

The Planning Inspectorate

M5 Junction 10 Improvements Project

**Examining Authority's (ExA) Consultation Draft Development Consent
Order (DCO)**

Schedule of ExA's recommended amendments to the Applicant's draft DCO
revision 6 [REP7-002]

Note to Interested Parties:

The Examining Authority (ExA) reminds Interested Parties (IP) that the recommended schedule of changes to the draft DCO [REP7-002] as set out below follows a statutory process. It is made irrespective of the recommendation the ExA will make to the Secretary of State (SoS) and is not an indication that ExA has already made up its mind on the Application. IPs participation and written responses will be treated as being given without prejudice to any position or view they hold on the scheme. IPs are invited to identify any outstanding concerns previously raised that are not addressed below.

No.	Article/Schedule	Text as set out in draft DCO revision 6 [REP7-002]	ExA's recommended amendment	Reason and Notes
1.	Article 10 Consent to Transfer benefits	Consent to transfer benefit of Order 10.—(1) The undertaker may— (a) transfer to another person (“the transferee”) any or all of the benefit of the provisions of this Order, including those relating to compulsory acquisition, and such related statutory rights as may be agreed between the undertaker and the transferee; or (b) grant to another person (“the lessee”) for a period agreed between the undertaker and the lessee any or all of the benefit of the provisions of this Order, including those relating to compulsory acquisition, and such related statutory rights as may be so agreed.	No Change	Discussions on going between applicant and NH, however the ExA are of the view that current wording of the dDCO is satisfactory. The reason given at the ISH4 by NH for not wishing to have deemed permissions and correspondence going to the wrong place in NH is not in the ExA view a robust justification. Clear communication structures should be agreed so the correct

		<p>(2) Where an agreement has been made in accordance with paragraph (1) references in this Order to the undertaker, except in paragraph (3), include references to the transferee or the lessee.</p> <p>(3) The exercise by a person of any benefits or rights conferred in accordance with any transfer or grant under paragraph (1) is subject to the same restrictions, liabilities and obligations as would apply under this Order if those benefits or rights were exercised by the undertaker.</p> <p>(4) If the benefit of the provisions of this Order relating to compulsory acquisition is transferred or granted to a transferee or lessee pursuant to this article and the transferee or lessee exercises those powers then the undertaker is liable to the transferee or lessee for any compensation that is payable to another party as a consequence of the exercise of those powers by the transferee or lessee.</p> <p>(5) The consent of the Secretary of State is required for a transfer or grant under this article, except where the transfer or grant is made to—</p> <p>(a) National Highways Limited (company number 09346363, whose registered office is at Bridge House, 1</p>		<p>teams have direct communication to ensure that the Proposed Development can be progressed.</p>
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		<p>Walnut Tree Close, Guildford, Surrey, GU1 4LZ);</p> <p>(b) Gigaclear Limited (company number 07476617, whose registered office is at Building One, Wyndyke Furlong, Abingdon, Oxfordshire, United Kingdom, OX14 1UQ) for the purposes of undertaking Work Nos. 8, 9, 10 and 11;</p> <p>(c) Openreach Limited (company number 10690039, whose registered office is at Kelvin House, 123 Judd Street, London, United Kingdom, WC1H 9NP) for the purposes of undertaking Work Nos. 27 to 34;</p> <p>(d) Severn Trent Water Limited (company number 02366686, whose registered office is at Severn Trent Centre, 2 St John's Street, Coventry, CV1 2LZ) for the purposes of undertaking Work Nos. 14 and 15;</p> <p>(e) Wales & West Utilities Limited (company number 05046791, whose registered office is at Wales & West House, Spooner Close Coedkernew, Newport, South Wales, NP10 8FZ) for the purposes of undertaking Work Nos. 16, 17, 18 and 35;</p> <p>(f) National Grid Electricity Distribution (West Midlands) PLC (company number 03600574, whose registered office is at Avonbank,</p>		
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		Feeder Road, Bristol, Avon, BS2 0TB) for the purposes of undertaking Work Nos. 19 to 26; or (g) Zayo Group UK Limited (company number 03726666, whose registered office is at 100 New Bridge Street, London, England, EC4V 6JA) for the purposes of undertaking Work Nos. 12 and 13.		
2.	Article 11 Street works.	Street works 11.—(1) The undertaker may, for the purposes of the authorised development, enter on so much of any of the streets as are within the Order limits and may— (a) break up or open the street, or any sewer, drain or tunnel under it; (b) tunnel or bore under the street; (c) place apparatus in the street; (d) maintain apparatus in the street or change its position; and (e) execute any works required for, or incidental to, any works referred to in sub-paragraphs (a), (b), (c) and (d). (2) The authority given by paragraph (1) is a statutory right for the purposes of sections 48(3) (streets, street works and undertakers) and 51(1) (prohibition of unauthorised street works) of the 1991 Act. (3) Subject to article 12 (application of the 1991 Act), the provisions of	Add (4) The powers conferred by paragraph (1) are not to be exercised without the consent of the street authority; but such consent must not be unreasonably withheld. (5) If a street authority which receives an application for consent under paragraph (4) fails to notify the undertaker of its decision before the end of the period of 42 days beginning with the date on which the application was made, it is deemed to have granted consent. (6) Paragraphs (4) and (5) do not apply where the undertaker is the street authority for a street in which the works are being carried out	To ensure that the appropriate approval is in place for undertaking works in a street and that the necessary safeguards are in place to do so.

