1</p>	<p>Environment Agency Internal drainage boards Lead local flood authorities Natural England</p>	<p>Article 3 Disapplication of legislative provisions No amendments proposed by the ExA, subject to further comments if any, from other parties.</p>

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Q4.3. PART 2 PRINCIPAL POWERS		
Q4.3.1 Article 4 – Development consent etc. granted by the Order		
Q4.3.1.1	All Parties Applicant	Provision relating to land adjacent to Order limits Refer to Q4.2.2.4 and Q4.5.2.1.
Q4.3.2 Article 5 – Maintenance of authorised development		
Q4.3.2.1	Applicant Local Authorities	Article 5 – Maintenance of authorised development No amendments proposed by the ExA; however the ExA notes that discussions are currently ongoing with LAs and requests an update from Applicant. LAs may comment.
Q4.3.3 Article 6 – Application of the 1990 Act		
		No amendments proposed by the ExA.
Q4.3.4 Article 7 – Planning permission		
		No amendments proposed by the ExA.
Q4.3.5 Article 9 – Limits of deviation		
Q4.3.5.1	All Parties Applicant	Article 9 – Limits of deviation a) No amendments proposed by the ExA; however the ExA notes that discussions are currently on-going with the Cambridgeshire Councils and requests an update from Applicant. Cambridgeshire Councils may comment. b) Applicant, justify why such wide limits of deviation are necessary as shown on the updated streets, rights of way and access plans [REP4-003]. The ExA notes your response that it is not your intention to make wholesale changes to the public rights of way network [REP6-034]; and currently consider this to be all the more reason to provide justification for the widely drawn limits of deviation. c) Applicant, what would be required to identify specific limits of deviation for the rights of way in the manner that has been proposed for the utilities [APP-009, Sheet 2C]?

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		<p>d) Cambridgeshire Councils, are there changes in the wording of this Article that could provide the controls that you seek with respect to the matters raised in questions b) and c) above, relating to widely drawn limits of deviation for public rights of way.</p> <p>e) The ExA is persuaded by the Applicant’s case that it is unnecessary for the LHA to have a separate approval role in relation to any proposal to extend the limits of deviation, given that LHAs would be consulted by the SoS during decision-making. Cambridgeshire Councils, what additional benefit or controls do you believe would be embedded in the provision by adding a separate approvals process from the LHA?</p>
<p>Q4.3.6 Article 11 – Consent to transfer benefit of Order</p>		
<p>Q4.3.6.1</p>	<p>Applicant National Grid Gas Plc Cadent Gas Limited EXOLUM Pipeline System Ltd AWG Group Limited South Staffordshire Water PLC UK Power Networks (Operations) Limited Openreach Limited Virgin Media Limited Vodafone Limited</p>	<p>Article 11 – Consent to transfer benefit of Order</p> <p>a) The ExA requests each of the bodies in Paragraph (5) to provide evidenced statements to demonstrate that they have the ability to deliver the works that could be transferred to them as stated in Paragraph (5). Applicant may comment.</p> <p>b) Alongside, Applicant to provide detailed justification for each of the bodies in Paragraph (5) to explain why the transfer of the benefit of the Order is acceptable without SoS consent.</p> <p>c) ExA notes Applicant’s response [REP1-022, Q1.7.3.9], and the provision in Paragraph (3) where the liability for the payment of compensation remains with the undertaker, where the benefits or rights transferred are exercised by a statutory undertaker or an owner occupier of land pursuant to Article 28(2). The ExA is not convinced by the widely drawn powers and proposes that Article 11 should exclude the transfer of the liability for the payment of compensation to any party (including the 9 statutory bodies in Paragraph 5) without the consent of the SoS. To achieve this, the ExA proposes including an additional Paragraph explicitly stating the exclusions, and making related changes to wording in Paragraphs 3, 4, 5 and any others. Applicant to provide suitable wording to dDCO and relevant changes to EM.</p> <p>d) Should the Applicant disagree with d), the Applicant and the 9 named bodies in Paragraph (5) to provide justification for permitting the transfer of CA powers, including the liability for the payment of compensation to each of the bodies in Paragraph (5). This justification must also include evidence (or, to the extent that it has already been provided, identify) that each of the bodies have the requisite funds to meet any CA costs. Applicant and the 9 bodies in Paragraph (5), provide confirmation that each of the bodies in Paragraph (5) would be covered by Paragraph (3) and the</p>

