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November 2023

London Luton Airport Expansion

Planning Inspectorate Scheme Ref: TR020001

Volume 8 Additional Submissions (Examination)

8.71 Applicant's response to Written Questions - Draft Development Consent Order

Infrastructure Planning (Examination Procedure) Rules 2010

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The Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

London Luton Airport Expansion Development Consent Order 202x

8.71 APPLICANT'S RESPONSE TO WRITTEN QUESTIONS - DRAFT DEVELOPMENT CONSENT ORDER

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1 RESPONSE TO EXAMINING AUTHORITY WRITTEN QUESTIONS (DRAFT DCO)

Table 1.1: Responses to the Examining Authority's Written Questions (Draft DCO)

PINS ID	Subject	Question / Response
Please note: The references to articles and requirements relate to the numbering of articles and requirements for the draft DCO that was submitted at D2 [REP2-003] and discussed at ISH1, unless otherwise stated.		
DCO 1.1	Precedent	**Question:** **Precedents** Notwithstanding that drafting precedent has been set by previous DCOs or similar orders, full justification should be provided for each power/ provision taking into account the facts of this particular DCO application. Where drafting precedents in previous made DCOs have been relied on, these should be checked to identify whether they have been subsequently refined or developed by more recent DCOs so that the DCO provisions reflect the Secretary of State's current policy preferences. If any general provisions (other than works descriptions and other drafting bespoke to the facts of this particular application and draft DCO) actually differ in any way from corresponding provisions in the Secretary of State's most recent made DCOs, an explanation should be provided as to how and why they differ (including but not limited to changes to statutory provisions made by or related to the Housing and Planning Act 2016). Provide a list of all the previous DCOs that have been used as a precedent for the drafting of this draft DCO or signpost where in the application documentation this can be found.
		Response: The Applicant's **Explanatory Memorandum [REP3-005]** sets out, on a provision-by-provision, the numerous "made" DCOs that were used to inform the Draft DCO as submitted with the application for development consent. Noting that some months have elapsed since that draft was put together, the Applicant has reviewed subsequent "made" DCOs to ensure that the DCO drafting adopted continues to represent current practice. That analysis is contained in **Appendix A – Review of 2023 DCO Drafting Precedents (ExA WQ DCO 1.1)**. The conclusion of the analysis is that no further drafting amendments are necessary as a result of the review. In summary, the Applicant is confident that the Draft DCO reflects both current drafting practice and the Secretary of State for Transport's current policy preferences, noting that all DCOs contain: - some modification of "standard" provisions to reflect the specific circumstances of that project; - some bespoke drafting relevant only to that project; and - some novel drafting that, if accepted by the Secretary of State, may come to represent new "best practice" for subsequent DCOs.
DCO 1.2	Articles	**Question:** **Article 2(9) and Article 6(3)** Article 2(9) of the draft DCO clarifies that the interpretation of materially new or materially different environmental effects must not be construed "so as to include the avoidance, removal or reduction of an adverse environmental effect that was reported in the environmental statement as a result of the authorised development". Article 6(3) also includes the wording "any new or materially different environmental effects". As currently drafted these articles do not include the caveat 'not materially worse than' or 'not environmentally worse than'. Should they and, if not, why not?
		Response: The Applicant has not used the phrase "materially worse" or "not environmentally worse than" because the Secretary of State has, across a number of decisions, confirmed that the phrase does not reflect their preferred drafting practice (as compared with the phrase "materially new or materially different"). For example, in the Great Yarmouth Third River Crossing project, the Secretary of State confirmed that "materially new or materially different... is wording preferred by the Secretary of State". In the A303 Stonehenge decision letter, the Secretary of State replaced the phrase "materially worse" with his preferred drafting (adopted in the Draft DCO). In light of that practice, the Applicant has opted to include the interpretive provision which the Applicant considers is consistent with both the Secretary of State's drafting practice, but also the Secretary of State's explicit acknowledgement that environmentally better outcomes should not be prevented. It is recognised that the A57 Link Roads Development Consent Order 2022 contains the phrase: "unlikely to give rise to any materially new or materially worse environmental effects in comparison with those reported in the environmental statement". However, in paragraph 217 of the decision letter the Secretary of State was clear that this was an exception to the norm: "…*while it is not the Secretary of State's position regarding the use of wording of 'materially new or materially*

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		worse', he has noted the discussion and agreement of this wording during the Examination and so believes on this occasion it is appropriate to deviate from his usual position and allow the agreed wording in this and other provisions within the DCO." The full explanation and justification of the interpretive provision is contained in section 3.12 to 3.12 of the **Explanatory Memorandum [REP3-005]**.
DCO1.3	Articles	**Question: This question was directed at the Joint Host Authorities only** **Article 24 – compulsory acquisition of land** For precision should paragraph 2 include more articles e.g. 26, 31, 32, 33, 39 and a reference to Schedule 8
		Response: While this question was directed to the Joint Host Authorities only, the Applicant has taken the opportunity to consider the query raised by the ExA and responds as follows. The Applicant has followed a precedented approach to this article, which reflects the Secretary of State's endorsed drafting approach. The provisions of any DCO are heavily intertwined, and ultimately have to be read and applied as a whole. The Applicant is conscious that the more articles that are referenced, the greater the argument is to add more articles, until the drafting becomes unwieldy. That said, for precision the Applicant is content to add reference to article 26 (Time limit for exercise of authority to acquire land compulsorily), article 36 (Statutory undertakers) and article 39 (Crown rights). As for the other provisions noted by the ExA: a. articles 31 and 32 are not restrictions on the scope of article 24, but rather powers available to the undertaker to reduce the scope of acquisition, so it is not considered appropriate to reference them in article 24; b. article 33 is already referenced in article 24; and c. reference to article 36 is the more appropriate reference to protect statutory undertakers, and obviates the need to reference Schedule 8.
DCO 1.4	Articles	**Article 30 – Application of 1981 Act and modification of the 2017 Regulations** **Paragraph (8)(b)** Should this refer to section 5a rather than 4? **Paragraphs 17 and 18** Provide a more detailed explanation of why these need to be included.
		Response: **Paragraph (8)(b)** The drafting change suggested by the ExA was made by the Applicant in the **Draft DCO [REP-3-055]** submitted at Deadline 3. **Paragraphs 17 and 18** This article modifies the application of the Compulsory Purchase of Land (Vesting Declaration) (England) Regulations 2017 ('the 2017 Regulations') to ensure that the interests and rights in land which are intended to benefit a third party, such as a statutory undertaker whose apparatus may be re-located in order to construct the authorised development, will vest in that third party instead of National Highways, who would otherwise be the acquiring authority in respect of those interests and rights. The amendments to these regulations, as well as the changes proposed for article 30, confirm the position that notwithstanding references in the Compulsory Purchase (Vesting Declarations) Act 1981 and 2017 Regulations to vesting land "in themselves" (i.e., in the acquiring authority), land and rights can be acquired by the Applicant in favour of any third party identified directly. This is a drafting change which confirms the ability for the Applicant to acquire such rights and land (where such powers of acquisition are not transferred to another person to acquire rights/land directly) and is not a substantive change to the rights or land sought for permanent acquisition.