		sections 54 to 106 of the 1991 Act apply to any street works carried out under paragraph (1).		
3.	Article15 (6)	If a street authority which receives an application for consent under paragraph (4) fails to notify the undertaker of its decision before the end of the period of 28 days beginning with the date on which the application was made, it is deemed to have granted consent.	If a street authority which receives an application for consent under paragraph (4) fails to notify the undertaker of its decision before the end of the period of 42 days beginning with the date on which the application was made, it is deemed to have granted consent.	It is important to ensure the ongoing safe operation of the SRN, but also to ensure that the ability to progress the design and completion of the Proposed Development and that this is not unduly delayed or prevented. In seeking to try and ensure a balance between these two competing elements the ExA consider that in extending the time period for approval, but in maintaining a deemed approval in the absence of a decision a sensible time is created that ensures there is a realistic prospect for the decision to be made, and if appropriate amendments sought during the period proposed thus that a

				<p>refusal should be less likely.</p> <p>The ExA are not persuaded that NH position that correspondence may get lost is justified. It is imperative for all concerned that clear communication routes are set out at the outset for the project and that this can be monitored by both parties.</p>
4.	Article 18 (7)	If a person who receives an application for consent under paragraph (3) or approval under paragraph (4)(a) fails to notify the undertaker of a decision within 28 days of receiving an application, that person is deemed to have granted consent or given approval, as the case may be.	If a person who receives an application for consent under paragraph (3) or approval under paragraph (4)(a) fails to notify the undertaker of a decision within 42 days of receiving an application, that person is deemed to have granted consent or given approval, as the case may be.	As Above
5.	Article 20 (6)	If either the local highway authority or a street authority which receives an application for consent under paragraph (4) fails to notify the undertaker of its decision within 28 days of receiving the application for consent, that authority is deemed to have granted consent.	If either the local highway authority or a street authority which receives an application for consent under paragraph (4) fails to notify the undertaker of its decision within 42 days of receiving the application for consent, that authority is deemed to have granted consent.	As Above