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		liability to meet the CA costs would remain with the undertaker where CA powers were transferred.
Q4.4. PART 3 STREETS		
Q4.4.1 Article 13 – Construction and maintenance of new, altered or diverted streets and other structures		
Q4.4.1.1	Applicant Local Highway Authorities	<p>Article 13 – Construction and maintenance of new, altered or diverted streets and other structures</p> <p>The ExA notes the Applicant’s proposed time-table for reaching agreement with LHAs [REP6-033] and the Overview of handover process for de-trunked assets and local highways [REP4- 039] and remains dissatisfied with the progress that would be expected at this this stage in the Examination or the assurance needed that agreement would be reached before the close of the Examination.</p> <p>a) As such and to cover the eventuality that agreement is not reached between parties before the close of the Examination, the ExA proposes tightening the wording of both Articles 13 and 14 to ensure that there are adequate controls for LHA to assess the quality and purpose of the assets that they inherit:</p> <ul style="list-style-type: none"> • Paragraph (1) – delete the word “reasonable” before satisfaction • Paragraph (2) – delete the word “reasonable” before satisfaction • Paragraph (3) – delete the word “reasonable” before satisfaction • Paragraph (10) – delete the word “reasonable” before satisfaction <p>b) Additionally, the ExA proposes adding additional wording in the dDCO and corresponding explanation in the EM to secure:</p> <ul style="list-style-type: none"> • The definition of De-Trunking Handover Plan and De-trunked Road Standards, in Article 2; and • Paragraph to be included in Article 14 to include the scope and content of the De-Trunking Handover Plan and De-trunked Road Standards, and the process and timing of approvals. <p>c) LHAs and Applicant to provide suitable wording for b).</p>
Q4.4.2 Article 14 – Classification of roads, etc.		
Q4.4.2.1	Applicant	Article 14 – Classification of roads, etc.

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	Local Highway Authorities	Further to comments in Q4.4.2.1, the ExA proposes related amendments to include the scope and content of the De-Trunking Handover Plan and De-trunked Road Standards, and the process and timing of approvals. LHAs and Applicant to provide suitable wording.
Q4.4.3 Article 15 – Power to alter layout etc. of streets		
		Article 15 – Power to alter layout etc. of streets No amendments proposed by the ExA at this stage.
Q4.5. PART 4 SUPPLEMENTAL POWERS		
Q4.5.1 Article 22 – Protective work to buildings		
		Notice period The ExA has not seen any evidence that 14 days’ notice would be insufficient to serve notice on the owners and occupiers of relevant building under this Article, and does not propose any changes at this stage.
Q4.5.2 Article 23 – Authority to survey and investigate the land		
Q4.5.2.1	All Parties Applicant	Provision relating to land adjacent to but outside the Order limits Also refer to Q4.2.2.4 and Q4.3.1.1. The ExA notes the Applicant’s response [REP6-033, Action 4] and requests the Applicant to provide a list of potential surveys that may be undertaken using this power.
		Notice Period The ExA is not persuaded that 14 days’ notice would be insufficient to notify persons with an interest in the land effected by the provision in this Article, and does not propose any changes at this stage.
Q4.6. PART 5 POWER OF ACQUISITION		
Q4.6.1 Article 25 – Compulsory acquisition of land		
Q4.6.1.1	Applicant	Confirm if the drafting change proposed at CAH1 [REP3-021, 9a] has been completed, and identify where with EL reference.