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		These changes (plus the changes to application of the 1981 Act) are justified because the Applicant is proposing to vest land and rights in third parties, for example rights in relation to utilities assets to statutory undertakers, or replacement land which will vest back into the existing owners of special category land. In the absence of these provisions, the transfer of the land to those third parties would be delayed requiring first the acquisition of the land and rights by the Applicant, registration at the Land Registry and then the subsequent transfer to the relevant third party and further registration at the Land Registry. Such a delay could give rise to unintended and undesirable consequences, for example, preventing statutory undertakers accessing their assets, and enabling local authorities to operate and maintain special category land. The Secretary of State has previously endorsed the principles of vesting land directly in third parties (see, for example, article 30(2) of the Cornwall Council (A30 Temple to Higher Carblake Improvement) Order 2015 and article 30(2) of the Lancashire County Council (Torrisholme to the M6 Link (A683 Completion of Heysham to M6 Link Road)) Order 2013).
DCO 1.5	Articles	**Question:** **Articles 33 and 34 Temporary use of land for carrying out the authorised development and temporary use of land to maintain the development** **Paragraph 1** Does this list include everything that needs to be included eg mitigation works? **A33, Paragraph 2** Why is the timeframe 14 rather than the usual 28 days? **Paragraph 6** Does Part 1 of the 1961 Act need to be defined? **Paragraph 7** Is this paragraph reasonable and necessary?
		Response: **Paragraph 1** The Applicant believes that the list included in paragraph 1 is comprehensive and includes everything that needs to be included. The Applicant notes that the ExA specifically refers to 'mitigation works' but such works are included in Schedule 7 (Land of which temporary possession may be taken). **Paragraph 2** It is commonplace for complex Nationally Significant Infrastructure Projects (NSIPs) to include a 14-day timeframe (see, for example, the Sizewell C (Nuclear Generating Station) Order 2022). In that sense, 28 days is not a "usual period". However, in view of the Examining Authority's comment the Applicant has considered this point further and has updated the paragraph to require the Applicant to provide a notice period of 28 days before taking temporary possession of land. **Paragraph 6** The 1961 Act is already defined in article 2 of the **Draft DCO [REP3-055].** **Paragraph 7** This is a well precedented and standard paragraph in articles relating to temporary use of land for carrying out the authorised development. The intention behind this article is to minimise the length of time that the Applicant is in temporary possession of any such land. This paragraph merely confirms that the Applicant may give up possession of the land as soon as possible after removing temporary works and restoring the land, without a dispute leading to ongoing compensation costs associated with occupation. The paragraph does not preclude the owner of the land from disputing the satisfactory removal of works and suitable restoration of land

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		provided for under paragraph 4. As such, the owner of the land is not prejudiced as it is still free to dispute the satisfactory nature of the removal/restoration of land and is still entitled to compensation as provided for in paragraph 5.
DCO1.6	Articles	**Question:** **Article 35 – Special Category Land** Provide a more detailed explanation as to why this article is necessary
		Response: A justification for article 35 (Special category land) is set out in the **Explanatory Memorandum [REP3-005]** at paragraphs 3.137 – 3.141, and in the **Statement of Reasons [AS-071]** at paragraph 5.3.25. The **Draft DCO [REP3-003]** proposes to authorise the acquisition of open space land (Wigmore Valley Park). Details of open space land subject to compulsory acquisition as well as proposed replacement land are set out in Part 5 of the **Book of Reference [APP-011]**. In accordance with section 131 of the Planning Act 2008, an order granting development consent is subject to special parliamentary procedure where it authorises the compulsory acquisition of open space land unless one of the exceptions set out within section 131 can be met. The Applicant proposes to rely upon the exception set out in section 131(4) relating to the provision of replacement land in exchange (i.e. land that is no less advantageous): *"(4) This subsection applies if—* *(a) replacement land has been or will be given in exchange for the order land, and* *(b) the replacement land has been or will be vested in the prospective seller and subject to the same rights, trusts and incidents as attach to the order land."* In accordance with section 131(4)(b), the replacement land must vest in the prospective seller (i.e. the owner of the open space land). Article 35 of the Draft DCO [**[REP3-003]** sets out the mechanism for ensuring that the replacement land is transferred to the current owner of the open space land, and that the replacement land obtains the necessary rights/designations which the open space land is currently subject to. In order to assist the ExA, the Applicant has provided further explanation for each element of article 35 below: d. Article 35(1) makes clear that the Applicant cannot acquire the open space land until first acquiring replacement land in its own name or in the name of the owner of the open space land. The Applicant must then submit to the relevant planning authority a scheme for the provision of the replacement land and a timetable for its implementation. This control over the Applicant's acquisition of open space land is in accordance with section 131 of the Planning Act 2008 and ensures that there is a scheme in place for the provision of the replacement land. e. Article 35(2) confirms that following compliance with article 35(1), the open space land vests in the undertaker free from public rights (i.e. free from its status of open space). Such rights are not ordinarily registered and so this paragraph clarifies that the rights in the open space land cease to apply following its acquisition (subject to their continuance being inconsistent with the Applicant's proposed use). f. Article 35(3) requires the Applicant to implement the scheme certified by the relevant planning authority under article 35(1) and provides for the replacement land to vest in the owner of the open space land. This paragraph transfers the rights formerly attached to the open space land to the replacement land so the rights of the public over the replacement land are no less effective than over the open space land. This ensures compliance with the provisions of section 131 of the Planning Act 2008.
DCO1.7	Articles	**Question:** **Article 36 – Statutory undertakers** **Paragraph 1** Should the reference to Article 27 be deleted?

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		Paragraph 1(b) Should 'and' be replaced with 'or' - 'acquire existing rights, create and acquire new rights or impose restrictive covenants…' **Paragraph 1 (c)** Should the following additional wording be added 'extinguishing or suspend the rights of or restrictions for the benefit of, or remove, relocate or reposition apparatus belonging to…'. **Paragraph 1 (d) and (e)** Provide further detail as to how this would work with the proposed protective provisions.
		Response: **Paragraph 1** The reference to article 27 (compulsory acquisition of rights and imposition of restrictive covenants) is correct and should not be deleted. Article 27(3) includes relevant qualifications in respect of statutory undertaker interests. **Paragraph 1(b)** The reference to 'and' is correct – the power to impose restrictive covenants in this context is not an alternative to acquiring rights. **Paragraph 1(c)** The drafting change suggested by the ExA was made by the Applicant in the **Draft DCO [REP3-055]** submitted at Deadline 3. **Paragraph 1 (d) and (e)** This provides the Applicant with the necessary power to construct the Proposed Development so as to cross under or over statutory undertakers' apparatus and to construct any necessary track or roadway, together with the right to maintain or remove the same, and to install service media under or over existing apparatus. Most importantly this article is subject to Schedule 8 which contains various provisions for the protection of certain statutory undertakers to ensure their continued ability to carry out their functions despite the interference with their rights/apparatus required to facilitate the Proposed Development. Schedule 8 (Part 1) contains various provisions for the benefit of electricity, gas, water and sewerage undertakers that must be complied with by the Applicant in exercising its powers under the DCO. The protective provisions contain obligations that the Applicant must follow such as providing to the statutory undertaker notice and details of proposed works and obtaining the consent of the statutory undertaker before acquiring land or providing alternative apparatus before the removal of the undertakers existing apparatus. In short, article 27(1) provides general powers, and the protective provisions (where applicable to the statutory undertaker in question) modify and qualify the exercise of those powers. The Applicant is also engaged in discussions with various statutory undertakers to agree terms of appropriate protective provisions designed to meet the individual requirements of statutory undertakers. As with the generic protective provisions described above, the exercise of powers under this article by the Applicant will be subject to these specific provisions.
DCO 1.8	Articles	**Question:** **Article 37 – Apparatus and rights of statutory undertakers in stopped up streets** Is this article necessary given you are not stopping up any streets?
		Response:

