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Dear Ms Dowling,

LONDON LUTON AIRPORT EXPANSION – DEADLINE 11 SUBMISSION

Please find attached National Highways' final submission on outstanding matters related to the SRN. Despite extensive and constructive engagement with the Applicant, we have been unable to reach agreement on these matters and this is reflected in the final SOCG.

Yours sincerely,



Kelly Milburn
Spatial Planning Manager

**Final Submission from National Highways Limited (Deadline 11) on outstanding matters related to the SRN
Application by London Luton Airport Limited for an Order granting Development Consent for the proposed London Luton
Airport Expansion Project**

Planning Inspectorate Reference Number: TR020001

1 Introduction and Executive Summary

- 1.1 National Highways (“**NH**”) has prepared this Deadline 11 submission because a number of the principal issues contained in the objection submitted by NH on 23 June 2023 at the commencement of the examination of the London Luton Airport Expansion Project (“**Project**”), and some additional concerns which have come to light during the course of the examination, remain unresolved. These issues include:
- 1.1.1 the proposal for an outline transport related impacts monitoring and mitigation approach (“**OTRIMMA**”) and final transport related impacts monitoring and mitigation approach (“**FTRIMMA**”) – specifically the details concerning the way in which monitoring will be carried out to the strategic road network (“**SRN**”) and the lack of NH input in the processes securing much needed mitigation as a consequence of the Project.
 - 1.1.2 the extent of works required to mitigate the impacts to the M1 Junction 10 which fall outside of the Schedule 1 works and the appropriate method of securing those mitigation works.
 - 1.1.3 the extent of NH’s involvement in the green controlled growth framework and necessary oversight over decisions which impact the SRN made by the environmental scrutiny group, of which NH is not a member.
 - 1.1.4 the form of protective provisions to be included on the Order to mitigate the impact of the Project on the SRN.
- 1.2 If the Secretary of State is minded to grant development consent, NH requests that the following amendments are made to the Order. It is NH’s position that without these measures included in the Order, the safe and efficient operation of the SRN would be severely impacted thus causing serious detriment to NH. These measures include:
- 1.2.1 the inclusion of the following Grampian requirement in Part 4 of Schedule 2 of the development consent order marked as requirement 33:

M1 Junction 10 – Schedule 1 works

33.(1) Notwithstanding the effect of Requirement 30, no part of the authorised development may commence until a scheme providing for the design and delivery of Work No 6e (n), (o) and (p) has been submitted to and approved in writing by National Highways;

(2) The authorised development must be constructed in accordance with the scheme approved under sub-paragraph (1).

(3) The authorised development must not be operated unless and until the works provided for in the scheme approved under sub-paragraph (1) have been commissioned and completed.

(4) This requirement may be enforced by National Highways as if it was a relevant planning authority.

1.2.2 the inclusion of the following Grampian requirements in Part 4 of Schedule 2 of the development consent order marked as requirement 34 and 35 respectively:

M1 Junction 10 – Modelling and Monitoring

34.(1) No part of the authorised development may commence until a report containing updated highway modelling for the potential impacts of the authorised development on the M1 Motorway including M1 Junction 10 and the M1 itself has been submitted to and approved by the relevant planning authority and National Highways. The modelling will address the baseline, the opening year and the design year ten years after opening of the authorised development or phases of the authorised development described in the report;

(2) Where the results of the updated highway modelling identify a potential material cumulative impact on the operation of the strategic road network as a result of the authorised development, no part of the authorised development may commence until a scheme of monitoring the impacts of the authorised development on the M1 Motorway has been submitted to and approved by the relevant planning authority and National Highways.

(3) The approved monitoring scheme will set out the intended triggers for the implementation of mitigation to the M1 Motorway and the constraints upon development that will apply until the relevant mitigation works are complete and open to traffic.

(4) The approved monitoring scheme will be implemented by the undertaker in carrying out the authorised development and the constraints upon the authorised development will apply in accordance with those contained in the approved report.

(5) This requirement may be enforced by National Highways as if it was a relevant planning authority.

M1 Junction 10 – Mitigation

35.(1) *Without prejudice to the general provisions of requirement 34, any mitigation identified in a monitoring scheme shall include provision whereby:*

(a) If an intended trigger for implementation of works is reached on either the southbound merge and/or northbound diverge to the M1 Junction 10, no authorised development may continue until a scheme of mitigation works is approved by National Highways.

(b) The throughput of the authorised development must not exceed 21.5 million passengers per annum until the mitigation comprised of works to the M1 Junction 10 southbound merge are complete and open to traffic.

(c) The throughput of the authorised development must not exceed 27 million passengers per annum until the mitigation comprised of works to the M1 Junction 10 northbound diverge are complete and open to traffic.

(3) Any scheme of works to the southbound merge must include changing the merge layout type from ‘Layout B – parallel merge’ to a higher capacity ‘Layout C – ghost island merge’ or any alternative scheme approved by National Highways.

(4) Any scheme of works to the northbound merge must include changing the diverge layout type from ‘Layout B option 2 – Two-lane auxiliary diverge’ to a higher capacity ‘Layout B option 1 – ghost island lane drop’ which would be facilitated by an extension of the 4th lane from the lane-drop location to the north of M1 Junction 9 to form a new lane-drop at the Junction 10 diverge, or any alternative scheme approved by National Highways.

(5) This requirement may be enforced by National Highways as if it was a relevant planning authority.

1.2.3 An amendment to Requirement 20(2) in Part 3 of Schedule 2 to include a new sub-heading as “(h) *National Highways;*”

1.2.4 The substitution of the protective provisions found at Part 5 of Schedule 8 of the final draft Order submitted by the Applicant with the protective provisions found at Appendix 1 of this document.

2 OTRIMMA

- 2.1 National Highways has been in discussion with the Applicant over the OTRIMMA since the first Traffic and Transport Issue Specific Hearing. The OTRIMMA is supposed to be an outline version of the FTRIMMA, however Requirement 30(2) of the Order provides that “*The [F]TRIMMA submitted under sub-paragraph (1) must be substantially in accordance with the OTRIMMA*”. This means that the content of the OTRIMMA should almost entirely reflect the content of the FTRIMMA. If this is the case, then National Highways has a number of serious concerns in relation to the way in which the FTRIMMA will operate in practice based on the brevity of the OTRIMMA.
- 2.2 The mitigation secured by the FTRIMMA covers two broad categories:
- (a) Mitigation Type (“**MT**”) 1 mitigation – which is mitigation that is expressly secured in Schedule 1 of the Order; and
 - (b) MT2 mitigation – which is additional works required to mitigate the impact of the Project over time that is not anticipated or that is not defined by reference to Schedule 1 of the Order and therefore falls outside of the envelope of the environmental assessment that has been carried out.

MT1 Mitigation

- 2.3 This mitigation is defined in Schedule 1 as Work No. 6e (n), (o) and (p) insofar as it relates to the SRN.
- 2.4 The Applicant has committed to provide a phasing plan prior to commencement of the authorised development which is capable of amendment at various intervals and will set out indicatively in which phase each part of the Schedule 1 works will sit.
- 2.5 The delivery of the MT1 mitigation will be determined in accordance with the FTRIMMA, which will be finalised when the capacity of the airport exceeds the capacity limit (mppa) in the LLAOL planning permission.
- 2.6 The FTRIMMA will provide that:
- (a) When capacity exceeds the LLAOL planning permission capacity limit, a notice will be served on Central Bedfordshire District Council, Dacorum Borough Council, Hertfordshire Council and North Hertfordshire Council. The baseline traffic levels will then be monitored to inform the future thresholds for delivery of the Schedule 1 works. National Highways is expected to be a consultee on the formation of these thresholds, but no legally binding commitment has been provided by the Applicant to this effect.

- (b) When the baseline traffic levels at various airport sites exceed the traffic levels of the previous year (which means as a minimum, this will be year 2 of the capacity exceeding LLAOL planning permission limits), Monitoring Level (“ML”) 2 is triggered – which involves inputting the traffic levels into the TRIMMA tool to establish whether the pre-determined thresholds have been met. If the thresholds have been met, the Applicant will discuss the relevant Schedule 1 works with the relevant highway authorities impacted at the various locations.