Q4.6.2 Article 28 – Compulsory acquisition of rights and imposition of restrictive covenants		
Q4.6.2.1	Applicant	<p>Article 28 – Compulsory acquisition of rights and imposition of restrictive covenants</p> <p>The ExA notes your justification [REP1-022, Q1.7.3.20, Q1.7.3.28] [REP3-021, 9b, 9c] for the wide power in Article 28(1), which is so the undertaker may be able to reduce the extent of permanent acquisition and rely on rights instead. The ExA is not convinced that this justification is sufficient for imposing such a wide power in relation to restrictive covenants.</p> <p>a) As such, the ExA proposes including the following wording in Article 28: <i>"The power to impose restrictive covenants under paragraph (1) is exercisable only in respect of plots specified in column (1) of Schedule 5"</i></p> <p>b) Alternatively, the Applicant may provide further justification permitting the creation of undefined restrictive covenants over all of the order land.</p>
Q4.6.3 Article 40 – Temporary use of land for carrying out the authorised development		
Q4.6.3.1	Applicant	<p>Article 40 – Temporary use of land for carrying out the authorised development</p> <p>The ExA remains concerned that the interaction between Articles 28 and 40 could permit the creation of undefined new rights and imposition of undefined restrictive covenants in the land listed in Schedule 7 which is described as being land for TP. There is no clarity at this stage on the new rights that could be sought. As such, the ExA is also not convinced that appropriate consultation has taken place on the creation of new undefined rights. Consequently, it would not be possible to determine whether or not there is a justified case for the acquisition of such rights [REP1-022, Q1.7.3.29].</p> <p>a) The ExA notes that the Applicant [REP 1-022, 1.7.3.28, 1.7.3.29] would not seek to create new rights in the land listed in Schedule 7 as being for TP unless that land is also in Schedule 5. The ExA is not clear from the Applicant's case [REP3-021, 9b, 9c] if there are plots that appear in both Schedule 5 and Schedule 7. Applicant to confirm, and provide a list of cross over plots; that is plots that appear in both Schedule 5 and Schedule 7 where temporary possession plots could then also be subject to acquiring</p>

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		<p>permanent rights. If there are cross over plots, then Applicant to confirm how the cross over plots have been colour coded in the Land Plans.</p> <p>b) In any event, the Applicant confirmed in its response that they would not create undefined new rights in the land listed in Schedule 7 and that the only CA that would be permitted in this land is the CA of new rights listed in Schedule 5 [REP1-022, Q1.7.3.29]. The ExA does not consider that the Applicant’s current drafting achieves this intention. Subject to the Applicant’s response to a), and if there are no cross over plots between Schedules 5 and 7, the ExA proposes the deletion of Paragraph 40(9)(a):</p> <p><i>"The undertaker may not compulsorily acquire under this Order the land referred to in paragraph (1)(a)(i) except that the undertaker is not to be precluded from—</i> <i>(a) acquiring new rights over any part of that land under article 28 (compulsory acquisition of rights and imposition of restrictive covenants); or</i> <i>(b) acquiring any part of the subsoil of or airspace over (or rights in the subsoil of or airspace over) that land under article 38 (acquisition of subsoil or airspace only)."</i></p> <p>c) Alternatively, if in response to a), the Applicant confirms that there are cross over plots then the ExA proposes including the following drafting:</p> <p><i>"The undertaker may not compulsorily acquire under this Order the land referred to in paragraph (1)(a)(i) except that the undertaker is not to be precluded from—</i> <i>(a) acquiring new rights</i> <u><i>or imposing restrictive covenant</i></u> <i>over any part of that land under article 28 (compulsory acquisition of rights and imposition of restrictive covenants) to the extent that such land is listed in column (1) of Schedule 5; or</i> <i>(b) acquiring any part of the subsoil of or airspace over (or rights in the subsoil of or airspace over) that land under article 38 (acquisition of subsoil or airspace only)."</i></p>
Q4.6.3.2	Applicant All Parties	<p>Notice Period</p> <p>NFU has consistently made the case on behalf of its members that before entering on and taking temporary possession of land under this article the undertaker must serve notice of a minimum of 28 days, as opposed to 14 days provided for [RR-074] [REP1-084] [REP3-050] [REP4-071] [REP6-098]. While the NFU has not provided specific cases of individual members who might benefit from the 28 days’ notice period for specific reasons, the ExA</p>

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		is persuaded by the argument 14 days would not be adequate preparatory period for landowners to adjust farming operations, organise livestock and other activities prior to the undertaker taking temporary possession. Conversely, the ExA notes the Applicant's case that 28 days' notice period could effect the construction programme and that in practice the notice given to landowners would likely be longer than 14 days anyway [REP4-037, WQ2.7.3.10, WQ2.7.3.11]. Alongside, the Applicant also states that increasing the notice period would not impact on the viability of the Proposed Development as a whole [REP6-039]. As such the ExA proposes increasing the notice period in Article 40(2) to 28 days.
Q4.7. PART 6 MISCELLANEOUS AND GENERAL		
Q4.7.1 Article 55 – Traffic regulation		
		Article 55 – Traffic regulation No further amendments proposed by the ExA.
Q4.7.2 Article 58 – Works in the River Great Ouse		
Q4.7.2.1	Environment Agency Applicant	Article 58 – Works in the River Great Ouse No further amendments proposed by the ExA, subject to comments from EA.
Q4.8. SCHEDULE 2 – REQUIREMENTS		
Q4.8.1 PART 1 – REQUIREMENTS		
Q4.8.1.1	Applicant	Interpretation There has been detailed input from parties on the First iteration EMP during Examination, across wide ranging environmental effects of the Proposed Development and management of mitigation measures. The ExA believes that this certified document should be secured in the dDCO to provide greater certainty to all parties than is afforded with the term " <i>substantially in accordance with</i> ". As such the ExA proposes deleting the word " <i>substantially</i> " from the definition of "Second Iteration EMP" and "Third Iteration EMP".
Q4.8.1.2	Applicant	Requirement 6 – Landscaping