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		The Applicant acknowledges that it is not proposed to stop up any streets. However, it is intended to stop up certain Public Rights of Way (PRoW) and these also qualify as 'streets' for the purpose of the proposed DCO. Whilst diligent inquiries have been taken to identify all relevant rights and statutory undertakers' apparatus and it is considered unlikely by the Applicant that there are any utilities under any of the PRoW, it is still possible that new rights or apparatus may be discovered during the course of the construction of the authorised development. On this basis, a general power for the extinguishment of rights and removal or relocation of apparatus belonging to statutory undertakers over or within the Order limits is required. It should be noted that paragraph (2) restricts the Applicant's power to extinguish rights or move apparatus by excluding apparatus in streets. It applies alternative provisions more appropriate to balancing the interests of the various affected parties where the apparatus in question is in a street. Also, as explained in the response to question DCO 1.7 above this article is subject to Schedule 8 which contains provisions for the protection of statutory undertakers. For the reasons stated above it is, therefore, the Applicant's view that it is prudent to retain this article in the Draft DCO.
DCO 1.9	Articles	**Question:** **Articles 40 – disregard of certain improvements etc and Article 41 – set off for enhancements in value of retained land** These articles appear to attempt to restrict what the Lands Tribunal can and cannot consider, how does this meet the test for articles to be reasonable or necessary?
		Response: Both articles are standard and reflect well precedented articles in recently made orders (see e.g the A47 Wansford to Sutton Development Consent Order 2023). Further, as detailed below, both articles comply with the requirements of the Planning Act 2008. Article 40 provides for the Tribunal to disregard certain interests in and enhancements to the value of land for the purposes of assessing compensation with respect to its compulsory acquisition where the creation of the interest or the making of the enhancement was designed with a view to obtaining compensation or increased compensation. Paragraph 1 is clear that this only applies if the Tribunal is satisfied if it is appropriate to disregard such interests. This article complies with section 126 of the Planning Act 2008 as it does not have the effect of modifying or excluding the application of an existing provision relating to compulsory purchase compensation. The wording of this article mirrors section 4 (assessment of compensation) of the Compulsory Purchase (Vesting Declaration) Act 1981 (the 1981 Act). It is necessary to specifically apply the effect of section 4 of the 1981 Act in the Order. This is because the 1981 Act only applies to a compulsory purchase to which any other statutory instrument has applied its provisions and the Planning Act 2008 (nor standard Order provisions) does not apply these. Sections 120(3) and 120(5)(a) and Schedule 5 (by virtue of section 120(3)) of the Planning Act 2008 allow the application in a DCO of statutory provisions which relate to the payment of compensation. Article 41 provides that in assessing the compensation payable to any person in respect of the acquisition of any land, the Tribunal shall set off against the value of the land any increase in value of any contiguous or adjacent land belonging to that person arising out of construction of the authorised development. This article also complies with section 126 of the Planning Act 2008. The principle in this article is established in section 7 of the Land Compensation Act 1961 (effect of certain actual or prospective development of adjacent land in same ownership), which needs to be applied. As stated above, sections 120(3) and 120(5)(a) and Schedule 5 (by virtue of section 120(3)) to the Planning Act 2008 allow the application in a DCO of statutory provisions which relate to the payment of compensation.
	Articles	**Question:**

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DCO 1.11		**Article 52 – arbitration** In order to manage expectation and ensure consensus should further detail about how the arbitration process would work be included in a Schedule?
		Response: The Applicant considers that the appropriate level of detail is provided for in the drafting of this well precedented article which governs what happens when two parties disagree in the implementation of any provision of the DCO. The article provides for any such disagreement to be settled by arbitration, and if the parties cannot agree on who the arbitrator should be, this is decided by the Secretary of State. It is considered preferable not to provide detail on how the arbitration process would work in any schedule to the DCO as this approach would be too prescriptive and potentially limiting on the appointed arbitrator's conduct of the arbitration process. It is considered preferable that each appointed arbitrator should be able to confirm the details of each arbitration process reflecting the particular nature of the issue under dispute.
DCO 1.12	Schedule 1	**Question:** **Work No 4a** Work No 4a would allow the construction of a hotel, can you: 1. Provide further detail why this is part of an application for National Infrastructure; and 2. Explain if this hotel is instead of, or in addition to, the hotel granted consent under the Green Horizons Park planning consent. If it is in addition to has the impact of two hotels been included in the environmental assessment and, if so, signpost where this can be found?
		Response: In response to the first part of the question, the construction of the hotel is included in Schedule 1 because there is a need for such a hotel as part of the Proposed Development. As is explained in the Explanatory Memorandum [**REP3-005**], because the Proposed Development will result in a development in excess of the specified threshold for airport development the Proposed Development is a NSIP. Schedule 1 to the draft Development Consent Order contains a list of numbered works comprising the authorised development. As well as the NSIP itself, the authorised development also includes associated development, as defined in section 115(2) of the Planning Act 2008 (the Act). In the guidance document *Planning Act 2008: associated development applications for major infrastructure projects* (Department for Communities and Local Government, April 2013) "associated development" is described as being: "*typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project" (paragraph 6) and "requires a direct relationship between associated development and the principal development. Associated development should therefore either support the construction or operation of the principal development or help address its impacts. Associated development should not be an aim in itself but should be subordinate to the principal development.*" (paragraph 5) As there is no requirement for a DCO to distinguish between these two categories, the Applicant has chosen not to differentiate between the NSIP and the associated development works in Schedule 1 of the DCO. Ultimately, all elements of the 'authorised development' in Schedule 1 either constitute part of the NSIP or are 'associated development' to the NSIP within the meaning of section 115(2) of the Planning Act 2008 and so can properly be authorised by the DCO. With the above Guidance in mind, the Need Case [**AS-125]** explains at paragraph 7.5.39 that there is a clear need for the additional hotel accommodation to serve an expanded airport. The Planning Statement [**AS-122**] further makes clear the requirement for additional hotel accommodation as part of the development for which consent is sought (paragraphs 8.3.44 to 8.3.46). Accordingly (with reference to the Guidance) the Applicant's case is that a hotel is "typical" for an airport expansion of this extent, and that there is a direct relationship between the expanded airport (the NSIP) and the hotel (associated development), which is subordinate to the airport.

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		The hotel would also comprise a key element of the Proposed Development's significant sub-regional economic contribution through employment and tourism. Provision of a hotel at the site of the airport expansion is, in principle, considered to be acceptable and would accord with policies LLP6 and LLP34 of the Luton Local Plan (paragraphs 8.3.50 to 8.3.51). With regards to the second element of the question, the Applicant can confirm that this hotel is in addition to the hotel granted consent under the Green Horizons Park planning consent. **Chapter 4** of the **Environmental Statement (ES) [AS-074]** provides a description of Work 4a (paragraph 4.8.3 to 4.8.7). **Chapter 2** of the **ES [APP-030]** provides a description of the Green Horizons Park development (para. 2.4.24 to 2.4.29), the elements of Green Horizons Park superseded by the Proposed Development (para. 2.4.33 to 2.4.34), and the elements of Green Horizons Park delivered through extant planning permission (para. 2.4.35 to 2.4.39). Those elements still delivered under the extant Green Horizons Park planning permission include a hotel constructed during DCO assessment Phase 2a (para. 2.4.38 b.). The approach to consideration of other developments, including Green Horizons Park, is described in **Chapter 5** of the **ES [AS-075].** As the remaining elements of Green Horizons Park are constructed during the delivery of the Proposed Development, they are considered in the cumulative assessment reported in **Chapter 21** of the **ES [AS-032]** and associated Appendices **[APP-140 to APP-142]** where relevant.
DCO 1.13	Requirements	**Question:** **Requirement 10 – Landscape and biodiversity management plan** Should (1) include the requirement for the relevant planning authority to consult with Natural England?
		Response: Please see the Applicant's response to Buckinghamshire Council's relevant representation **[RR-0166]** as detailed in the **Applicant's Response to Relevant Representations - Part 2A of 4 (Local Authorities) [REP1-021]** namely: 'The Applicant would draw the Council's attention to the fact that the **Landscape and Biodiversity Management Plan** (LBMP) (Appendix 8.2 of the **ES [AS029])**, to be approved by the relevant planning authority, must be substantially in accordance the Outline LBMP. This Outline LBMP has been produced as part of the Environmental Impact Assessment process, and a draft was subject to consultation. The Outline LBMP will be subject to further scrutiny by the ExA and Interested Parties during the examination. The Applicant does not believe, therefore that the final LBMP requires additional consultation with other external consultees such as Natural England as the relevant local planning authority is competent to approve such a plan.' However, noting the Examining Authority's question, and responding to representations from Interested Parties, in the Deadline 4 version of the Draft Development Consent Order the Applicant has included new provisions at paragraphs 33-34 of Schedule 2, which allow for consultation on the requirements discharging process with certain specified bodies (including Natural England) if the discharging authority considers the relevant conditions are met.
DCO 1.14	Requirements	**Question:** **Requirement 18 – Interpretation** To improve precision should the interpretation of Level 2 Plan (b) have 'including timescales' inserted after implementation ie 'the proposed programme for the implementation including timescales'? Mitigation Plan (a) includes the phrase 'as soon as reasonably practicable' how does this meet the test for precision and enforceability? Slot regulations are defined with respect to Airport Slot Allocation Regulations 2006 – does the drafting need to allow for any future variation of those regulations eg 'or successor Regulations'? Technical panel a) refers to Environmental Scrutiny Group (ESG) which isn't included in interpretations (as it's covered by Requirement 20) but should this be in full? And for precision after ESG should 'as set out in the terms of reference' be included?
		Response: In relation to the inclusion of 'including timescales' in the definition of the Level 2 Plan, the Applicant considers that the use of "programme" is sufficiently clear to include the timescales associated with the measures sought to be secured in a Level 2 Plan. A "programme" would include the proposed schedule or sequencing of such measures. In line with the Office for Parliamentary Counsel drafting guidance (June 2020), the Applicant has not used more words than necessary for the dDCO as a proposed piece of secondary legislation.