2.6 National Highways has a number of concerns in relation to this approach:

- (a) Traffic volumes alone will be insufficient to confirm the baseline capacity on M1 Junction 10. Additional information relating to the operational performance of the junction is required to form an accurate picture. An accurate baseline of the junction’s performance is not included within the monitoring regime (if it would assist, we explain the metrics that National Highways believe should be captured in Section 2.3.1 of REP9-073 of the Examination Library) as part of the OTRIMMA.
- (b) M1 Junction 10 is congested in the forecast baseline (2027) and will be sensitive to any future additional or redistributed traffic, which is likely to result in significant congestion and safety issues at this key location on the SRN. The OTRIMMA indicates that monitoring (ML2) will take place at specific locations only if it exceeds ML1 thresholds and that this will take place every five years. Therefore, since ML2 is not implemented immediately, there may be a delay of some years between an impact and monitoring being initiated with an up to date quinquennial survey. Even if ML2 is not triggered because the monitoring does not show an increase in traffic, that does not mean that there is not an experienced impact. Static volumes could still lead to congestion caused by redistribution of trips towards the SRN.
- (c) It is indicated in the OTRIMMA that any off-site car park, which is any car park not under the ownership or operation of the airport, is not considered an ‘airport site’, and is therefore excluded from the monitoring. However, this means that the number of airport related trips is underestimated at ML2 as the Applicant will only be monitoring the shuttlebus movements at the airport without considering the number of individual cars that have driven to the off-site car parks and via both the LRN and SRN to access them. Therefore, in the current approach this would mean that these trips are assumed to be background growth, when they are actually airport related trips, and won’t be included in the monitoring at ML2. Consequently, National Highways reconfirms its position that either monitoring of the off-site airport car parks is required, or a multiplier (for average shuttle bus occupancy) is required to be applied to give an accurate representation of the number of airport related trips using the offsite car parks.

- (d) It is noted that ML3 includes that specific junction monitoring such as ‘investigating queue lengths and delays’ would be undertaken by the Applicant. National Highways is concerned that this will only be investigated and not committed as part of the monitoring regime. At present the OTRIMMA only sets out that junction specific type of monitoring will take place at ML3. National Highways’ view is that more detail concerning the junction performance, for example queue lengths, delays and journey times is required at all monitoring levels, given the complexity of movements and potential patterns of congestion at the junction. Traffic volumes alone will be insufficient to confirm whether the capacity has been exceeded and whether the junction performance has deteriorated. National Highways’ view is that further details concerning the metrics that will be used to monitor the airport impacts at ML0, ML2 and ML3 are required to give National Highways appropriate assurance of the data that will be collected and baseline junction performance to compare any future monitoring against. These requirements should be stated now in the OTRIMMA.
- (e) The thresholds at which specific mitigation can come forward under the OTRIMMA are determined later and in consultation with National Highways. If National Highways disagrees then the Applicant is proposing arbitration as the mode of dispute resolution. This is unacceptable, as arbitration is both very costly and time consuming and this mode bypasses any meaningful attempt by senior directors at the respective organisations to agree a constructive way forward.

2.7 In the absence of a form of OTRIMMA that is acceptable to National Highways and based on the fact that the Applicant is legally committed to providing the FTRIMMA in substantially similar form to the OTRIMMA, National Highways has no choice but to request an alternative structure in which Schedule 1 mitigation (specifically, Work No 6e(n), (o) and (p)) can be delivered. This structure is the precedented approach taken to all DCOs – a Grampian requirement. The form of wording for this requirement is as follows and we request that it is inserted at Schedule 2, Part 4 of the Order:

M1 Junction 10 – Schedule 1 works

33.(1) Notwithstanding the effect of Requirement 30, no part of the authorised development may commence until a scheme providing for the design and delivery of Work No 6e (n), (o) and (p) has been submitted to and approved in writing by National Highways;

(2)The authorised development must be constructed in accordance with the scheme approved under subparagraph (1).

(3) The authorised development must not be operated unless and until the works provided for in the scheme approved under sub-paragraph (1) have been commissioned and completed.

(4) This requirement may be enforced by National Highways as if it was a relevant planning authority.

- 2.8 We understand that the Applicant's novel approach is intended to be innovative and drive forward a new approach to adaptive mitigation. However, the form of the OTRIMMA that has been presented throughout the Examination – which is plainly not a prototype for adoption but a loose expression of intent - is simply not acceptable to National Highways with respect to the management of impacts to the SRN and the certainty as to when scheduled mitigation will be delivered.

MT2 Mitigation

- 2.9 MT2 mitigation relates to residual airport-related traffic effects that will be funded by the Sustainable Transport Fund. Examples of this include junction capacity enhancements, traffic calming and parking controls.
- 2.10 National Highways has identified two residual airport-related traffic interventions that will be required as a result of the Project, but the extensive modelling carried out by the Applicant is unable to identify when the need for these interventions will be triggered. National Highways confirmed in its deadline 7 representation (REP7-093) that the updated VISSIM modelling still shows that there are some residual delays and queueing on the southbound on slip merge and that the VISSIM modelling shows that there are queues on the northbound mainline where there is a lane drop from five to four lanes. This gives National Highways safety concerns due to the queueing traffic in these locations. Due to the location of the cameras as set out in Figure 3.4 in the OTRIMMA it is unlikely that the cameras would be able to monitor the junction performance in these areas at junction 10. National Highways requires that a mechanism for monitoring potential airport related and cumulative impacts at junction 10 on the south facing slips (the southbound merge and the lane drop from five to four lanes on the northbound diverge) is included with the FTRIMMA or a separate monitoring mechanism is included within the DCO.
- 2.11 The process for securing interventions outside of Schedule 1 works is as follows:
- (a) Proposals for interventions may be brought forward to the Airport Transport Forum Steering Group by its members. This includes National Highways.
 - (b) If the Airport Transport Forum Steering Group decides that a proposal is valid, the group will vote on whether to fund interventions by the sustainable transport fund (which is a finite amount that needs to cover local road network issues as well as SRN).

- (c) If approved by the Steering Group, interventions will be delivered by the member with an appropriate contribution voted on by the Steering Group.

2.12 National Highways has concerns in relation to this approach:

- (a) The Airport Transport Forum Steering Group is made up of local planning authorities and local highway authorities, who are concerned primarily with the local road network. The funds in the sustainable transport fund are finite – meaning there is a strong possibility that National Highways will be outvoted in respect of any interventions they proposed to the M1 Junction 10.
- (b) The relevant contribution from the sustainable transport fund may be insufficient to mitigate the cost of the works required. The works have not been fully costed but it is more than likely that they will exceed (by some margin) the amount designated in the sustainable transport fund for interventions related to the M1 Junction 10.
- (c) The approach to MT2 mitigation raises legal challenges in that the effects it is seeking to mitigate cannot have been assessed as part of the environment assessment. They were (and to a large extent still are) simply not known at the present stage. The case of *R v Cornwall County Council ex parte Jill Hardy* [2001] Env LR 26 held that whilst it was not necessary to include every conceivable scrap of environmental information about a particular project, it was unlawful to leave matters that challenged whether the Applicant had the full environmental information required, to a planning condition. In the present case the application of the MT2 approach assumes that there will be additional impacts but the scope and extent of those impacts is not understood. It cannot be correct then to designate a finite sum towards the mitigation of those impacts where the extent of them is simply not known.

2.13 At a very late stage in the examination, the Applicant offered to make a financial contribution to National Highways for the interventions proposed as MT2 mitigation provided those interventions were delivered by 2043. These interventions would then be removed from MT2 altogether. It is recognised that this may provide an optimal outcome if the detail can continue to be negotiated, however National Highways will need to secure a confirmation of funding from the Department for Transport to ensure that the interventions can be brought forward within designated funds under a Road Investment Strategy. Without a necessary commitment of designated funding, National Highways would have a significant shortfall in the funds required to deliver the interventions. Further, National Highways also needs to be able to understand the relationship between any financial contribution and proposed works on an evidential basis – at present this is not available.