6.	Article 23 Time Limit for exercise of authority to acquire land compulsorily	<p>23.—(1) After the end of the period of 5 years beginning on the day on which this Order is made—</p> <p>(a) no notice to treat is to be served under Part 1 of the 1965 Act as modified by article 27 (modification of Part 1 of the 1965 Act); and</p> <p>(b) no declaration is to be executed under section 4 (execution of declaration) of the 1981 Act as applied by article 28 (application of the 1981 Act).</p> <p>(2) The authority conferred by article 31 (temporary use of land for carrying out the authorised development) ceases at the end of the period referred to in paragraph (1), except that nothing in this paragraph prevents the undertaker from remaining in possession of land after the end of that period, if the land was entered and possession was taken before the end of that period.</p>	<p>23.—(1) After the end of the period of 2 years 6 months beginning on the day on which this Order is made—</p> <p>(a) no notice to treat is to be served under Part 1 of the 1965 Act as modified by article 27 (modification of Part 1 of the 1965 Act); and</p> <p>(b) no declaration is to be executed under section 4 (execution of declaration) of the 1981 Act as applied by article 28 (application of the 1981 Act).</p> <p>(2) The authority conferred by article 31 (temporary use of land for carrying out the authorised development) ceases at the end of the period referred to in paragraph (1), except that nothing in this paragraph prevents the undertaker from remaining in possession of land after the end of that period, if the land was entered and possession was taken before the end of that period.</p>	<p>Substitute 2 years 6 months for 5 years. The ExA is of the view that the certainty of the funding for compulsory acquisition relies upon the HIF funding being in place. This is of itself is currently time limited to the end of 2027. While we have indicated a 2 year 6 month window as opposed to the 5 years, on the assumption the SoS makes a positive decision to grant the DCO in June 2025, the date currently anticipated for a decision, if the SoS agrees that the CA funding relies upon the HIF funding should the decision be delayed, logically the period should be shortened, unless there is evidence the HIF funding has been extended, or an</p>
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				alternate robust funding stream is in place.
7.	Requirement 9 Archaeology	<p>9.—(1) In order to be included in the EMP (2nd iteration) pursuant to paragraph 3(2)(e)(viii) of this Schedule, the archaeological management plan, must reflect the investigation and mitigation measures included in chapter 11 (cultural heritage) of the environmental statement, the EMP (1st iteration), and must include provision for site-specific archaeological project designs for each area and each phase where necessary, and have been prepared in consultation with the relevant planning authority, county planning authority, the strategic highway authority, Historic England and the County Archaeologist and have been submitted to and approved in writing by the Secretary of State.</p> <p>(2) The authorised development must be carried out in accordance with the archaeological management plan and where relevant the site specific archaeological project designs referred to in sub-paragraph (1) unless otherwise agreed in writing by the Secretary of State.</p>	<p>9.—(1) In order to be included in the EMP (2nd iteration) pursuant to paragraph 3(2)(e)(viii) of this Schedule, the archaeological management plan, must accord with the investigation and mitigation measures included in chapter 11 (cultural heritage) of the environmental statement, the EMP (1st iteration), and must include provision for site-specific archaeological project designs for each area and each phase where necessary, and have been prepared in consultation with the relevant planning authority, county planning authority, the strategic highway authority, Historic England and the County Archaeologist and have been submitted to and approved in writing by the Secretary of State.</p> <p>(2) The authorised development must be carried out in accordance with the archaeological management plan and where relevant the site specific archaeological project designs referred to in sub-paragraph (1) unless otherwise</p>	<p>Replace 'reflect' with 'accord with'.</p> <p>The ExA is of the view this is a more precise description of what might be expected to be undertaken and is more likely to be a form of words which would be enforceable.</p>

		<p>(3) A programme of archaeological reporting, post excavation and publication required as part of the archaeological management plan and where relevant the site specific archaeological project designs referred to in sub-paragraph (1) must be prepared in consultation with the County Archaeologist and implemented within a reasonable timescale and deposited with the Historic Environment Record of the relevant planning authority within two years of the date of completion of the authorised development or such other period as may be agreed in writing by the relevant planning authority.</p> <p>(4) Any archaeological remains not previously identified which are revealed when carrying out the authorised development must be—</p> <p>(a) retained in situ and reported to the County Archaeologist as soon as reasonably practicable; and</p> <p>(b) subject to appropriate mitigation as set out in the archaeological management plan referred to in sub-paragraph (1).</p> <p>(5) No construction operations are to take place within 10 metres of the remains referred to in sub-paragraph (4) for a period of 14 days from the</p>	<p>agreed in writing by the Secretary of State.</p> <p>(3) A programme of archaeological reporting, post excavation and publication required as part of the archaeological management plan and where relevant the site specific archaeological project designs referred to in sub-paragraph (1) must be prepared in consultation with the County Archaeologist and implemented within a reasonable timescale and deposited with the Historic Environment Record of the relevant planning authority within two years of the date of completion of the authorised development or such other period as may be agreed in writing by the relevant planning authority.</p> <p>(4) Any archaeological remains not previously identified which are revealed when carrying out the authorised development must be—</p> <p>(a) retained in situ and reported to the County Archaeologist as soon as reasonably practicable; and</p>	
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		date the remains are reported to the County Archaeologist under sub-paragraph (4) unless otherwise agreed in writing by the Secretary of State.	(b) subject to appropriate mitigation as set out in the archaeological management plan referred to in sub-paragraph (1). (5) No construction operations are to take place within 10 metres of the remains referred to in sub-paragraph (4) for a period of 14 days from the date the remains are reported to the County Archaeologist under sub-paragraph (4) unless otherwise agreed in writing by the Secretary of State.	
8.	New Requirements 16 and 17 for approval of materials		Building and construction materials - highways (1) No part of the authorised development is to commence until written details of the materials to be used for the surfacing of the new highway and the adjacent cycleway and footway have been submitted to and approved in writing by the SoS following consultation with the relevant planning authority. (2) The details submitted under sub-paragraph (1) must include provision for the use of low noise road surfacing materials on the highway.	To ensure that the materials used are complimentary to and cognisant of the local context, and that the design vision of the scheme is met, and suitable for a project of national importance. The current Landscaping Requirement No.5 (d) stipulates a need to specify hard surfacing materials but this would not deal with the structures, cycleways etc. NPS NN in setting