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		In relation to the use of 'as soon as reasonably practicable', the Applicant considers the phrase is also sufficiently precise. First, it is a phrase which is commonly used in a legal context in a number of contexts. For example, the Court of Appeal (in its judgment in Edwards v. National Coal Board, [1949] 1 All ER 743) held that "'*Reasonably practicable' is a narrower term than 'physically possible' … a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them*". Second, even leaving aside the considerable judicial treatment of the phrase and notwithstanding the unique context of the GCG Framework, the Applicant notes its use is well precedented in the context of DCOs (the phrase is used 35 times in the Norfolk Boreas Offshore Wind Farm Order 2021 and 29 times in the Norfolk Vanguard Development Consent Order 2022). Finally, the Applicant would note that the phrase is used in relation to the timescales for achieving an avoidance or prevention of an exceedance of a Limit, and it does not require only measures which are themselves reasonably practicable. This is important as it shows that the judgment to be applied is to the programme, not to the measures per se, thereby limiting the scope of the phrase. In relation to both of these matters (i.e., the programme and the use of 'as soon as reasonably practicable), the Applicant wishes to emphasise that given the Level 2 Plan (as well as the Mitigation Plan) is required to be approved by the ESG (or determined via an appeal to the Secretary of State), there are sufficient safeguards in place to ensure that the measures and any associated timescales are appropriate and not subject to the unilateral determination of the Applicant (and/or the operator). In relation to the definition of the slots regulations, the Applicant would highlight section 17(2) of the Interpretation Act 1978 which provides "(2) Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears.. (a) any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted" and section 20(2) which provides "Where an Act refers to an enactment, the reference, unless the contrary intention appears, is a reference to that enactment as amended". It is noted that these provisions refer to an "Act" rather than subordinate legislation (such as the Draft DCO if made) but these provisions are applied to subordinate legislation under section 23(1) of the Interpretation Act 1978. In light of these provisions, the Applicant does not consider a reference to "or successor regulations" necessary.
DCO 1.15	Requirements	**Question:** **Requirement 20 – Environmental Scrutiny Group** **Paragraph 2** **Applicant:** A number of organisations have raised concerns about the appointment of the independent chairperson and independent aviation specialist, the concern being that, whilst their appointment would need to be approved by the Secretary of State, their selection would be by Luton Borough Council in consultation with the airport operator – what do you think could be done to alleviate these concerns? **Paragraph 6** **Everyone:** As currently drafted the undertaker would be responsible for establishing the technical panels. Should this be the ESG? If not, why not?
		Response: The Applicant would note that there is a distinction between the processes for the 'first' appointment of the independent chairperson, and independent aviation specialist, and their appointment following the establishment of the ESG. In relation to the latter, the **Terms of Reference [REP3-019]** set out that "the airport operator will, following consultation with the other members of ESG (including the outgoing member(s) where appropriate), submit a recommendation to the Secretary of State of suitable candidates for the relevant role as soon as reasonably practicable". This simply reflects the fact that the processes for establishing the ESG, as well as ensuring the first appointments, would necessarily occur prior to the first appointment. The Applicant considers these arrangements appropriate given Luton Borough Council (LBC) is distinct from the Applicant, and as a public authority, would have to ensure its powers were exercised reasonably and properly. As explained in **[REP1-018]**, The decision-making statutory function of a Local Planning Authority on planning matters is always totally separate from a Council's other functions and as such, within LBC, the roles and responsibilities of the Local Planning Authority are carried out as a wholly separate function. The separation, distinct persons and functions set out in that document would apply in this context. The fact that the Secretary of State has to approve the appointment provides further assurance in this context as the Secretary of State, who is capable of being judicially reviewed, would have to ensure its decision is reasonable, rational and procedurally fair.
	Requirements	**Question:**

PINS ID	Subject	Question / Response
DCO 1.16		**Requirement 23 – Exceedance of Level 2 threshold** **Paragraph 2** **Applicant:** As drafted this refers to the ESG certifying that a Level 2 threshold has been exceeded. Given the ESG is not a regulatory body, can it certify this or should it be 'confirmed in writing'? **Paragraphs 4 and 6** Sets out that the ESG have 21 days to approve or refuse a plan, otherwise it is a deemed consent. Unlike other requirements this does not include the 'unless otherwise agreed in writing' tailpiece so, as drafted, there is no flexibility to extend the timescale by agreement – is this reasonable and is the 21 day timeframe appropriate? If not, why not and what timeframe would be appropriate?
		Response: In relation to paragraph 2, the Applicant does not consider the use of the phrase 'certify' is confined to regulatory bodies. The Applicant would note that the term 'certify' is used in relation to organisations and bodies which are not regulatory bodies in others DCOs (see, for example, paragraph 4 of Part 4 of Schedule 12 to the Dogger Bank Creyke Beck Offshore Wind Farm Order 2015 as well as the Dogger Bank Teesside A and B Offshore Wind Farm Order 2015). In relation to paragraphs 4, and 6, the Applicant is considering the matter further for Deadline 5, alongside other amendments being considered for the GCG regime.
DCO 1.17	Requirements	**Question:** **Requirement 28 – Fixed plant noise management plan** Further to ISH5 and the Joint Host Authorities' post hearing submissions, confirm whether agreement has been reached on the 10 decibels (dB) below background noise levels criteria for the Fixed Plant Noise Mitigation Plan? **Applicant:** Why is there a difference between the consented scheme and the current application? **Both (Luton Borough Council and the Applicant):** Should the noise levels be secured in the requirement?
		Response: The Applicant and Luton Borough Council have agreed on the 10dB below background sound level criteria and the **Fixed Plant Noise Management Plan [TR020001/APP/5.02]** has been updated for Deadline 4 to reflect this (please also refer to the response to NO.1.7). It is not considered necessary for noise levels to be secured by the Fixed Plant Noise Management Plan requirement, as the requirement secures the entirety of the Fixed Plant Noise Management Plan, which includes the noise levels as well as wider considerations of the management plan that are equally as important.
DCO 1.18	Requirements	**Question:** **Requirement 38 – Matters to be considered in an appeal by the Secretary of State** The requirement as drafted would appear to seek to restrict the matters that the Secretary of State could consider in an appeal. Given that the Secretary of State is bound by legislation over what matters they can consider at an appeal why is this necessary?
		Response: The Applicant does not agree that this provision restricts the matters which can be considered. First, the provision explicitly refers to having due regard under sub-paragraph (c) to "any other matters they consider relevant" thereby allowing for consideration of other issues and matters. Second, in relation to the consideration of matters in subparagraphs (a) and (b), the Secretary of State is only required to have "due regard" which does not restrict or otherwise regulate their decision making but merely requires that regard is had to such matters. In the case of the DCO, the 'legislation' which would bind the Secretary of State would be the DCO itself and the Applicant considers that explicitly acknowledging two of the considerations that will always be relevant (i.e.,the need to ensure that the Limits are not exceeded; and the safe and efficient commercial operation of the airport) is appropriate in the circumstances of the Proposed Development without unduly binding their discretion.
	Requirements	**Question:**