- 2.14 As National Highways has no certainty that the additional mitigation identified will be delivered through the mechanism outlined in the OTRIMMA, National Highways requests that the following Grampian requirements are included in Schedule 2 Part 4 of the Order:

M1 Junction 10 – Modelling and Monitoring

34.(1) No part of the authorised development may commence until a report containing updated highway modelling for the potential impacts of the authorised development on the M1 Motorway including M1 Junction 10 and the M1 itself has been submitted to and approved by the relevant planning authority and National Highways. The modelling will address the baseline, the opening year and the design year ten years after opening of the authorised development or phases of the authorised development described in the report;

(2) Where the results of the updated highway modelling identify a potential material cumulative impact on the operation of the strategic road network as a result of the authorised development, no part of the authorised development may commence until a scheme of monitoring the impacts of the authorised development on the M1 Motorway has been submitted to and approved by the relevant planning authority and National Highways.

(3) The approved monitoring scheme will set out the intended triggers for the implementation of mitigation to the M1 Motorway and the constraints upon development that will apply until the relevant mitigation works are complete and open to traffic.

(4) The approved monitoring scheme will be implemented by the undertaker in carrying out the authorised development and the constraints upon the authorised development will apply in accordance with those contained in the approved report.

(5) This requirement may be enforced by National Highways as if it was a relevant planning authority.

M1 Junction 10 – Mitigation

35.(1) Without prejudice to the general provisions of requirement 34, any mitigation identified in a monitoring scheme shall include provision whereby:

(a) If an intended trigger for implementation of works is reached on either the southbound merge and/or northbound diverge to the M1 Junction 10, no authorised development may continue until a scheme of mitigation works is approved by National Highways.

(b) The throughput of the authorised development must not exceed 21 million passengers per annum until the mitigation comprised of works to the M1 Junction 10 southbound merge are complete and open to traffic.

(c) The throughput of the authorised development must not exceed 27 million passengers per annum until the mitigation comprised of works to the M1 Junction 10 northbound diverge are complete and open to traffic.

(3) Any scheme of works to the southbound merge must include changing the merge layout type from 'Layout B – parallel merge' to a higher capacity 'Layout C – ghost island merge' or any alternative scheme approved by National Highways.

(4) Any scheme of works to the northbound merge must include changing the diverge layout type from 'Layout B option 2 – Two-lane auxiliary diverge' to a higher capacity 'Layout B option 1 – ghost island lane drop' which would be facilitated by an extension of the 4th lane from the lane-drop location to the north of M1 Junction 9 to form a new lane-drop at the Junction 10 diverge, or any alternative scheme approved by National Highways.

(5) This requirement may be enforced by National Highways as if it was a relevant planning authority.

3 Green Controlled Growth Framework

3.1 National Highways has made numerous representations throughout the Examination in respect of the membership of the Environmental Scrutiny Group (“**ESG**”) and has been consistently told by the Applicant that it cannot be included in the membership of the ESG decision making panel. As the green controlled growth framework includes surface access as a critical area within its overall remit, and the ESG panel is responsible for managing the implementation of monitoring and mitigation plans which directly impact on the SRN, it makes no sense why National Highways should be precluded from membership of the ESG. The only reason given is that an arbitrary rule has been created that membership of the ESG should be confined to parties who have an interest in at least 2 environmental topics. This is simply a cost-saving exercise and does not represent

an outcome that protects the interests of the SRN or the public using the network over which we are the responsible custodian. Decisions that have impacts on the SRN, should be taken with National Highways as a key stakeholder and not simply as a technical consultee.

3.2 We request that Requirement 20(2) is amended at (h) to include “National Highways”.

4 Protective Provisions

- 4.1 The Applicant was provided with a copy of NH’s protective provisions in early 2023, prior to the application for the Project being submitted. It is disappointing that the Applicant has been unable to agree many of the provisions which are either now extremely well precedented or are supported by legislation.
- 4.2 NH does not agree to the draft form of protective provisions submitted by the Applicant at deadline 10 (5 February 2023) and requests that the Secretary of State disregard these and substitute them for the version found at Appendix 1 of this document. The table below shows each of the provisions which remain in dispute and NH’s reasons for their inclusion.

Paragraph of NH PPs	Drafting in NH PPs	Applicant’s Amendment	Applicant’s Reasoning for the Amendment	NH Position
2(2)	<p>“national highways mitigation works” means additional mitigation works not comprised in work no. 6(e) of Schedule 1 of the Order, namely;</p> <p>(a) works to the M1 Junction 10 southbound merge including changing the merge layout type from ‘Layout B – parallel merge’ to</p>	Not included	The Applicant does not agree to the inclusion of this definition because it considers that the OTRIMMA and FTRIMMA provide adequate protection to NH.	This definition ties in with paragraphs 6(12) and 6(13) of the NH protective provisions. See below for further details of why these paragraphs (and this corresponding definition) are required.

Paragraph of NH PPs	Drafting in NH PPs	Applicant's Amendment	Applicant's Reasoning for the Amendment	NH Position
	<p>a higher capacity 'Layout C - ghost island merge'; and</p> <p>(b) works to the M1 Junction 10 northbound diverge including changing the diverge layout type from 'Layout B option 2 – Two-lane auxillary diverge' to a higher capacity 'Layout D option 1 – ghost island lane drop'.</p>			
4	<p>"Requirements 33-35 of Schedule 2 of this Order shall be enforceable by National Highways"</p>	Not included	<p>The Applicant does not agree to the inclusion of Requirements 33-35 as it feels that sufficient certainty has been provided in respect of the non-DCO works in the OTRIMMA.</p>	<p>See 1.2.2 above which sets out the proposed Requirements 33-35, the need for which is addressed above. This provision is required to ensure that National Highways has a contractual right to enforce the terms of the requirement. The Planning Act 2008 does not expressly say that only a local planning authority may enforce the terms of a development consent order (or a requirement attached to it) however by analogy with</p>

Paragraph of NH PPs	Drafting in NH PPs	Applicant's Amendment	Applicant's Reasoning for the Amendment	NH Position
				<p>the Town and Country Planning Act 1990, this must be assumed to be the case. There has been no case law in this area confirming that a party other than a local planning authority may enforce the terms of a DCO.</p> <p>NH can concede this provision if the Secretary of State includes Requirements 33-35 in the form drafted in this submission, as subparagraph (5) of each allow for National Highways to enforce the terms of the requirements as if it were a planning authority.</p>
5(1)	<p>The authorised development must not commence until</p> <p>(a) a stage 1 and stage 2 road safety audit has been carried out and all recommendations raised by them or any exceptions are approved by National Highways;</p>	<p>The specified works must not commence until</p> <p>(a) a stage 1 and stage 2 road safety audit has been carried out and all recommendations raised by them or any exceptions are approved by National Highways;</p>	<p>The Applicant does not think it is reasonable (or indeed feasible) to discharge all of those matters under 5(1) (including detailed design and road space booking etc. of matters many years away from being needed) before</p>	<p>National Highways is concerned that it is the impact of the authorised development (i.e not just the specified works which are limited to the SRN) which will lead to greater capacity pressures on the SRN.</p>

Paragraph of NH PPs	Drafting in NH PPs	Applicant's Amendment	Applicant's Reasoning for the Amendment	NH Position
	<p>(b) the programme of works has been approved by National Highways;</p> <p>(c) the detailed design of the specified works comprising of the following details, insofar as considered relevant by National Highways, has been submitted to and approved by National Highways—</p> <p>(d) to the extent that this is not provided for in the Construction and Traffic Management Plan in a form that is acceptable to National Highways, a scheme of traffic management relating to traffic management on the strategic road network has (where relevant) been submitted by the undertaker and approved by National Highways such scheme to be capable of amendment by agreement between the</p>	<p>(b) the programme of works has been approved by National Highways;</p> <p>(c) the detailed design of the specified works comprising of the following details, insofar as considered relevant by National Highways, has been submitted to and approved by National Highways—</p> <p>(d) to the extent that this is not provided for in the Construction and Traffic Management Plan in a form that is acceptable to National Highways, a scheme of traffic management relating to traffic management on the strategic road network has (where relevant) been submitted by the undertaker and approved by National</p>	<p>the DCO can be commenced.</p>	<p>The Applicant has not confirmed to National Highways when the Schedule 1 M1 Junction 10 will be delivered. It is important to National Highways that we can get certainty on these points and the requested drafting gives sufficient control to National Highways that will ensure the Applicant engages with us effectively to plan the necessary schedule 1 works and also provide a suitable timescale for delivery. In the absence of these controls, the delivery of the schedule 1 works is too nebulous.</p>