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		Replace the word " <i>reflect</i> " with " <i>in accordance with</i> " in Paragraph 2 for the same reasons in Q4.8.1.1.
Q4.8.1.3	Applicant	<p>Requirement 11 – Traffic management</p> <p>The ExA proposes deleting the word "<i>substantially</i>" from R11(1) for the same reasons in Q4.8.1.1.</p>
Q4.8.1.4	Applicant	<p>Requirement 12 – Detailed Design</p> <p>The ExA believes that scheme design approach and design principles [REP3-014] is a high level document that provides overarching principles to guide detailed design outcomes of the Proposed Development. On the basis of the content in the document currently in the Examination, the ExA also believes that the application of the approach and principles embodied in this document to deliver design outcomes that meet the policy requirements in NPS NN (Paragraphs 4.29, 4.30, 4.31, 4.33) and the NPPF (Chapter 12) would be a matter of interpretation. As such, the ExA believes that the application of the approach and principles embodied in this document to specific sites and structures along the route should be subject to scrutiny by relevant parties, such as the LAs and S#tatutory bodies and landowners. While the ExA can see the Applicant’s position that the document would not be updated post consent, it remains unconvinced about the extremely limited engagement on detailed design and application of the approach and principles embodied in this document post consent [REP6-037]. Subject to responses to WQ3, the ExA is minded to propose additional provision relating to the detailed design development process post consent, should consent be granted. Applicant and LAs to provide suggested wording.</p>
Q4.8.1.5	Applicant Historic England	<p>Requirement 16 – Brook Cottages</p> <p>Subject to responses to WQ3 regarding the on-going conversation with HistE, the ExA is minded to propose additional provisions relating to the demolition and potential reconstruction of Grade II listed Brook Cottages, including greater clarity in terms of specific and detailed reasons that would prevent reconstruction and timescale and mechanism for demolition and reconstruction, if considered appropriate.</p>
Q4.8.1.6	Applicant	<p>Requirement 18 – Noise Mitigation</p> <p>In the ES [APP-080, Paragraph 11.10.2] the Applicant explains that noise surveys would be undertaken to ensure that measures, such as low noise surfacing materials were installed as required. However, little further detail is provided of such monitoring. In</p>

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		<p>addition to responses to WQ3, the Applicant to propose additional wording for Requirement 18 or an additional section in the First Iteration EMP [REP6-008, Annex B, B3] to secure operational noise monitoring described in the ES [APP-080, Paragraph 11.10.2] so as to ensure that intended noise mitigation measures would achieve their desired outcome, should consent be granted.</p>
Q4.8.1.7	Applicant	<p>New Requirement</p> <p>Throughout the Examination, LHAs have consistently raised concern regarding potential unanticipated traffic effects on the local road network during operational phases of the Proposed Development and the likelihood of either the Applicant or the LHA being able to mitigate such effects in a timely manner [REP6-060] [EV-069]. Whilst the ExA accepts that such potential effects are largely unknown at this stage, it remains concerned that there is a possibility that the Proposed Development could effect the local network and indeed the LHAs' ability to deliver their statutory Network Management Duty, as defined in S16 of the Traffic Management Act, 2004. In that regard, the ExA finds that the current traffic monitoring methodology being proposed by the Applicant is neither robust, nor secured through the dDCO [REP6-041]. Therefore, subject to responses to WQ3, the ExA is minded to propose a Requirement relating to quantitative Traffic Monitoring and Mitigation for the Proposed Development's operational phase, should consent be granted. Applicant to provide suggested wording, including definitions if relevant. LHAs have provided wording for such a Requirement [REP6-074], which the Applicant may consider.</p>