PINS ID	Subject	Question / Response
DCO 1.19		**Requirement 39 – Application of Part 8 of the Planning Act 2008** 1. As currently drafted, this would appear to seek to limit the requests for enforcement action to the two scenarios listed in the requirement. Is this appropriate? 2. As currently drafted, there is no right of appeal against a situation where a request for enforcement action has been declined. Should there be and should this be dealt with by Article 52 (arbitration) or should the appeal be to the Secretary of State?
		Response: Whilst recognising that this question is directed to the Joint Host Authorities, the Applicant wishes to make the following remarks. In relation to both of these questions regarding Part 8 of the Planning Act 2008, the Applicant wishes to emphasise that these provisions do not modify or otherwise affect the application of the enforcement regime under the Planning Act 2008. Instead, they supplement that regime by adding a process around enforcement action which may be considered or brought by LBC. The Applicant would note that the statutory enforcement provisions – deemed appropriate by Parliament, and which apply to all DCO projects – would apply to the Proposed Development (should development consent be granted). Those provisions bestow enforcement functions on local authorities and allow relevant local planning authorities to bring enforcement action. The Applicant would further note that given section 160/161 are criminal offences, any person would be able to bring a private prosecution in relation to a breach of the DCO. The extant and applicable statutory enforcement regime therefore is not limited to the two scenarios, and in that context the Proposed Development is no different to any other DCO project. Paragraph 39 seeks to provide supplemental and explicit transparency, over and above the established statutory enforcement regime, around the process for LBC bringing enforcement actions to provide assurance that such matters will be considered appropriately. The two scenarios highlighted have been selected because they are the fundamental and critical parts of the GCG regime: monitoring, and the implementation of the plans which are designed to prevent or avoid exceedances of Limits. Given the criticality of these issues to the operation of the GCG Framework, the need to balance the additional administrative burden placed on LBC under paragraph 39 (and in particular, the requirement to produce a written account), and the continued operation of the statutory enforcement regime, the use of the two scenarios in requirement 39 is considered to be proportionate, and appropriate. In relation to the latter question, the Applicant does not consider arbitration or an appeal to be appropriate in those circumstances. LBC, as a public authority, is amenable to judicial review and it is considered that route is the appropriate route for any challenge to its decision not to bring enforcement action. In this context, the failure to bring enforcement action would be no different from any other local authority failing to bring such action under the existing statutory regime. In addition, it is not considered appropriate for a decision on enforcement action, granted to local authorities under the Planning Act 2008, to be made by an arbitrator (a private individual).
DCO 1.20	Requirements	**Question:** **Phasing** Many of the requirements refer to 'no part of the authorised development may commence until a…for the construction of that part has been submitted to…'. In addition, mitigation of the effects of the Proposed Development are predicated on various works or measures being in place before certain operations are commenced. In order to manage the discharge of requirements and to ensure certain elements of the scheme don't come forward/ start to operate without all of the necessary works being completed, is a phasing and/ or masterplan requirement needed? If not, why not and, if it is, provide a form of preferred drafting.
		Response: The Applicant notes that this question was directed to the Joint Host Authorities but confirms it has included substantial revised drafting in Schedule 2 to respond to the ExA's questions on phasing. The Applicant notes that the **Scheme Layout Plans [AS-072]** already serve as the "masterplan" for the works authorised by the Draft DCO, and therefore it is not necessary to replicate the creation of these plans. Instead, revised paragraph 5 ("*Detailed design, phasing and implementation"*) references the Scheme Layout Plans (now certified by Schedule 9) and sets out the detailed information that would be required for an application under that paragraph to provide sufficient clarity to the relevant planning authorities as to the scope / phase of works contained in the application, and how they relate to the Scheme Layout Plans and any DCO works previously authorised. Provision has also been made regarding the programming of works, notice of the start and conclusion of the phase of works, and the effect of those works on airport capacity. Provision has been made for a Register of Requirements (new paragraph 36 – see ExQ DCO 1.22 below) so that a public record of approved works is maintained. Lastly, it should be noted that existing paragraph 35 permits the relevant planning authority to request further information

PINS ID	Subject	Question / Response
		before discharging a requirement. It is envisaged that the detailed design discharging process would, in practice, be a collaborative exercise as between the undertaker and the relevant planning authority.
DCO 1.21	Requirements	**Question:** **Decommissioning** Should the draft DCO include a requirement to deal with decommissioning? If not, why not? If it should, provide suitable drafting, and, given the duration of the Proposed Development, consider whether the drafting would need to include a requirement for an assessment of the impacts of decommissioning?
		Response: Due to the operational lifecycle of the Proposed Development, being permanent, reliance cannot be placed on a requirement to decommission on an unknown date far into the future, and no assessment could meaningfully be undertaken. Additionally, it is considered that the site will not be undertaking activities that pose a long-term risk requiring detailed decommissioning requirements. In the unlikely event that the airport is decommissioned in any foreseeable time horizon, the Applicant would need to secure any necessary associated permissions at that time. That can reasonably be expected to implement necessary measures, such as a Decommissioning Environmental Management Plan, taking into account the circumstances of the site and the use of best practice methods available at that time. This approach is precented within a number of made DCOs for schemes that have a long operational life, for example the Manston Airport Development Consent Order 2022, the East Northamptonshire Resource Management Facility Order 2023 and the A47 Wansford to Sutton Development Consent Order 2023.
DCO 1.22	Requirements	**Question:** Register of requirements Given the number of proposed requirements that would require discharging, some of which would need to be discharged multiple times over an extended period of time, is a requirement that would require the undertaker to establish and maintain an electronic register of requirements that require further approvals needed? If not, why not? And if yes would the suggested drafting below be appropriate? Suggested Drafting: (1) The undertaker must, as soon as practicable following the making of the Order, establish and maintain in an electronic form suitable for inspection by members of the public, the joint host authorities and other interested bodies a register of those requirements contained within Part 1 of this schedule that provide for further approvals to be given by the relevant planning authority, the relevant highway authority or the Secretary of State. (2) The register must set out in relation to each requirement the status of the requirement in terms of whether any approval to be given by the relevant planning authority, the relevant highway authority or the Secretary of State has been applied for or given, providing an electronic link to any document containing any approved details. (3) The register must be maintained by the undertaker for a period of three years following the completion of the authorised development.
		Response: The Applicant agrees to include a 'Register of requirements' requirement. The new requirement 36 has been included in the Draft DCO submitted at D4, and the requirement reads as follows: **36A *Register of Requirements*** *(1) The undertaker must, as soon as practicable following the making of the Order, establish and maintain in an electronic form suitable for public inspection a register of those requirements contained within Parts 1, 2 and 4 of this schedule that provide for further approvals to be given by the relevant planning authority.* *(2) The register must set out in relation to each requirement the status of the requirement in terms of whether any approval to be given by the relevant planning authority has been applied for or given, providing an electronic link to any document containing any approved details*.' The Applicant has amended the drafting proposed by the ExA to take into account that:

PINS ID	Subject	Question / Response
		- Part 3 (GCG) should not be included, as this has sperate publication processes; - reference to the Secretary of State has been removed as this is no longer relevant due to Part 3 being removed; - similarly reference to the "relevant highway authority" has been removed, as they do not have an approval function; and - the time limit in (3) has been deleted as some of the requirements are permanent operational commitments and could be varied at any point in the future under Requirement 2.
DCO 1.23	Requirements	**Question:** **Operational Ground Noise** At Issue Specific Hearing (ISH) 3 the Applicant stated that it intended to submit an outline operational ground noise management plan with a final plan secured by requirement. Please provide a copy of the outline plan and suggested requirement wording.
		Response: The **Outline Ground Noise Management Plan [TR020001/APP/8.46]** has been submitted at Deadline 4. This is secured by new requirement 27 included in the version of the Draft DCO also submitted at Deadline 4.

APPENDIX A – REVIEW OF 2023 DCO DRAFTING PRECEDENTS

Contents

1 INTRODUCTION

1.1.1 This paper has been prepared in response to the Examining Authority's Written Question DCO 1.1 **[PD-1-10]**.

1.1.2 The Applicant carried out a comparative exercise assessing the differences between the articles[1] of the version of the Applicant's Draft DCO (**the dDCO**) submitted at deadline 3 **[REP3-003]** against the recently made DCOs noted below. The Schedules to the dDCO are not considered given their project specific nature, but the Applicant emphasises that these following the conventional format and approach.