Paragraph of NH PPs	Drafting in NH PPs	Applicant's Amendment	Applicant's Reasoning for the Amendment	NH Position
	<p>undertaker and National Highways from time to time;</p> <p>(e) stakeholder liaison has (where relevant) taken place in accordance with the process for such liaison agreed between the undertaker and National Highways under sub-paragraph 39(c)(iv);</p> <p>(f) National Highways has approved the audit brief and CVs for all road safety audits and exceptions to items raised in accordance with the road safety audit standard; the undertaker has agreed the estimate of the commuted sum with National Highways;</p> <p>(g) the scope of all maintenance operations (routine inspections, incident management, reactive and third party damage) to be carried out by the undertaker</p>	<p>Highways such scheme to be capable of amendment by agreement between the undertaker and National Highways from time to time;</p> <p>(e) stakeholder liaison has (where relevant) taken place in accordance with the process for such liaison agreed between the undertaker and National Highways under sub-paragraph 39(c)(iv);</p> <p>(f) National Highways has approved the audit brief and CVs for all road safety audits and exceptions to items raised in accordance with the road safety audit standard; the undertaker has agreed the estimate of</p>		

Paragraph of NH PPs	Drafting in NH PPs	Applicant's Amendment	Applicant's Reasoning for the Amendment	NH Position
	<p>during the construction of the specified works (which must include winter maintenance) has been agreed in writing by National Highways;</p> <p>(h) the undertaker has procured to National Highways collateral warranties in a form reasonably approved by National Highways from the contractor and designer of the specified works in favour of National Highways to include covenants requiring the contractor and designer to exercise all reasonable skill care and diligence in designing and constructing the specified works, including in the selection of materials, goods, equipment and plant; and</p> <p>(i) a condition survey and regime of monitoring of any National Highways assets or structures that National</p>	<p>the commuted sum with National Highways;</p> <p>(g) the scope of all maintenance operations (routine inspections, incident management, reactive and third party damage) to be carried out by the undertaker during the construction of the specified works (which must include winter maintenance) has been agreed in writing by National Highways;</p> <p>(h) the undertaker has procured to National Highways collateral warranties in a form reasonably approved by National Highways from the contractor and designer of the specified works in favour of National Highways to include covenants requiring the contractor</p>		

Paragraph of NH PPs	Drafting in NH PPs	Applicant's Amendment	Applicant's Reasoning for the Amendment	NH Position
	Highways reasonably considers will be affected by the specified works, has been agreed in writing by National Highways.	and designer to exercise all reasonable skill care and diligence in designing and constructing the specified works, including in the selection of materials, goods, equipment and plant; and		
5(1)(c)(iv)	to the extent that this is not provided for in the Construction and Traffic Management Plan in a form that is acceptable to National Highways, a process for stakeholder liaison, with key stakeholders to be identified and agreed between National Highways and the undertaker;	to the extent that this is not provided for in the Construction and Traffic Management Plan, a process for stakeholder liaison, with key stakeholders to be identified and agreed between National Highways and the undertaker;	The Construction Traffic Management Plan provides for a process for stakeholder liaison, for which National Highways is a consultee.	This goes to matters of safety and reputation. Being a consultee is not the same as actually having an effective control over the process by which works to our network are to be carried out. As a consultee, National Highways can be ignored. The required drafting ensures that we are satisfied that the stakeholder liaison is appropriate with in accordance with our guidelines for managing interfaces with stakeholders on the SRN (e.g. utilities).
5(1)(d)	to the extent that this is not provided for in the Construction and Traffic	to the extent that this is not provided for in the Construction and Traffic	The Construction Traffic Management Plan provides for a	As the Construction Traffic Management Plan provides for a scheme of traffic

Paragraph of NH PPs	Drafting in NH PPs	Applicant's Amendment	Applicant's Reasoning for the Amendment	NH Position
	<p>Management Plan in a form that is acceptable to National Highways, a scheme of traffic management relating to traffic management on the strategic road network has (where relevant) been submitted by the undertaker and approved by National Highways such scheme to be capable of amendment by agreement between the undertaker and National Highways from time to time;</p>	<p>Management Plan, a scheme of traffic management relating to traffic management on the strategic road network has (where relevant) been submitted by the undertaker and approved by National Highways such scheme to be capable of amendment by agreement between the undertaker and National Highways from time to time;</p>	<p>scheme of traffic management, for which National Highways is a consultee.</p>	<p>management, the second half of the paragraph relating to approval by National Highways is not engaged. Meaning that National Highways is only a consultee on the scheme of traffic management and not a controlling party. The effect of this means that we can be disregarded which is not acceptable and goes to safety and reputational impacts. National Highways must act reasonably in giving its approvals so there is no reason why we should not be given the right to approve matters of traffic management that impact on our network.</p>
6(12), 6(13)	<p>(12) Where in the opinion of National Highways the operation of the airport following construction of any authorised development is leading to or may lead to an increase in traffic on the strategic road network</p>	<p>Not included</p>	<p>This provides an unacceptable control on the ability to delivery the Project.</p>	<p>National Highways does not consider the OTRIMMA goes sufficiently far in protecting the SRN from the impacts of traffic growth at this critical location on the network. There are a variety of</p>

Paragraph of NH PPs	Drafting in NH PPs	Applicant's Amendment	Applicant's Reasoning for the Amendment	NH Position
	<p>beyond tolerable limits, National Highways may serve on the undertaker written notice to cease the operation of all or any part of such specified works until either the national highways mitigation works have been completed or capacity on the strategic road network is otherwise increased.</p> <p>(13) In the event of a notice being served pursuant to paragraph 12, the undertaker will suspend the operation of all authorised development stated in the notice until either the national highways mitigation works have been completed or National Highways serves written notice on the undertaker confirming that capacity on the strategic road network has increased.</p>			<p>reasons why the OTRIMMA is not satisfactory:</p> <ol style="list-style-type: none"> 1. Article 44(2) of the Order does not include National Highways – so it is not clear how we will know that MLO has been commenced in order to establish the baseline to inform the thresholds which will dictate when the relevant Schedule 1 mitigation will come forward. 2. When the thresholds are finally determined – and National Highways will have limited consultation rights over this – monitoring will commence at various airport sites. Only where annual traffic entering and exiting those sites exceeds the previous years value, will the traffic levels be inputted into the TRIMMA model. This means that at the very earliest, the TRIMMA will

Paragraph of NH PPs	Drafting in NH PPs	Applicant's Amendment	Applicant's Reasoning for the Amendment	NH Position
				<p>only start to consider the need for mitigation at year 2, when sufficient data has been accumulated to compare against the last year.</p> <p>3. Only when the data shows an increase in traffic entering the airport from the earlier year, will the data be inputted into the TRIMMA tool to assess whether traffic has met the pre-determined threshold levels. National Highways has had no input into this TRIMMA tool or the data formulation which will determine whether mitigation is required. If National Highways is concerned, the Applicant has provided for a dispute resolution mechanism – which they have specified as arbitration. National Highways have requested a staggered dispute resolution process, including conversations</p>

Paragraph of NH PPs	Drafting in NH PPs	Applicant's Amendment	Applicant's Reasoning for the Amendment	NH Position
				<p>between senior executives before a more formal mode of dispute resolution is selected but the Applicant has refused to include this in the OTRIMMA at this stage.</p> <p>4. Only when the TRIMMA tool shows that the threshold has been met, will the Applicant liaise with National Highways to deliver the Schedule 1 works.</p> <p>5. The non-scheduled works to M1 Junction 10 include two interventions to the southbound merge and northbound diverge, which we believe will be required in the 2039 and 2043 design years respectively. The OTRIMMA provides that proposals for interventions which are not in schedule 1 must be approved by the ATF steering group – of which National Highways is a member, alongside a number</p>