			<p>(3) The authorised development must be carried out using the materials approved under sub paragraph (1).</p> <p>Building and construction materials - structures</p> <p>(1) No part of the authorised development is to commence until written details of the building materials to be used for the external facings of all structures, including bridges, retaining walls and culvert sides and headwalls, have been submitted to and approved in writing by the SoS following consultation with the relevant planning authority.</p> <p>(2) The authorised development must be carried out using the materials approved under sub paragraph (1).</p>	<p>criteria for ‘Good Design’ states at para 4.32 “Scheme design will be a material consideration in decision making” and the SoS needs to be satisfied that national networks “are sustainable and as aesthetically sensitive, durable, adaptable and as resilient as they can reasonably be.”</p>
9.	Requirement 16 Approvals and amendments to approved details	16. With respect to any requirement which requires the authorised development to be carried out in accordance with the details approved under this Schedule, the approved details are taken to include any amendments that may subsequently be approved or agreed in writing by the Secretary of State.	<p>18. With respect to any requirement which requires the authorised development to be carried out in accordance with the details approved under this Schedule, the approved details are taken to include any amendments that may subsequently be approved or agreed in writing by the Secretary of State.</p>	<p>Renumber 16 to 18 to reflect additional Requirements proposed to be added</p>

10.	Wales and West Utilities			Protective Provisions – ExA awaiting final comments from parties following revisions introduced at D7
11.	National Grid Electricity Distribution (West Midlands) plc			Protective Provisions – ExA awaiting final comments from parties following revisions introduced at D7
12.	Severn Trent Water			Protective Provisions – ExA awaiting final comments from parties following revisions introduced at D7
13.	BT Openreach Limited			Protective Provisions – ExA awaiting final comments from parties following revisions introduced at D7
14.	Part 3 For the Protection of National Highways			
15.	Interpretation 21	21 (2) (l) (l) such other information as is required by National Highways to be used to update all relevant databases and to ensure compliance with National Highway's Asset Data Management Manual as is in operation at the relevant time..	(l) such other information as is required by National Highways to be used to update all relevant databases and to ensure compliance with National Highway's Asset Data	Delete repeated full stop at the end of the paragraph

			Management Manual as is in operation at the relevant time.	
16.	Prior Approvals and Security 25	25 (7) (c) (c) shall be deemed to have been approved if neither given nor refused within 2 months of the receipt of the information for approval or, where further particulars are requested by National Highways within 2 months of receipt of the information to which the request for further particulars relates;	(c) shall be deemed to have been approved if neither given nor refused within 42 days of the receipt of the information for approval or, where further particulars are requested by National Highways within 42 days of receipt of the information to which the request for further particulars relates	Replace two months with 42 days for consistency of time period with other articles
17.	Indemnity 35.	35.—(1) The undertaker fully indemnifies National Highways from and against all costs, claims, expenses, damages, losses and liabilities suffered by National Highways arising from the construction, maintenance or use of the specified works (including under Part 1 of the Land Compensation Act 1973) or exercise of or failure to exercise any power under this Order within 14 days of demand save for any loss arising out of or in consequence of any negligent act or default of National Highways provided always that National Highways has taken reasonable steps to mitigate such loss to minimise all costs, claims expenses, damages, losses and	35.—(1) The undertaker fully indemnifies National Highways from and against all costs, claims, expenses, damages, losses and liabilities suffered by National Highways arising from the construction, maintenance or use of the specified works (including under Part 1 of the Land Compensation Act 1973) or exercise of or failure to exercise any power under this Order within 14 days of demand save for any loss arising out of or in consequence of any negligent act or default of National Highways provided always that National Highways has taken reasonable steps to mitigate such loss to	Full stop added at the end of paragraph.