1.1.3 The Explanatory Memorandum **[REP3-005]** (**EM**) sets out how the provisions of the dDCO were derived, based on "made" DCOs that were in existence before the application was submitted in February 2023. Particular reliance is placed on the Manston Airport DCO (August 2022) than on other DCOs, since it is the only other airport DCO made to date, and hence particularly relevant. Since then, the Secretary of State for Transport has made three DCOs: the A47 Wansford DCO (**Wansford**) on 17 February 2023, the A303 Amesbury to Berwick Down DCO (**Stonehenge**) which was made for a second time on 14 July 2023, and the A38 Derby Junctions DCO (**Derby Junction**) which was made for a second time on 17 August 2023 (together the '**Transport DCOs'**).

1.1.4 There have also been three energy DCOs made since this application was made, being the Awel y Môr Offshore Wind Farm Order 2023 (**Awel**) on 19 September 2023, The Longfield Solar Farm Order 2023 (**Longfield**) on 26 June 2023, and the Hornsea Four Offshore Wind Farm Order 2023 (**Hornsea**) on 12 July 2023, and one waste DCO being the East Northamptonshire Resource Management Western Extension 2023 (**ENRM**) on 23 January 2023 (together the '**Energy and Waste DCOs'**). From the perspective of DCO drafting precedent, the Applicant considers that – to a degree – these projects carry less weight than the Transport DCOs, being consented by the Secretary of State for Energy Security and Net Zero and the Secretary of State for Levelling Up, Housing and Communities. Accordingly, they follow the drafting practices of government departments other than the Department for Transport. This has a bearing on the weight to be placed on any drafting differences noted in this document.

1.1.5 The sections below summarise only those articles and schedules where there was found to be a substantial difference between the Applicant's Draft DCO and any one of the above-mentioned comparative DCOs.

1.2 Article 2 (Definition of 'maintain')

1.2.1 The dDCO includes 'improve' *and* 'refurbish' which are in the Manston DCO but not the above Transport DCOs and Energy and Waste DCO. Since these powers are limited to what has been assessed in the Environmental Statement, the Applicant considers that they are not significant departures.

[1] This exercise excludes the project specific DCO drafting in articles 5, 10, 11, 20, 24, 32, 37 – 42, 44, 45, 49 and other articles which were not materially different to other made Orders.

1.3 Article 3 (Development consent etc. granted by the Order)

1.3.1 The dDCO does not use the words 'within the Order limits'; these words are also omitted from the Stonehenge DCO but are included in the Wansford, Derby Junctions DCO and Energy and Waste DCOs. The Applicant justifies the wording because some of the works, e.g. protection of buildings, may be carried out outside the Order limits.

1.3.2 The Energy and Waste DCOs do not include article 3(2) within the dDCO. The EM explains article 3(2) of the dDCO is necessary in order to ensure there are no Acts of a local or other nature that would hinder the construction and operation of the authorised development. It ensures that the modifications made in the Order apply to any enactments that may affect the authorised development and further ensures consistency with legislation more generally. The Applicant does not consider the exclusion of this article within the Energy and Waste DCOs warrants any change in drafting to the dDCO.

1.4 Article 4 (Maintenance of authorised development)

1.4.1 Article 4 of the dDCO replicated the equivalent article within all three of the recent Transport Orders.

1.4.2 The Longfield DCO restricts maintenance to taking place within the Order limits, which the dDCO does not. This is contrary to the model provisions and the recently made Transport DCOs. No updates to the dDCO are required as a result of this.

1.5 Article 6 (Limits of works)

1.5.1 The Transport DCOs require Secretary of State approval of a departure from the limits of deviation, following consultation with the relevant planning authority. This reflects the fact that post-consent detailed approvals in the Transport DCOs are the function of the Secretary of State. The dDCO affords these approval functions to the relevant planning authority, which under requirement 33 is capable of consulting other specified parties where the relevant conditions are met.

1.6 Article 7 (Benefit of the Order)

1.6.1 The Stonehenge and Derby Junctions DCO both exclude works for the express benefit of other parties whereas this dDCO does not. The Applicant considers that such drafting is not required on the basis that "benefit" in this context does not relate to the beneficial effects of the exercise of DCO powers.

1.7 Article 8 (Consent to transfer benefit of the Order)

1.7.1 The Stonehenge and Wansford DCOs differ in that they both express that the undertaker remains liable for compensation with regard to the transfer of any benefits or rights relating to compulsory acquisition. The dDCO and the Derby Junctions DCO do not contain these rights. Any transfer of benefits under the dDCO would be subject to an agreement which is capable of addressing

compensation matters as agreed between both parties, and flexibility is required in the case of this project.

1.8 Article 9 (Application of the New Roads and Street Works Act)

1.8.1 The equivalent article in the Stonehenge and Wansford DCOs are substantially the same as the dDCO. The Derby Junctions DCO differs in that it does not exclude sections 73A, 73B or 73C of the New Roads and Street Works Act and does not modify any sections, but the Stonehenge and Wansford drafting is more usual and has been adopted for this dDCO.

1.9 Article 12 (construction and maintenance of new, altered or diverted streets)

1.9.1 The Stonehenge DCO has special provisions for bridges which are project specific, and not considered to be required for this project.

1.9.2 The Transport DCOs have a 12-month maintenance period for private streets before transferring responsibility to the street authority. As these DCOs were promoted by a highway authority, National Highways, who are responsible for maintaining, for example, trunk roads, this requirement is not appropriate for the Applicant. Any private streets related to the dDCO are expected to be in the airport estate, and to be the responsibility of the airport operator in any event.

1.9.3 Article 12 of the dDCO replicates that of the Manston DCO.

1.10 Article 13 (temporary closure and restriction of streets)

1.10.1 The Stonehenge DCO does not have any deemed consent provisions, however the Derby Junctions and Wansford DCOs contain equivalent provisions. The dDCO includes deemed consent provisions in line with the Transport DCOs save that the Transport DCOs add an additional requirement that the undertaker must make clear within their application to the ‘street authority’ of the deemed consent provisions. The Applicant will consider the appropriateness of such a provision as part of ongoing discussions with the local authorities on the dDCO.

1.10.2 The Hornsea DCO allows a period of 56 days before deemed consent is provided. The dDCO adopts the standard period of 28 days as followed by a number of dDCO (such as Derby Junctions and Wansford), which is considered appropriate in this case.

1.11 Article 14 (permanent stopping up of public rights of way)

1.11.1 The Transport DCOs have additional provisions requiring substitute means of access to be provided, but this is not relevant to the proposals for this project.

1.11.2 Reference is made the public rights of way only in the dDCO, as there are no other forms of highways being permanently stopped up.

1.12 Article 15 (access to works)

1.12.1 The dDCO places an additional requirement on the undertaker to apply for consent of the 'street authority' before exercising its powers under this article which the other Transport DCOs do not. As this is more onerous drafting in the dDCO, the Applicant has no further comments.

1.13 Article 16 (traffic regulation)

1.13.1 The Stonehenge DCO has a completely bespoke provision (article 48); the Derby Junctions and Wansford DCOs require 12 and 4 weeks' notice for permanent and temporary restrictions whereas the dDCO has a 4 week and 2 week notice respectively.

1.13.2 Additionally, the power to regulate traffic within the Derby Junctions and Wansford DCOs only lasts for 12 months after the opening of the development whereas the dDCO is not so restricted given the long term and phased nature of the project. It is important to note that the article 16 power requires the consent of the traffic authority in any event.

1.13.3 The dDCO's adoption of shorter notice periods and non-time limited powers to regulate traffic under this article is supported by a number of made DCOs (such as A63 (Castle Street Improvement, Hull) Development Consent Order 2020, The M25 Junction 28 Development Consent Order 2022 and the Sizewell C (Nuclear Generating Station) Order 2022). The dDCO is more flexible to allow for the efficient delivery of the Proposed Development whilst also ensuring its safe delivery by implementing measures such as notifying and consulting the police and authorities before exercising any traffic regulation powers under this article. This drafting also ensures expediency of the delivery of the Proposed Development.