Paragraph of NH PPs	Drafting in NH PPs	Applicant's Amendment	Applicant's Reasoning for the Amendment	NH Position
				<p>of host authorities, including other highway authorities. The local road network is also substantially impacted by the Project and the funds in which interventions put to the ATF steering group are finite. Each ATF steering group member has a single vote. It is not unreasonable to believe that the host authorities may decide to reject the proposed interventions to the southbound merge and northbound diverge in favour of directing resources towards their own schemes. The Applicant has made a financial contribution towards the non scheduled works, however National Highways is unable to commit to the offer until there is sufficient certainty from the Department for Transport that the funding gap will be met. The only way to protect the SRN in this location is to</p>

Paragraph of NH PPs	Drafting in NH PPs	Applicant's Amendment	Applicant's Reasoning for the Amendment	NH Position
				<p>require the delivery of those non scheduled works when they become necessary. The drafting proposed does not obligate the Applicant to provide the works – the detail as to who pays for the works and who delivers them can be resolved later and once confirmation from Government has been obtained as to funding. However without these paragraphs, there is no contractual way to prevent the airport from expanding to levels which will negatively impact the SRN in this location, which is a matter of safety.</p>
7(1)(d)	<p>all reasonable legal, technical and administrative costs and disbursements incurred by National Highways in connection with the Order and sub-paragraphs (a)-(c); and</p>	<p>all reasonable legal, technical and administrative costs and disbursements incurred by National Highways in connection with sub-paragraphs (a)-(c); and</p>	<p>The Applicant does not agree to pay NH's legal and technical costs.</p>	<p>National Highways has expended resources in the form of technical consultation on the Project, legal advice and redirecting staff from other projects. The Applicant has benefitted from NH's</p>

Paragraph of NH PPs	Drafting in NH PPs	Applicant's Amendment	Applicant's Reasoning for the Amendment	NH Position
				<p>input throughout the pre-application consultation stage and throughout the examination. National Highways does not have a budget for this and despite asking for a contribution towards funding its costs (which is a usual approach for projects of this size – including Gatwick), the request was refused by Luton.</p> <p>This provision is very recently precedented in the Drax Power Station Bioenergy with Carbon Capture and Storage Extension Order 2024 – SI/SR Template (planninginspectorate.gov.uk)</p> <p>It appears in ongoing DCO examinations or DCOs awaiting determination, in all of which it is uncontested: See Medworth Energy from Waste Combined Heat and Power Facility, Gatwick</p>

Paragraph of NH PPs	Drafting in NH PPs	Applicant's Amendment	Applicant's Reasoning for the Amendment	NH Position
				<p data-bbox="1610 316 2036 379">Airport Northern Runway and Yorkshire Green.</p> <p data-bbox="1610 427 2036 1267">The provision simply mirrors the intended effect of section 54A of the Levelling Up and Regeneration Act 2023, which creates the framework for statutory consultees (including National Highways) recovering expenditure incurred throughout the pre-application consultation phases and into the examination. Regulations to bring s54A into force have been drafted by the Department for Levelling Up, Housing and Communities and will come into force 1 April 2024. This means that this provision will be the default position at law by the time any Order for the Project is granted.</p>

6 Summary

- 6.1 For the reasons given above, National Highways maintains its objection to the Project and requests that:
- (a) The three Grampian requirements at 1.2.1 and 1.2.2 are included as 33, 34 and 35 of Part 4 of Schedule 2 of the DCO;
 - (b) The suggested amendment is made to Requirement 20(2) to include National Highways as a member of the Environmental Scrutiny Group under the Green Controlled Growth framework;
 - (c) The protective provisions included in the Order at Schedule 8 Part 5 are replaced by those included at Appendix 1 of this document.
- 6.2 Should the ExA or the Secretary of State wish to discuss these matters further, NH would be happy to assist in whatever way it can.

APPENDIX 1

National Highways' Approved Form of Protective Provisions

PART 1

FOR THE PROTECTION OF NATIONAL HIGHWAYS LIMITED

Application, etc.

1.—(1) The provisions of this Part of this Schedule apply for the protection of National Highways of Bridge House, 1 Walnut Tree Close, Guildford, Surrey, GU1 4LZ (company registration number 09346363) and all successors in title and have effect unless otherwise agreed in writing between the undertaker and National Highways.

(2) An agreement for the purpose of sub-paragraph (1) includes, but is not limited to, an agreement made under article 17 of this Order, or under the 1980 Act provided that the paragraph agreement expressly refers to this paragraph 1 of this schedule.

(3) Nothing in this Order affects or prejudices the operation of the powers and duties of National Highways or the Secretary of State under the 1980 Act, the 1984 Act, the 1991 Act, the Transport Act 2000⁽¹⁾, or Town and Country Planning (General Permitted Development) (England) Order 2015⁽²⁾ which continues to apply in respect of the exercise of all National Highways' statutory functions.

Interpretation

2.—(1) Where the terms defined in article 2 (interpretation) of this Order are inconsistent with subparagraph (2) the latter prevail.

(2) In this Part of this Schedule—

“as built information” means one electronic copy of the following information—

- (a) as constructed drawings in both PDF and AutoCAD DWG formats for anything designed by the undertaker; in compliance with Interim Advice Note 184 or any successor document;
- (b) list of suppliers and materials used, as well as any relevant test results and CCTV surveys (if required to comply with DMRB standards);
- (c) product data sheets and technical specifications for all materials used;
- (d) as constructed information for any utilities discovered or moved during the works;
- (e) method statements for the works carried out;
- (f) in relation to road lighting, signs, and traffic signals any information required by Series 1300 and 1400 of the Specification for Highway Works or any replacement or modification of it;
- (g) organisation and methods manuals for all products used;
- (h) as constructed programme;

⁽¹⁾ 2000 c. 38.

⁽²⁾ S.I. 2015/596.

- (i) test results and records as required by the detailed design information and during construction phase of the project;
- (j) a stage 3 road safety audit subject to any exceptions to the road safety audit standard as agreed by the undertaker and National Highways;
- (k) the health and safety file; and

such other information as is reasonably 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;

“the bond sum” means the sum equal to 200% of the cost of carrying out the specified works (to include all costs plus any commuted sum) or such other sum agreed between the undertaker and National Highways;

“the cash surety” means the sum agreed between the undertaker and National Highways;

“commuted sum” means such sum calculated as provided for in paragraph 48 of this Part of this Schedule to be used to fund the future cost of maintaining the specified works;

“condition survey” means a survey of the condition of National Highways structures and assets within the Order limits that in the reasonable opinion of National Highways may be affected by the specified works;

“contractor” means any contractor or subcontractor appointed by the undertaker to carry out the specified works;

“defects period” means the period from the date of the provisional certificate to the date of the final certificate which is to be no less than 12 months from the date of the provisional certificate;

“detailed design information” means such of the following drawings specifications and calculations as are relevant to the development—

- (a) site clearance details;
- (b) boundary, environmental and mitigation fencing;
- (c) road restraints systems and supporting road restraint risk appraisal process assessment;
- (d) drainage and ducting as required by DMRB CD 535 Drainage asset data and risk management and DMRB CS551 Drainage surveys – standards for Highways
- (e) earthworks including supporting geotechnical assessments required by DMRB CD622 Managing geotechnical risk and any required strengthened earthworks appraisal form certification;
- (f) pavement, pavement foundations, kerbs, footways and paved areas;
- (g) traffic signs and road markings;
- (h) traffic signal equipment and associated signal phasing and timing detail;
- (i) road lighting (including columns and brackets);
- (j) regime of California Bearing Ratio testing;
- (k) electrical work for road lighting, traffic signs and signals;
- (l) motorway communications as required by DMRB;

- (m) highway structures and any required structural approval in principle;
- (n) landscaping;
- (o) proposed departures from DMRB standards;
- (p) walking, cycling and horse riding assessment and review report;
- (q) stage 1 and stage 2 road safety audits and exceptions agreed;
- (r) utilities diversions;
- (s) topographical survey;
- (t) maintenance and repair strategy in accordance with DMRB GD304 Designing health and safety into maintenance or any replacement or modification of it;
- (u) health and safety information including any asbestos survey required by GG105 or any successor document; and
- (v) other such information that may be reasonably required by National Highways to be used to inform the detailed design of the specified works;

