A66 Northern Trans-Pennine Project

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7.44 Applicant's Response to the ExA's Comments on and Schedule of Changes to the Draft DCO

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7.44 APPLICANT'S RESPONSE TO THE EXA'S COMMENTS ON AND SCHEDULE OF CHANGES TO THE DRAFT DCO

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1 Introduction

1.1.1 This document has been prepared to provide the Applicant's response to the Examining Authority's *Schedule of recommended amendments to the Applicant's draft DCO submitted at Deadline 5* **[PD-015]**.

2 Applicant's response to the ExA's Comments on and Schedule of Changes to the Draft DCO

2.1.1 The below table sets out the Applicant's response to the ExA's Comments on and Schedule of Changes to the Draft DCO. The Applicant's response largely follows the form of PD-015 save that the second column in **[PD-015]** (which contained an extract from the Applicant's third revision of the draft DCO **[REP-012]**) has been omitted and an additional column setting out the Applicant's response has been added.

Reference	ExA's Recommended Change	ExA's Reason	Applicant's Response
Part 5 Article 53(2) *Environmental Management Plan (EMP)*	**INSERT NEW PARAGRAPH (2)** "(2) The Secretary of State must consult the relevant statutory environmental bodies, local authorities and highway authorities, allowing each party a period not exceeding 30 days (unless the Secretary of State gives written consent for further time to be allowed) to respond to the Secretary of State."	The ExA discussed the issue of inserting such wording at Issue Specific Hearing 3 (ISH3) held on Thursday 2 March 2023 [EV-046 to EV-053] and has noted the Applicant's written response [REP5-024]. Notwithstanding the text contained within the first iteration EMP, the ExA nevertheless considers Interested Parties (IPs) and Statutory Parties would benefit from clear and unambiguous understanding of the consultation the Secretary of State must undertake in the approval of the second iteration EMP, and the timescales to respond, within the Article itself. The ExA suggests such wording be inserted as suggested.	The Applicant has carefully considered the Examining Authority's recommended change and its reasons for making the recommendation, but remains of the firm view that the proposed new paragraph in article 53 is both unnecessary and would be detrimental were it to be included in the draft DCO. The Applicant has not come to this conclusion lightly. The reason given by the Examining Authority for making the recommendation is that it "*nevertheless considers Interested Parties (IPs) and Statutory Parties would benefit from clear and unambiguous understanding of the consultation the Secretary of State must undertake in the approval of the second iteration EMP and the timescales to respond, within the article itself*". The Applicant shares the Examining Authority's concern of ensuring that there is a clear and unambiguous understanding of the parties' responsibilities and timescales for carrying out consultation on a second iteration EMP. Indeed, this objective is set out in the introduction to the first iteration EMP at paragraphs 1.4.3 to 1.4.6 which, in summary: • states that under the Project Speed initiative, the Applicant has considered how to streamline the process of post consent determinations in order to see the important public

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			benefits of nationally significant highways projects being delivered sooner; • notes some of the practical difficulties with the typical approach of including requirements in a Schedule to a statutory instrument, which is subject to the constraints of statutory instrument drafting, while the majority of the key environmental mitigation provisions are contained in a certified document; and • explains that the first iteration EMP is the Applicant's response to that challenge by seeking to set out in a single document the post consent determinations that are required to be made *and the process by which those determinations in relation to environmental management (including related consultations) are to be made*. Paragraphs 1.4.9 to 1.52 of the first iteration EMP (the "consultation and determination provisions") set out in detail, in clear prose free of the constraints of statutory instrument drafting conventions, and in one place, the precise consultation process that is to be followed in relation to the development of a second iteration EMP. The Applicant has explained in its response to written question DCO 1.4 (**[REP4-011]**) that, if development consent is granted, the first iteration EMP would become a certified document and would therefore be "fixed". The definitions in article 53(8) of "first iteration EMP" and "the consultation and determination provisions" ensure that the single consultation process described in clear language in the first iteration EMP remains the process by which consultation on a second iteration EMP is conducted. It simply is not open to the Applicant, short of applying to change the DCO itself, to seek to

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			change the "consultation and determination provisions" contained in the first iteration EMP, if development consent is granted. The Applicant remains of the firm view that it is unnecessary to make further provision for consultation in relation to a second iteration EMP on the face of the Order – it is already unambiguously secured through the provisions of article 53 (see article 53(4)(b) and 53(7)(b)) and the process itself is set out clearly in one place in the first iteration EMP itself. It is important to note that in drawing up the consultation and determination provisions in the first iteration EMP, the Applicant has sought to apply the "front loading" philosophy that underlies the Planning Act 2008 regime to post consent determinations. In summary, the consultation and determination provisions provide for: • which consultees are to be consulted in relation to which matters, ensuring that consultees are burdened only with the matters that are relevant to their statutory functions; • at least 5 working days' advance notice of the commencement of a consultation; • an initial consultation period of 20 working days i.e. around four working weeks and approximately equivalent to the 30 (calendar) days suggested in the Examining Authority's recommended drafting, depending on the presence of public holidays and noting, in that case, that the Applicant's drafting is more generous by discounting such public holidays;