1.13.4 Awel, Hornsea and the ENRM DCOs do not contain equivalent provisions. The Longfield DCO differs in that it authorises the placing of temporary signs or signals in locations specified in the Order and restricts the undertaker to powers under this article to the construction or decommissioning phases of the project, and only with the traffic authority's written consent. The dDCO follows the standard drafting of the above-mentioned DCOs.

1.14 Article 17 (agreements with street authorities)

1.14.1 The Transport DCOs do not have equivalent articles within their DCOs as they are promoted by highway authorities who can already enter into agreements with street authorities under s7 of the Highways Act 1980.

1.15 Article 18 (designation of highways)

1.15.1 The Transport DCOs have a more detailed 'classification of roads etc.' power since that is a specific requirement for those projects. The Energy and Waste DCOs do not contain equivalent provisions.

1.16 Article 19 (discharge of water)

1.16.1 The dDCO has a provision forbidding damage or interference with bed or banks of a main river unless the Environment Agency consents, which is not in the Transport DCOs.

1.16.2 The Stonehenge DCO does not include deemed consent provisions, but, like the dDCO, the Derby Junctions and Wansford DCOs do. The dDCO does not contain the requirement for the undertaker to include a statement detailing the deemed consent provisions within their application. As above, the Applicant will consider the appropriateness of such a provision as part of ongoing negotiations.

1.16.3 The dDCO also includes additional provisions contained in article 19(10) and (11) of the dDCO which the Transport DCOs do not include. Paragraph 10 is a bespoke provision added to state that the Environment Agency is deemed to have granted consent under paragraph 3 where the watercourse, public sewer or drain belongs to the Environment Agency an Environmental Permit has been granted for the discharge, rather than having to obtain the additional landowner consent. This has been added to streamline this process where an Environmental Permit is required. Similarly, paragraph 11 provides that sewerage undertake is deemed to have granted consent under paragraph (3) where the watercourse, public sewer or drain belongs to the sewerage undertaker and consent under section 118 of the Water Industry Act 1991 has been granted in respect of the discharge, rather than having to obtain additional landowner consent. Again, this is designed to streamline the process when a trade effluent consent is required.

1.16.4 The Energy and Waste DCOs have similar differences to those noted above, the Applicant has no further comments with regard to these differences.

1.17 Article 21 (authority to survey and investigate the land)

1.17.1 The dDCO is substantially the same as the Derby Junctions and Wansford DCO save for the deemed consent provisions within the dDCO do not place a requirement on the undertaker to include a statement / letter within their application under this article detailing the deemed consent provisions. As above, the Applicant will consider the appropriateness of such a provision as part of ongoing negotiations.

1.17.2 The Stonehenge DCO does not include deemed consent powers and has an additional power to survey land outside the order limits.

1.17.3 The Hornsea DCO includes a restriction on the undertaker from carrying out boreholes or trenches in (a) land forming a railway without the consent of Network Rail; (b) in land held by or in right of the Crown without the consent of the Crown. The Applicant is in discussion with Network Rail about suitable protections for its interests (e.g. Protective Provisions and / or a side agreement). The Applicant has a separate provision protecting Crown land.

1.18 Article 22 (felling or lopping of trees and removal of hedgerows)

1.18.1 The Derby Junctions and Wansford DCOs contain an additional provision to take steps not to breach the Wildlife and Countryside Act 1981 and the Habitats Regulations that the dDCO and the Stonehenge DCO do not. The inclusion of this wording is unnecessary as it is an implied requirement not to breach those enactments, the inclusion of which could lead to the exclusion of others not noted therefore creating a precedent of noting all enactments that cannot be breached within Orders; Orders specifically include provisions showing what sections of legislation are disapplied to avoid this.

1.18.2 The Longfield DCO contains an additional provision to require consent from the highway authority prior to utilising powers under this article for any trees or hedgerow within the extent of the publicly maintainable highway. The Applicant does not consider such a provision necessary given the detailed approvals already required from local authorities for works, e.g. under Schedule 2.

1.19 Article 23 (removal of human remains)

1.19.1 The dDCO, the Transport DCOs and the only Energy and Waste DCO that contains this article (the Awel DCO) are all worded slightly differently. The dDCO and the Stonehenge DCO exclude the need to provide notice for remains interred more than 100 years ago where no relative is likely to object to removal but with consent of the Secretary of State. The Derby Junctions and Awel DCOs do not include this exclusion. The Stonehenge DCO applies section 238 of the Town and Country Planning Act 1990, this dDCO and the Derby Junctions DCO do not. Similarly, the Wansford DCO specifically applies sections 239 and 249 of the Town and Country Planning Act 1990.

1.19.2 These are not regarded as significant differences and are clearly acceptable to the Secretary of State.

1.19.3 Additionally, Article 23 of the dDCO is included and drafted to replace the existing and disparate regimes regulating the removal of human remains and consolidate the applicable provisions in a single article in the dDCO. It is required by the Applicant to ensure that archaeological remains are recovered appropriately without causing unacceptable delay to the implementation of this nationally significant infrastructure project.

1.20 Article 26 (time limit)

1.20.1 The dDCO has a 10-year limit whereas the Transport DCOs have a five-year limit.

1.20.2 The 10-year period for the dDCO is necessary due to the complex nature and large scale of the Proposed Development. It also reflects the required and necessary prolonged construction programme which includes a significant period of necessary earthworks to be carried out (including allowing time for the earthworks to settle) before subsequent construction works can commence which means that it may not be possible or desirable to exercise the powers of compulsory acquisition within five years of the Order being made.

1.20.3 The Energy and Waste DCOs have the same difference as noted for the Transport DCOs, the Applicant submits the same reasoning for the difference in drafting.

1.21 Article 27 (compulsory acquisition of rights and imposition of restrictive covenants)

1.21.1 Although the Stonehenge and Derby Junctions DCOs do not refer to restrictive covenants in the headings of their corresponding articles (22 and 26) they do in fact have similar powers. The Stonehenge DCO has two additional provisions (article 22(2)and(3)) allowing specified statutory undertakers or landowners to exercise these powers that are not used in this dDCO. As these are additional powers provided to the undertaker, the Applicant has no further comments.

1.21.2 The Stonehenge DCO article, specifically paragraph (6) (‘*where the undertaker acquires a right over land or the benefit of a restrictive covenant, the undertaker is not required to acquire a greater interest in that land.’*) is expressly stated as subject to section 8 of the Compulsory Purchase Act 1965; the dDCO, and the Wansford and the Derby Junctions DCOs equivalent provisions are not subject to section 8. The dDCO follows the wording adopted by the recently made Wansford and Derby Junctions DCO and so is deemed acceptable.

1.21.3 The dDCO, Derby Junctions and Stonehenge DCOs all have the additional provision under article 22(3) of the dDCO which the Wansford DCO does not have. This provision provides that powers under paragraph (1) do not preclude the acquisition of such other rights and the imposition of such other restrictive covenants in respect of the same land. This wording is precedented in the recently made Deby Junctions and Stonehenge Orders and the Lake Lothing (Lowestoft) Third Crossing Order 2020.

1.21.4 The Energy and Waste DCOs contain an additional requirement for the undertaker to receive SoS consent before transferring the ability to acquire rights and impose restrictions to the statutory undertaker. The Transport DCOs do not include the ability to transfer these rights, the dDCO follows the precedent set by the Transport DCOs as the most comparable schemes.

1.22 Article 28 (private rights over land)

1.22.1 The Energy and Waste DCOs do not contain the additional trigger (at article 28(3) of the dDCO) for the extinguishment of private rights over land owned by the undertaker when activity authorised under the Order conflicts with those rights. The Transport DCOs do, however, contain this provision and the Applicant follows the precedent set by the Transport DCOs, as the closest comparable schemes.

1.23 Article 29 (Modification of the 1965 Act)

1.23.1 The dDCO differs from the Transport DCOs in that there is a ten rather than five-year period for exercising compulsory acquisition powers. In line with the reasons noted at paragraph 1.20.2 above, the Proposed Development requires a longer period of time due to the complexity of the project.

1.23.2 Where the Energy and Waste DCOs include the equivalent article, the same difference in time period noted above applies. The Longfield DCO differs further in that it does not include modifications relating to the substitution of provisions relating to airspace and soil (as detailed in article 29(4)) of the dDCO). The Applicant has adopted standard form drafting and so does not consider this difference as substantial.