“DBFO contract” means the contract between National Highways and the highway operations and maintenance contractor for the maintenance and operation of parts of the strategic road network which are within the Order Limits or any successor or replacement contract that may be current at the relevant time;

“DMRB” means the Design Manual for Roads and Bridges or any replacement or modification of it;

“final certificate” means the certificate relating to those aspects of the specified works that have resulted in any alteration to the strategic road network to be issued by National Highways pursuant to paragraph 46;

“the health and safety file” means the file or other permanent record containing the relevant health and safety information for the authorised development required by the Construction (Design and Management) Regulations 2015⁽³⁾ (or such updated or revised regulations as may come into force from time to time);

“highway operations and maintenance contractor” means the contractor appointed by National Highways under the DBFO contract;

“national highways mitigation works” means additional mitigation works not comprised in work no. 6(e) of Schedule 1 of the Order, namely;

(a) works to the M1 Junction 10 southbound merge including changing the merge layout type from ‘Layout B – parallel merge’ to a higher capacity ‘Layout C -ghost island merge’; and

(b) works to the M1 Junction 10 northbound diverge including changing the diverge layout type from ‘Layout B option 2 – Two-lane auxillary diverge’ to a higher capacity ‘Layout D option 1 – ghost island lane drop’.

“nominated persons” means the undertaker’s representatives or the contractor’s representatives on site during the carrying out of the specified works as notified to National Highways from time to time;

“programme of works” means a document setting out the sequence and timetabling of the specified works;

⁽³⁾ S.I. 2015/51.

“provisional certificate” means the certificate of provisional completion relating to those aspects of the specified works that have resulted in any alteration to the strategic road network to be issued by National Highways in accordance with paragraph 42 when it considers the specified works are substantially complete and may be opened for traffic;

“road safety audit” means an audit carried out in accordance with the road safety audit standard;

“road safety audit standard” means DMRB Standard HD GG119 or any replacement or modification of it;

“road space booking” means road space bookings in accordance with National Highways’ Asset Management Operational Requirements (AMOR) including Network Occupancy Management System (NOMS) used to manage road space bookings and network occupancy;

“Specification for Highways Works” means the specification for highways works forming part of the manual of contract documents for highway works published by National Highways and setting out the requirements and approvals procedures for work, goods or materials used in the construction, improvement or maintenance of the strategic road network;

“specified works” means so much of any work, including highway works and signalisation, authorised by this Order including any maintenance of that work, as is on, in, under or over the strategic road network for which National Highways is the highway authority;

“strategic road network” means any part of the road network including trunk roads, special roads or streets for which National Highways is the highway authority including drainage infrastructure, street furniture, verges and vegetation and all other land, apparatus and rights located in, on, over or under the highway;

“utilities” means any pipes wires cables or equipment belonging to any person or body having power or consent to undertake street works under the New Roads and Street Works Act 1991⁽⁴⁾; and

“winter maintenance” means maintenance of the road surface to deal with snow and ice.

(3) References to any standards, manuals, contracts, Regulations and Directives including to specific standards forming part of the DMRB are, for the purposes of this Part of this Schedule, to be construed as a reference to the same as amended, substituted or replaced, and with such modifications as are required in those circumstances.

(4) For the purposes of its obligations to procure a bond under this Part of this Schedule, the undertaker may procure a bond in relation to the specified works, and a separate bond in relation to the commuted sums, and in those circumstances references in this Part to “bond” and “bond sum” means both bonds together.

General

3. The undertaker acknowledges that parts of the works authorised by this Order affect or may affect parts of the strategic road network in respect of which National Highways have appointed the highway operations and maintenance contractor.

4. Requirements 33-35 of Schedule 2 of this Order shall be enforceable by National Highways.

⁽⁴⁾ 1991 c. 22.

Prior approvals and security

5.—(1) The authorised development must not commence until—

- (a) a stage 1 and stage 2 road safety audit has been carried out and all recommendations raised by them or any exceptions are approved by National Highways;
- (b) the programme of works has been approved by National Highways;
- (c) the detailed design of the specified works comprising of the following details, insofar as considered relevant by National Highways, has been submitted to and approved by National Highways—
 - (i) the detailed design information, incorporating all recommendations and any exceptions approved by National Highways under sub-paragraph (a);
 - (ii) details of the proposed road space bookings with National Highways;
 - (iii) the identity of the contractor and nominated persons;
 - (iv) to the extent that this is not provided for in the Construction and Traffic Management Plan in a form that is acceptable to National Highways, a process for stakeholder liaison, with key stakeholders to be identified and agreed between National Highways and the undertaker;
 - (v) information demonstrating that the walking, cycling and horse riding assessment and review process undertaken by the undertaker in relation to the specified works has been adhered to in accordance with DMRB GG142 – Designing for walking, cycling and horse riding;
- (d) to the extent that this is not provided for in the Construction and Traffic Management Plan in a form that is acceptable to National Highways, a scheme of traffic management relating to traffic management on the strategic road network has (where relevant) been submitted by the undertaker and approved by National Highways such scheme to be capable of amendment by agreement between the undertaker and National Highways from time to time;
- (e) stakeholder liaison has (where relevant) taken place in accordance with the process for such liaison agreed between the undertaker and National Highways under sub-paragraph 39(c)(iv);
- (f) National Highways has approved the audit brief and CVs for all road safety audits and exceptions to items raised in accordance with the road safety audit standard;
- (g) the undertaker has agreed the estimate of the commuted sum with National Highways;
- (h) the scope of all maintenance operations (routine inspections, incident management, reactive and third party damage) to be carried out by the undertaker during the construction of the specified works (which must include winter maintenance) has been agreed in writing by National Highways;
- (i) the undertaker has procured to National Highways collateral warranties in a form reasonably approved by National Highways from the contractor and designer of the specified works in favour of National Highways to include covenants requiring the contractor and designer to exercise all reasonable skill care and diligence in designing and constructing the specified works, including in the selection of materials, goods, equipment and plant; and
- (j) a condition survey and regime of monitoring of any National Highways assets or structures that National Highways reasonably considers will be affected by the specified works, has been agreed in writing by National Highways.

(2) The undertaker must not exercise—

- (a) article 4 (maintenance of authorised development);

- (b) article 10 (street works);
- (c) article 11 (power to alter layout, etc., of streets);
- (d) article 12 (construction and maintenance of new, altered or diverted streets);
- (e) article 13 (temporary closure and restriction of use of streets);
- (f) article 14 (permanent stopping up or public rights of way);
- (g) article 15 (access to works);
- (h) article 16 (traffic regulation);
- (i) article 19 (discharge of water);
- (j) article 20 (protective works to buildings) insofar as this relates to buildings owned or operated by National Highways;
- (k) article 21 (authority to survey and investigate the land);
- (l) article 22 (felling, lopping and removal of trees, shrubs and hedgerows);
- (m) article 33 (temporary use of land for carrying out the authorised development); or
- (n) article 34 temporary use of land for maintaining the authorised development),

of this Order, over any part of the strategic road network without the consent of National Highways, and National Highways may in connection with any such exercise require the undertaker to provide details of any proposed road space bookings and/or submit a scheme of traffic management for National Highways' approval.

(3) National Highways must prior to the commencement of the specified works or the exercise of any power referenced in sub-paragraph (2) inform the undertaker of the identity of the person who will act as a point of contact on behalf of National Highways for consideration of the information required under sub-paragraph (1) or (2).

(4) National Highways must provide the undertaker with a list of all the structures, assets and pavements to be subject to both a condition survey and regime of monitoring pursuant to sub-paragraph (1)(i) and paragraph 44(1) of this Part of this Schedule before the first condition survey is conducted and the regime of monitoring is implemented.