		liabilities so far as possible. National Highways must provide full and sufficient details of the particulars and quantum of any claim to the undertaker as soon as possible following receipt and shall not settle any claim without first giving the undertaker the opportunity to comment on any proposed settlement and National Highways shall have proper regard to any representations made by the undertaker	minimise all costs, claims expenses, damages, losses and liabilities so far as possible. National Highways must provide full and sufficient details of the particulars and quantum of any claim to the undertaker as soon as possible following receipt and shall not settle any claim without first giving the undertaker the opportunity to comment on any proposed settlement and National Highways shall have proper regard to any representations made by the undertaker.	
18.	Expert Determination 38	38.—(1) Article 46 (arbitration) of the Order does not apply to this Part of this Schedule. (1) Any difference under this Part of this Schedule may be referred to and settled by a single independent and suitable person who holds appropriate professional qualifications and is a member of a professional body relevant to the matter in dispute acting as an expert, such person to be agreed by the differing parties or, in the absence of agreement, identified by the President of the Institution of Civil Engineers.	38.—(1) Article 46 (arbitration) of the Order does not apply to this Part of this Schedule. (1) Any difference under this Part of this Schedule may be referred to and settled by a single independent and suitable person who holds appropriate professional qualifications and is a member of a professional body relevant to the matter in dispute acting as an expert, such person to be agreed by the differing parties or, in the absence of agreement, identified by the	Full stop added at the end of the paragraph

		<p>(2) On notification by either party of a dispute, the parties must jointly instruct an expert within 14 days of notification of the dispute.</p> <p>(3) All parties involved in settling any difference must use best endeavours to do so within 21 days from the date that an expert is appointed.</p> <p>(4) The expert must—</p> <p>(a) invite the parties to make submission to the expert in writing and copied to the other party to be received by the expert within 7 days of the expert’s appointment;</p> <p>(b) permit a party to comment on the submissions made by the other party within 7 days of receipt of the submission;</p> <p>(c) issue a decision within 7 days of receipt of the submissions under sub-paragraph (b); and</p> <p>(d) give reasons for the decision.</p> <p>(5) Any determination by the expert is final and binding, except in the case of manifest error in which case the difference that has been subject to expert determination may be referred to and settled by arbitration under article 46 (arbitration).</p> <p>(6) The fees of the expert are payable by the parties in such proportions as the expert may determine or, in the</p>	<p>President of the Institution of Civil Engineers.</p> <p>(2) On notification by either party of a dispute, the parties must jointly instruct an expert within 14 days of notification of the dispute.</p> <p>(3) All parties involved in settling any difference must use best endeavours to do so within 21 days from the date that an expert is appointed.</p> <p>(4) The expert must—</p> <p>(a) invite the parties to make submission to the expert in writing and copied to the other party to be received by the expert within 7 days of the expert’s appointment;</p> <p>(b) permit a party to comment on the submissions made by the other party within 7 days of receipt of the submission;</p> <p>(c) issue a decision within 7 days of receipt of the submissions under sub-paragraph (b); and</p> <p>(d) give reasons for the decision.</p> <p>(5) Any determination by the expert is final and binding, except in the case of manifest error in which case the difference that has been subject to expert determination may be referred to</p>	
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		absence of such determination, equally	and settled by arbitration under article 46 (arbitration). (6) The fees of the expert are payable by the parties in such proportions as the expert may determine or, in the absence of such determination, equally.	
19.	Security 39		Security 39. —(1) The specified works must not commence until— (a) the undertaker procures that the specified works are secured by a bond from a bondsman first approved by National Highways in the agreed form between the undertaker and National Highways to indemnify National Highways against all losses, damages, costs or expenses arising from any breach of any one or more of the obligations of the undertaker in respect of the exercise of the powers under this Order and the specified works under the provisions of this Part of this Schedule provided that the maximum liability of the bond must not exceed the bond sum; and (b)	In light of response from Applicant to funding uncertainty and Applicant’s response post hearing [REP4-037] The ExA is of the view that certainty is needed that the SRN is protected and that the potential safety implications of a scheme being commenced, but either being incomplete or a default position arising is avoided. In the ExA view the lack of certainty for the funding for the whole project leaves there a potential for work to commence and a default situation to arise. The ExA remain

			<p>the undertaker has provided the cash surety which may be utilised by National Highways in the event of the undertaker failing to meet its obligations to make payments under paragraph 9 or to carry out works the need for which arises from a breach of one or more of the obligations of the undertaker under the provisions of this Part of this Schedule.</p>	<p>of the view that the safety of the SRN must be an underlying principle, and the bond will assist in assuring this is secured.</p> <p>The ExA recognise this may be overcome in another way if the Applicant and NH can come to an agreement by another means, but at the current time this is the ExA view.</p>
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