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			• that period to be extended by agreement; • following consideration of the first round of consultation responses, a second round of consultation of 10 working days on the revised consultation materials, accompanied by a summary report of the consultation undertaken, which is required to include an explanation of the reasons why any consultation responses have not resulted in amendments being included in the revised consultation materials – this gives consultees the opportunity to understand the views of other consultees and to see how the Applicant has taken those matters into account; • the second round of consultation to be extended by agreement; and • following the second round of consultation, the materials to be revised if appropriate and the summary statement of consultation to be updated to account for the second round of consultation; Only after the completion of this process would the Applicant submit to the Secretary of State an application for approval of a second iteration EMP. The Secretary of State would therefore have the benefit of being in receipt of an application in relation to which a thorough, two stage process of consultation would have been undertaken and would have the benefit of a summary report explaining how responses to that consultation have been reflected in the materials before the Secretary of State for determination. The Examining Authority's recommended change would, however, inject into this process a requirement on the Secretary of State, and

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			indeed, all of the consultees, to engage upon a *further* third stage of consultation. The ExA's recommended drafting refers to a period "*allowing each party a period not exceeding 30 days (unless the Secretary of State gives written consent for further time to be allowed) to respond to the Secretary of State.*" The Applicant understands that this is intended to afford a degree of flexibility, by for example, allowing for a period of less than 30 days. However, in practice, the most likely scenario is that the maximum 30 day period would be given as to do otherwise would require a positive decision to justify a shorter period in the circumstances. This would extend the total consultation period from the 30 working days proposed by the Applicant (via the two stage process set out in the first iteration EMP) to 30 working days plus a further period of 30 *calendar* days. This process would not be governed by the detailed consultation and determination provisions contained in the first iteration EMP but would instead be located in the DCO. This is contrary to the Applicant's aim, shared by the reasoning supporting the Examining Authority's change, of providing a "*clear unambiguous understanding*" of the consultation required. It would also introduce a substantial further delay to the post consent determination process, which runs contrary to the objectives of the Project Speed initiative. Significantly, by cutting across the carefully crafted process set out in the first iteration EMP, the recommended change would impose further administrative burdens on the consultees by requiring them to consider those materials for a third time and also a risk of being burdened with a consultation on materials that are not relevant to their statutory functions (as a result of the ambiguity arising from the

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			use of the phrase ""relevant statutory environmental bodies" in a context where the first iteration EMP already identifies the consultees to be consulted in relation to each of the relevant matters). In this regard, it is important to note that the Applicant has reached agreed positions with the bodies that would be consulted on a second iteration EMP, in the context of agreeing provisions of the first iteration EMP, that this proposed amendment potentially undermines. In this regard it is significant to note that outside of the DCO process the Applicant is working with the Statutory Environmental Bodies and the local authorities to prepare a structured engagement plan intended to further assist all parties in establishing protocols and understandings around the consultation processes set out in the first iteration EMP. Finally, it is important to recognise that the Secretary of State is always at liberty to initiate a further round of consultation in relation to a proposed second iteration EMP if in the circumstances it is considered to be necessary and appropriate. However, given the 'front loaded' approach that has been adopted, the Applicant would expect this to occur only in the most exceptional of circumstances. It is therefore disproportionate to require it in every case as a blanket provision, as would be the effect of the Examining Authority's proposed change.
Part 5 Article 53(4)(a) and (7)(a)(ii) Article 54(2) *EMP*	"…would not give rise to any materially new or materially ~~worse~~ ~~adverse~~ **different** environmental effects…"	The Applicant stated in its response to Further Written Question (FWQ) DCO 2.1 [REP6-020] that it would amend the said text "to align with DfT's preferred formulation". The ExA, welcomes the change as it broadly aligns with the request made at ISH2 held on Thursday 1 December 2022 [EV-019 to EV-028] and will expect to see the revised wording for the next iteration of draft	The Applicant has made this change in the version of the draft DCO submitted at this Deadline 7. But in accordance with the Applicant's response to further written question DCO 2.1 [REP6-020], its adoption of the alternative wording is on the basis that the accompanying interpretative provisions now included at article 2(7) makes it clear that the Applicant would not be precluded from meeting that test by way of lessening the severity of an assessed adverse environmental effect, or by increasing the benefit of a positive environmental effect.