(5) Any approval or consent of National Highways required under this paragraph—

- (a) must not be unreasonably withheld or delayed;
- (b) must be given in writing;
- (c) in the case of a refusal must be accompanied by a statement of grounds for refusal;
- (d) shall be deemed to have been refused 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; and
- (e) may be subject to any conditions as National Highways reasonably considers necessary.

(6) Any change to the identity of the contractor and/or designer of the specified works will be notified to National Highways immediately along with collateral warranties in a form agreed by National Highways acting reasonably.

(7) Any change to the detailed design of the specified works must be approved by National Highways in accordance with sub-paragraph (1) of this Part of this Schedule.

Construction of the specified works

6.—(1) The undertaker must

- (a) give National Highways 28 days' notice in writing of the date on which the authorised development will start unless otherwise agreed by National Highways;
- (b) give National Highways 28 days' notice in writing of the date on which the specified works will start unless otherwise agreed by National Highways; and
- (c) give National Highways as much notice as is reasonably practicable of any element of the authorised development that the undertaker reasonably considers would significantly affect the strategic road network or the level of traffic on the strategic road network.

(2) The undertaker must comply with National Highways' road space booking procedures prior to and during the carrying out of the specified works and no specified works for which a road space booking is required is to commence without a road space booking having first been secured from National Highways, such road space booking not to be unreasonably withheld or delayed.

(3) The specified works must be carried out by the undertaker to the reasonable satisfaction of National Highways in accordance with—

- (a) the relevant detailed design information and programme of works approved pursuant to paragraph 39(1) or as subsequently varied by agreement between the undertaker and National Highways;
- (b) the DMRB, the Manual of Contract Documents for Highway Works, including the Specification for Highway Works, together with all other relevant standards as required by National Highways to include, inter alia; all relevant interim advice notes, the Traffic Signs Manual and the Traffic Signs Regulations and General Directions 2016⁽⁵⁾ save to the extent that exceptions from those standards apply which have been approved by National Highways; and
- (c) all aspects of the Construction (Design and Management) Regulations 2015⁽⁶⁾ or any statutory amendment or variation of the same and in particular the undertaker, as client, must ensure that all client duties (as defined in the said regulations) are undertaken to the reasonable satisfaction of National Highways.

(4) The undertaker must permit and must require the contractor to permit at all reasonable times persons authorised by National Highways (whose identity must have been previously notified to the undertaker by National Highways) to gain access to the specified works for the purposes of inspection and supervision of the specified works.

(5) If any part of the specified works is constructed—

- (a) other than in accordance with the requirements of this Part of this Schedule; or
- (b) in a way that causes damage to the highway, highway structure or asset or any other land of National Highways,

National Highways may by notice in writing require the undertaker, at the undertaker's own expense, to comply promptly with the requirements of this Part of this Schedule or remedy any damage notified to the undertaker under this Part of this Schedule, to the reasonable satisfaction of National Highways.

⁽⁵⁾ S.I. 2016/362.

⁽⁶⁾ S.I. 2015/51.

(6) If during the carrying out of the authorised development the undertaker or its appointed contractors or agents causes damage to the strategic road network then National Highways may by notice in writing require the undertaker, at its own expense, to remedy the damage.

(7) If within 28 days on which a notice under sub-paragraph (5) or sub-paragraph (6) is served on the undertaker (or in the event of there being, in the opinion of National Highways, a danger to road users of the strategic road network, within such lesser period as National Highways may stipulate), the undertaker has failed to take the steps required by that notice, National Highways may carry out the steps required of the undertaker and may recover any expenditure incurred by National Highways in so doing, such sum to be payable within 30 days of demand.

(8) Nothing in this Part of this Schedule prevents National Highways from carrying out any work or taking any such action as it reasonably believes to be necessary as a result of or in connection with the carrying out or maintenance of the authorised development without prior notice to the undertaker in the event of an emergency or to prevent the occurrence of danger to the public and National Highways may recover any expenditure it reasonably incurs in so doing.

(9) In constructing the specified works, the undertaker must at its own expense divert or protect all utilities and all agreed alterations and reinstatement of highway over existing utilities must be constructed to the reasonable satisfaction of National Highways.

(10) During the construction of the specified works the undertaker must carry out all maintenance (including winter maintenance) in accordance with the scope of maintenance operations agreed by National Highways pursuant to paragraph 39(1)(h) and the undertaker must carry out such maintenance at its own cost.

(11) The undertaker must notify National Highways if it fails to complete the specified works in accordance with the agreed programme pursuant to paragraph 39(1)(b) of this Part or suspends the carrying out of any specified work beyond a reasonable period of time and National Highways reserves the right to withdraw any road space booking granted to the undertaker to ensure compliance with its network occupancy requirements.

(12) Where in the opinion of National Highways the operation of the airport following construction of any authorised development is leading to or may lead to an increase in traffic on the strategic road network beyond tolerable limits, National Highways may serve on the undertaker written notice to cease the operation of all or any part of such specified works until either the national highways mitigation works have been completed or capacity on the strategic road network is otherwise increased.

(13) In the event of a notice being served pursuant to paragraph 12, the undertaker will suspend the operation of all authorised development stated in the notice until either the national highways mitigation works have been completed or National Highways serves written notice on the undertaker confirming that capacity on the strategic road network has increased.

Payments

7.—(1) The undertaker must pay to National Highways a sum equal to the whole of any costs and expenses which National Highways reasonably incurs (including costs and expenses for using internal or external staff and costs relating to any work which becomes abortive) in relation to the specified works and in relation to any approvals sought under this Order, or otherwise incurred under this Part, including—

- (a) the checking and approval of the information required under paragraph 40(1) and any advice given to the undertaker relating to the design, specification and programme of the specified works generally;
- (b) the supervision of the specified works;
- (c) the checking and approval of the information required to determine approvals under this Order;

- (d) all reasonable legal, technical and administrative costs and disbursements incurred by National Highways in connection with the Order and sub-paragraphs (a)-(c); and
- (e) any value added tax which is payable by National Highways in respect of such costs and expenses and for which it cannot obtain reinstatement from HM Revenue and Customs,

together comprising “the NH costs”.

(2) The undertaker must pay to National Highways upon demand and prior to such costs being incurred the total costs that National Highways reasonably believe will be properly and necessarily incurred by National Highways in undertaking any statutory procedure or preparing and bringing into force any traffic regulation order or orders necessary to carry out or for effectively implementing the authorised development.

(3) National Highways must provide the undertaker with a fully itemised schedule showing its estimate of the NH costs prior to the commencement of the specified works and the undertaker must pay to National Highways the estimate of the NH costs attributable to the specified works prior to commencing the specified works and in any event prior to National Highways incurring any cost.

(4) If at any time after the payment referred to in sub-paragraph (3) has become payable, National Highways reasonably believes that the NH costs will exceed the estimated NH costs it may give notice to the undertaker of the amount that it believes the NH costs will exceed the estimate of the NH costs (the excess) and the undertaker must pay to National Highways within 28 days of the date of the notice a sum equal to the excess.

(5) National Highways must give the undertaker a final account of the NH costs referred to in sub-paragraph (1) to (4) within 30 days of the issue of the provisional certificate issued pursuant to paragraph 42(4).

(6) Within 28 days of the issue of the final account—

- (a) if the final account shows a further sum as due to National Highways the undertaker must pay to National Highways the sum shown due to it;
- (b) if the account shows that the payment or payments previously made by the undertaker have exceeded the costs incurred by National Highways, National Highways must refund the difference to the undertaker.

(7) If any payment due under any of the provisions of this Part of this Schedule is not made on or before the date on which it falls due the party from whom it was due must at the same time as making the payment pay to the other party interest at 1% above the Bank of England base lending rate from time to time being in force for the period starting on the date upon which the payment fell due and ending with the date of payment of the sum on which interest is payable together with that interest.

Provisional certificate

8.—(1) Following any closure or partial closure of any of the strategic road network for the purposes of carrying out the specified works, National Highways will carry out a site inspection to satisfy itself that the strategic road network is, in its opinion, safe for traffic and the undertaker must comply with any reasonable requirements of National Highways prior to reopening the strategic road network.

(2) As soon as the undertaker considers that the provisional certificate may be properly issued it must apply to National Highways for the provisional certificate.