1.24 Article 30 (application of the 1981 Act and modification of the 2017 Regulations)

1.24.1 The dDCO has a number of additional provisions that the Transport DCOs do not. The dDCO omits the words 'in themselves' from section 1(1) of the Compulsory Purchase (Vesting Declarations) Act 1981 (the 1981 Act), this is considered more precise wording as the powers could vest in another party.

1.24.2 The dDCO also modifies section 4 of the 1981 Act to allow vesting in other parties and sections 8, 10 and 11 to refer to such parties.

1.24.3 The dDCO further modifies the form at Schedule 1 to the Compulsory Purchase of Land (Vesting Declarations) (England) Regulations 2017 to allow for vesting in third parties.

1.24.4 Where there are equivalent articles within the Energy and Waste DCOs, they only relate to modification of the 1981 Act and not the 2017 regulations.

1.24.5 The additional paragraphs within the dDCO, being paragraphs (5), (11) and (12), are intended to facilitate the compulsory acquisition of rights for the benefit of a third party such as a statutory undertaker, which is provided for by article 27(1). These provisions are not contained in the Model Provisions but are consequential amendments intended to clarify that the power in article 27(1) to acquire rights for the benefit of third parties can be implemented in practice by way of the general vesting declaration procedure. In particular, these amendments clarify that the 1981 Act can be used to acquire rights and land on behalf of third parties, without the need to acquire the land or rights in favour of the Applicant and then transfer such land or rights to a third party, thereby causing a delay to any transfers of land or rights to those who are intended to benefit from such acquisition.

1.25 Article 31 (acquisition of subsoil or airspace only)

1.25.1 The Derby Junctions and Wansford DCOs are identical to the dDCO, the Stonehenge DCO restricts compulsory acquisition of subsoil, or rights relating to subsoil, with regard to the Order land (as detailed in paragraph 2) and modifies provisions around service of notices.

1.25.2 The Applicant does not consider the differences between the dDCO and the Derby Junctions DCO as being substantial and, in any event, the dDCO follows the drafting approach of two of the most recently made transport Orders and the M42 Junction 6 Development Consent Order 2020, the M25 Junction 28 Development Consent Order 2022 and the Sizewell C (Nuclear Generating Station) Order 2022.

1.25.3 There were no substantial differences noted between the Energy and Waste DCOs and the dDCO.

1.26 Article 33 (Temporary use of land for carrying out the development)

1.26.1 The dDCO contains wider powers of removal under paragraph (1)(b), which the Stonehenge and Derby Junctions DCOs do not. However, the dDCO adopts drafting set by a number of other made Orders, including the M25 Junction 28 Order 2022 and the Awel and Longfield Orders.

1.26.2 The dDCO differs from the Stonehenge and Derby Junctions Orders in that it clarifies that any disputes relating to the restoration of land does not prevent the undertaker returning / vacating the land. The dDCO follows the drafting of other made transport orders, including Wansford, the M25 Junction 28 Order 2022 and the Southampton to London Pipeline Order 2020. This drafting is considered preferable as it prevents ongoing costs of occupation in addition to any costs related to a dispute over restoration.

1.27 Article 34 (Temporary use of land for maintaining the development)

1.27.1 The dDCO waives the notice provisions in the case of emergency which the Stonehenge and Derby Junctions DCOs do not. This approach is well precedented within a number of recently made Orders, including the Wansford, the M25 junction 28 Order 2022 and the Portishead Branch Line (MetroWest Phase 1) Order 2022. The exception to notice provisions prevent delay in the undertaker responding to situations where risk is involved.

1.27.2 The dDCO, as compared to the Energy and Waste DCOs, differ in the same way with an additional provision at paragraph (7) of the dDCO allowing the undertaker to give up possession of land even if there is a dispute with regard to temporary works and restoration. The wording in Article 34(7) is well precedented within a number of recently made Orders, such as the A47 Wansford to Sutton Development Consent Order 2023, the A57 Link Roads Development Consent Order 2022 and the A428 Black Cat to Caxton Gibbet Development Consent Order 2022.

1.28 Article 35 (special category land)

1.28.1 Within the dDCO, the relevant planning authority certifies the scheme for replacement land whereas it is the Secretary of State in the case of the Stonehenge and Derby Junctions DCOs. This reflects that highways DCOs have requirements signed off by the Secretary of State rather than the local planning authority.

1.29 Article 36 (statutory undertakers)

1.29.1 The dDCO expressly references powers to construct the development to cross under or over apparatus or construct any track or roadway over such apparatus, which the Transport DCOs do not. Additionally, the dDCO contains express

powers to acquire existing rights, create new rights and impose restrictive covenants which the Stonehenge and Wansford Orders do not have.

1.29.2 The drafting is based on article 31 of the Model Provisions but the article also sets out, in common with other DCOs (see, for example the Sizewell C (Nuclear Generating Station) Order 2022, the Southampton to London Pipeline Development Consent Order 2020 and the Thorpe Marsh Gas Replacement Pipeline Order 2016) additional express powers. These powers are also consistent with the undertaker's ability to acquire existing rights, and create and acquire new rights, and impose restrictive covenants under the rest of the Order.

1.29.3 A further difference between the dDCO and the Energy and Waste DCOs is that the dDCO applies alternative provisions more appropriate to balancing the interests of the various affected parties where the apparatus in question is in a street.

1.30 Article 43 (disapplication of legislative provisions)

1.30.1 The dDCO, the Stonehenge and Derby Junctions DCO have different disapplied provisions, but all those in this dDCO are listed in one or other of those two DCOs.

1.30.2 The Energy and Waste DCOs do not contain an equivalent article.

1.30.3 The Applicant’s position is that it should take a cautious approach by ensuring that its proposals do not interfere with other legislative provisions applicable in the area. The Applicant has therefore sought to disapply any potentially conflicting legislative provisions for the purposes of the construction or operation of the authorised development.

1.31 Article 46 (application of landlord and tenant law)

1.31.1 The drafting is similar to the Derby Junctions, Wansford and Hornsea DCOs except that the dDCO qualifies the scope of this article to agreements that relate to the terms of use of a lease. As this restricts the undertaker’s application of this article, the Applicant has no further comments.

1.32 Article 47 (defence to proceedings in respect of statutory nuisance)

1.32.1 The dDCO has an additional qualification to the Transport and Energy and Waste DCOs that compliance with the code of construction practice is a sufficient defence to show that an alleged nuisance could not reasonably be avoided.

1.32.2 This additional paragraph (2) confirms that compliance with the controls and measures described in the Code of Construction Practice approved under paragraph 8 of Schedule 2 will be sufficient, but not necessary, to show that an alleged nuisance could not reasonably be avoided. This paragraph is based on article 41(2) of the Southampton to London Development Consent Order 2020 and is necessary to clarify the scope of the defence of statutory authority arising

from the grant of the Order. This is a reasonable additional provision given the scrutiny of the CEMP and is also precedented in the recently made Boston Alternative Energy Facility Order 2023.

1.33 Article 48 (No double recovery)

1.33.1 The Stonehenge and Awel DCOs contain an equivalent double recovery article as the dDCO. The remaining Transport and Energy and Waste DCOs do not have an equivalent article.

1.33.2 Article 48 is included to reflect the principle of equivalence in compulsory purchase compensation, namely that a claimant is to be compensated for no more and no less than their loss. This article is precedented within a number of made Orders, such as the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014, the M25 Junction 28 Development Consent Order 2022, and the Sizewell C (Nuclear Generating Station) Order 2022.

1.34 Article 50 (certification of documents)

1.34.1 The dDCO and the Derby Junctions DCO are identical, the Stonehenge and Wansford DCO have an additional provision requiring the undertaker to provide the certified documents available for public view electronically. The Applicant's requirement 37(2) provides for the equivalent of this.

2 CONCLUSION

2.1.1 The Applicant notes that, taken as a whole, the dDCO does not substantially differ from the recently made DCOs. Where the Applicant is considering a change in drafting of the dDCO, this has been specified within the article comparison.