Reference	ExA's Recommended Change	ExA's Reason	Applicant's Response
Detailed Design		DCO at **Deadline 7, Tuesday 9 May 2023.**	
Part 5 Article 54(1) *Detailed Design*	*"(1) Subject to article 7 (limits of deviation) and the provisions of this article, the authorised development must be designed in detail and carried out so that it is ~~compatible~~* ***substantially in accordance*** *with"* –	The Applicant stated in its response to Further Written Question DCO 2.2 [REP6- 020] that it would amend the paragraph as suggested by the ExA. The ExA welcomes the change and will expect to see the revised wording for the next iteration of draft DCO at **Deadline 7, Tuesday 9 May 2023**.	The Applicant has made this change in the version of the draft DCO submitted at this Deadline 7.
Part 5 Article 54 (4) *Detailed Design*	**INSERT NEW PARAGRAPH**: "(4) The undertaker must not commence construction of each of the viaducts comprised in Work Nos. 0405-1A(xii), 0405- 2A(x), 06- 1C(vi) and 06-1C(x) until details of the external appearance of the viaduct have been submitted to, and following consultation with the relevant planning authority, approved in writing by the Secretary of State."	The ExA notes the Applicant's response to ISH3 held on 02 March 2023, together with its response to FWQ DCO 2.2 [REP6-020]. However, the ExA remains concerned that the designs of the Trout Beck, Cringle Beck and Moor Beck viaducts should be approved by the Secretary of State given their size and the potential landscape and visual effects that may occur. In the absence of draft detailed designs, including the Applicant's decision not to provide photomontages, the ExA is not persuaded that the Design Principles are sufficiently detailed, or at an advanced stage to allow these viaducts to be constructed without approval. The ExA accepts the Applicant position on this matter and that it disagrees and will likely reject the change.	The Applicant has carefully considered the Examining Authority's reasons for recommending this change to article 54(4). The Applicant remains of the view that it, as the strategic highway company responsible for setting the design standards for England's strategic road network, is the appropriate body to be responsible for the detailed design of the Project. The Applicant maintains its view that the provisions of article 54, including the Design Principles, Works Plans and Engineering Section Drawings: Plan and Profiles and Cross Sections are sufficient to secure good design. The Applicant re-iterates its earlier submissions, most notably those recorded in its Issue Specific Hearing (ISH3) Post Hearing Submissions (including written submissions of oral case) [REP5-024] under agenda item 2.0, its Response to the Examining Authority's Written Questions [REP4-011] (questions BHR 1.1 and LV 1.1) and its Response to the Examining Authority's Further Written Questions [REP6-020] question DCO 2.2. The Applicant therefore still considers that this provision should not be added to the draft DCO.

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		Nevertheless, the ExA wishes to give the Applicant the opportunity to review its position before the Secretary of State makes their decision on the need for this additional paragraph.	
Part 5 Article 54(5) *Detailed Design*	**INSERT NEW PARAGRAPH:** (5) "The undertaker must not commence the construction of Work No. 06-7 until the detailed designs of the positioning of the access road and the associated Ancillary Works have been submitted to approved in writing by the Secretary of State following consultation with the relevant planning authority."	The design for Work No 06-07 and the associated Ancillary Works were the topic of discussion at ISH1 [EV-013 to EV-018]. The Change Request [CR-002] number DC-25 proposed a change to the location of the Langrigg to Flitholme link road and removal of the A66 Langrigg Lane junction. The Applicant states in paragraph 3.25.16 that "*Many of the other issues raised at consultation, such as those relating to drainage and land, will be addressed through further engagement and through provisions of the EMP. For example,* [The Applicant] *proposed to rationalise the pond designs and associated access for maintenance which may involve amendments to pond locations and/or shape to better fit the existing landscape/ field patterns. This will be undertaken in consultation with the drainage authorities and the land interests affected."* Owing to the uncertainties around the final design of this area and having regard to concerns expressed by IPs and shared by the ExA regarding the	The Applicant has carefully considered the Examining Authority's reasons for recommending this change to article 54(5). The Applicant remains of the view that it, as the strategic highway company responsible for setting the design standards for England's strategic road network, is the appropriate body to be responsible for the detailed design of the Project. However, the Applicant is prepared to commit to consulting the relevant local planning authority in relation to any proposal to exercise the Applicant's intended power to deviate in the positioning of Work No. 06-7 and so is minded to give the following commitment in the final version of the Project Design Principles due to be submitted at Deadline 8: *"Construction of Work No. 06-7 must not start until the relevant planning authority has been consulted (in accordance with the provisions of Chapter 1 of the EMP) on:* • *the proposed final alignments of any highway comprised in that work (where the lateral or vertical limits of deviation are proposed to be utilised in accordance with article 7 of the DCO); and* • *the proposed final positioning of any attenuation pond required for that work."*

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		living conditions in nearby residential properties, that the final design of the link road and ancillary works at Langrigg should be approved by the Secretary of State to allow the IPs and others to comment.	
Schedule 1 Ancillary Works	(a) "works within highways, including - (i) alteration of the layout of any street permanently or temporarily, including increasing or reducing the width of the carriageway of any street by increasing or reducing the width of any footway, cycleway or verge within the street; and altering the level or increasing the width of any such footway, cycleway or verge within the street; works for the strengthening, improvement, repair, maintenance or reconstruction of any street; and works associated with the tie-in of the authorised development to the existing highway;"	A kerb is a building block of elements of highways such as footways, footpaths, cycleways, etc, and as such its use in this paragraph is not required. It should be removed to provide greater clarity in the meaning of this paragraph.	The Applicant has made this change in the version of the draft DCO submitted at this Deadline 7.