(3) Following an application for a provisional certificate, National Highways must as soon as reasonably practicable—

- (a) inspect the specified works; and

(b) provide the undertaker with a written list of works that are required for the provisional certificate to be issued or confirmation that no further works are required for this purpose.

(4) When—

(a) a stage 3 road safety audit for the specified works has been carried out and all recommendations raised including remedial works have (subject to any exceptions agreed) been approved by National Highways, such approval not to be unreasonably withheld or delayed;

(b) the specified works incorporating the approved remedial works under sub-paragraph (4)(a) and any further works notified to the undertaker pursuant to sub-paragraph (3)(b) have been completed to the reasonable satisfaction of National Highways;

(c) the as built information has been provided to National Highways; and

(d) the undertaker has paid the commuted sum to National Highways,

National Highways must promptly issue the provisional certificate.

(5) The undertaker must submit a stage 4 road safety audits as required by and in line with the timescales stipulated in the road safety audit standard.

(6) The undertaker must comply with the findings of the stage 4 road safety audit and must pay all reasonable costs of and incidental to such and provide updated as-built information to National Highways.

Opening

9. The undertaker must notify National Highways not less than 56 days in advance of the intended date of opening to the public of the strategic road network and the undertaker must notify National Highways of the actual date the strategic road network will be opened to the public within 14 days of that date.

Final condition survey

10.—(1) The undertaker must, as soon as reasonably practicable after making its application for a provisional certificate pursuant to paragraph 42(2), arrange for the highways structures and assets that were the subject of the condition survey to be re-surveyed and must submit the re-survey to National Highways for its approval.

(2) The re-survey will include a renewed geotechnical assessment required by DMRB CD622 if the specified works include any works beneath the strategic road network.

(3) If the re-surveys carried out pursuant to paragraph 44(1) indicates that any damage has been caused to a structure or asset, the undertaker must submit a scheme for remedial works in writing to National Highways for its approval in writing and the undertaker must carry out the remedial works at its own cost and in accordance with the scheme submitted.

(4) If the undertaker fails to carry out the remedial work in accordance with the approved scheme, National Highways may carry out the steps required of the undertaker and may recover any expenditure it reasonably incurs in so doing.

(5) National Highways may, at its discretion, at the same time as giving its approval to the re-surveys pursuant to paragraph 44(1) give notice in writing that National Highways will remedy any damage identified in the re-surveys and National Highways may recover any expenditure it reasonably incurs in so doing.

(6) The undertaker must make available to National Highways upon request copies of any survey or inspection reports produced pursuant to any inspection or survey of any specified work following its completion that the undertaker may from time to time carry out.

(7) Any approval of National Highways required under this paragraph must not be unreasonably withheld or delayed.

Defects period

11.—(1) The undertaker must at its own expense remedy any defects in the strategic road network as are reasonably required by National Highways to be remedied during the defects period.

(2) All identified defects must be remedied in accordance with the following timescales—

- (a) in respect of matters of urgency, within 24 hours of receiving notification for the same (urgency to be determined at the absolute discretion of National Highways);
- (b) in respect of matters which National Highways reasonably considers to be serious defects or faults, within 14 days of receiving notification of the same; and
- (c) in respect of all other defects notified to the undertaker, within 4 weeks of receiving notification of the same.

(3) Following the expiry of the defects period National Highways has responsibility for routine maintenance of the strategic road network save for any soft landscaping works which must be established and which must thereafter be maintained for a period of 3 years by and at the expense of the undertaker.

Final certificate

12.—(1) The undertaker must apply to National Highways for the final certificate no sooner than 12 months from the date of the provisional certificate.

(2) Following receipt of the application for the final certificate, National Highways must as soon as reasonably practicable—

- (a) inspect the strategic road network; and
- (b) provide the undertaker with a written list of any further works required to remedy or make good any defect or damage in the strategic road network or confirmation that no such works are required for this purpose.

(3) The undertaker must carry out such works notified to it pursuant to sub-paragraph 46(2).

(4) When National Highways is reasonably satisfied that—

- (a) any defects or damage arising from defects during the defects period and any defects notified to the undertaker pursuant to sub-paragraph 11(2) and any remedial works required as a result of the stage 4 road safety audit have been made good to the reasonable satisfaction of National Highways; and
- (b) the NH costs have been paid to National Highways in full,

National Highways must issue the final certificate after which the bond shall be released in full.

(5) The issue of a final certificate by National Highways amounts to an acknowledgement by National Highways that the construction, alteration or diversion (as the case may be) of the highway has been completed to its reasonable satisfaction for the purposes of article 12 of this Order.

(6) The undertaker must pay to National Highways within 28 days of demand the costs reasonably incurred by National Highways in identifying the defects and supervising and inspecting the undertaker's work to remedy the defects that it is required to remedy pursuant to these provisions.

Security

13. 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) 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 41 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.

Committed sums

14.—(1) National Highways must provide to the undertaker an estimate of the commuted sum, calculated in accordance with FS Guidance S278 Commuted Lump Sum Calculation Method dated 18 January 2010 or any successor guidance, prior to the commencement of the specified works.

(2) The undertaker must pay to National Highways the commuted sum prior to the issue of the provisional certificate.

Insurance

15. Prior to the commencement of the specified works the undertaker must ensure public liability insurance is in place with an insurer in the minimum sum of £10,000,000.00 (ten million pounds) in respect of any one claim against any legal liability for damage loss or injury to any property or any person as a direct result of the execution of specified works or use of the strategic road network by the undertaker.

Indemnity

16.—(1) Subject to sub-paragraphs (2) and (3) 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 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.

(2) Sub-paragraph (1) does not apply to any costs, claims, expenses, damages, losses and liabilities which were caused by or arose out of the negligence or default of National Highways or its officers, servants, agents or contractors or any person or body for whom it is responsible.

(3) If any person makes a claim or notifies an intention to make a claim against National Highways which may reasonably be considered likely to give rise to a liability under this paragraph then National Highways must—

- (a) as soon as reasonably practicable give the undertaker reasonable notice of any such third party claim or demand, specifying the nature of the indemnity liability in reasonable detail; and
- (b) not make any admission of liability, agreement or compromise in relation to the indemnity liability without first consulting the undertaker and considering their representations.

(4) National Highways must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands and penalties to which the indemnity under this paragraph applies where it is within National Highway's reasonable gift and control to do so and which expressly excludes any obligation to mitigate liability arising from third parties which is outside of National Highway's control.

(5) National Highways must provide an explanation of how any claim has been mitigated or minimised or where mitigation or minimisation is not possible an explanation as to why, if reasonably requested to do so by the undertaker and only in relation to costs that are incurred which are within National Highways' direct control.

Maintenance of the specified works

17.—(1) The undertaker must, prior to the commencement of any works of maintenance to the specified works, give National Highways 28 days' notice in writing of the date on which those works will start unless otherwise agreed by National Highways, acting reasonably.

(2) If, for the purposes of maintaining the specified works, the undertaker needs to occupy any road space, the undertaker must comply with National Highways' road space booking requirements and no maintenance of the specified works for which a road space booking is required is to commence without a road space booking having first been secured, such road space booking not to be unreasonably withheld or delayed.

(3) The undertaker must comply with any reasonable requirements that National Highways may notify to the undertaker, such requirements to be notified to the undertaker not less than 14 days' in advance of the planned commencement date of the maintenance works.

(4) The provisions of paragraph 43 apply to the opening of any part of the strategic road network following occupation of any road space under this paragraph.

Expert determination

18.—(1) Article 52 (arbitration) of the Order does not apply to this Part of this Schedule.

(2) 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.

(3) All parties involved in settling any difference must use best endeavours to do so within 21 days from the date of a dispute first being notified in writing by one party to the other and in the absence of the difference being settled within that period the expert must be appointed within 21 days of the notification of the dispute.

(4) The expert must—

- (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 21 days of the expert's appointment;
- (b) permit a party to comment on the submissions made by the other party within 21 days of receipt of the submission;

(c) issue a decision within 42 days of receipt of the submissions under sub-paragraph (b); and

(d) give reasons for the decision.

(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 52 (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.