

Draft DCO and Explanatory Memorandum

1.	Article 2 (Interpretation)	<p>The definition of “commence” includes 16 exceptions to the meaning of “commence” (i.e., those listed (a) to (p)) which are wider than those included in the cited precedents. It is not clear from the EM why more carve outs to the definition are required for this project as no justification for the inclusion of any of (a) to (p) is provided in the EM.</p> <p>Moreover, certain of the exceptions would seem capable of potentially giving rise to significant environmental effects e.g. (k) receipt and erection of construction plant and equipment; (l) erection of temporary buildings and structures (m) site preparation and site clearance (n) establishment of construction compounds and (o) establishment of temporary haul roads and should include definitions with regard to permits.</p> <p>Paragraph 3.4.1 of the EM states –</p> <p>The works that are excluded from the definition do not give rise to any materially new or materially different environmental effects to those assessed in the ES, being either de minimis or have minimal potential for adverse effects, in line with the Inspectorate’s Advice Note 15”.</p> <p>The Local Authorities would therefore expect GAL to set out:</p> <ul style="list-style-type: none">(i) where each of these exceptions is assessed in the ES and(ii) provide a copy of its pre-commencement plan. (For instance, the Councils would wish to know how temporary haul roads, which fall within the exceptions, would be controlled; similarly, the Councils would wish to know about the proposed size, scale, and duration of the erection of any temporary buildings and structures). <p>Once further information is known, the Councils might wish to seek to control these activities listed in (a) to (p) by requirement.</p> <p>Regarding temporary works, it is not clear how these will be dealt with when they are no longer needed, and we would expect a requirement to deal with this.</p> <p>Ref. No. 36 of the Meeting Note states –</p> <p>“Interpretation of “commence”. The Applicant has included a number of operations in (a) to (p) that would be excluded from the definition of commence but which have the potential to give rise to environmental effects. The Applicant may wish to review this list”.</p>
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		<p>The Authorities agree with this comment and, as well as reviewing the list, we would hope GAL provides an explanation for the inclusion of each exception. This is consistent with the regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (“APFP”) which states a DCO application “must be accompanied by ... an explanatory memorandum explaining the purpose and effect of provisions in the draft order, including in particular any divergences from the model provisions”, which is amplified by the advice given in paragraph 2.26 of PINS <i>Advice note thirteen: Preparation of a draft order granting development consent and explanatory memorandum</i> –</p> <p>“The draft order must be accompanied by an explanatory memorandum (Regulation 5(2)(c) APFP) explaining the purpose and effect of each provision in a draft order (explaining, for example, why it is considered necessary)”.</p>
2.	Article 2 (Interpretation)	<p>The definition of “maintain” sets out a non-exclusive list of 9 actions which are considered “maintenance” for the purposes of the Order. These actions should not give rise to any materially new or materially different environmental effects to those identified in the ES and this should be explained in the Explanatory memorandum for the Authorities to be able to consider whether any of the proposed actions give rise to any concern.</p> <p>‘Ancillary structures’ defined in article 2 aren’t further clarified but the construction of these allows vertical and lateral deviation (to an extent not yet known)</p>
3.	Art.3 (development consent etc. granted by Order)	<p>Art. 3(1) states –</p> <p>“Subject to the provisions of this Order including the requirements in Schedule 2 (requirements), the undertaker is granted development consent to <u>construct, operate and use</u> the authorised development”. [Emphasis added].</p> <p>The corresponding provision used in other DCO’s is usually “... the undertaker is granted development consent <u>for</u> the authorised development ...”. It would be helpful to know why these words have been chosen instead of that usually used.</p>
4.	Art.6 (limits of deviation)	<p>This article appears incomplete and cannot be understood until the Work No. is included in art.6(2), the number of the relevant requirement included in art.6(3), and the maximum vertical level of deviation is included in art.6(4). Since art.6(4) concerns constructing highway works, highway authorities will be particularly interested in this provision to agree dimensions in terms of metres included in relevant sections.</p> <p>Ref. No. 39 of the Meeting Note states –</p>

		<p>“The Applicant may wish to further consider the drafting of this Article, and in particular 6(2) and 6(4)”.</p> <p>In addition, as mentioned above, the drafting of art.6(3) needs to be considered including the defining of ancillary structures.</p>
5.	Art. 7 (benefit of Order)	Art.7(1) states – “Subject to article 8 ... the provisions of this Order conferring powers on the undertaker have effect solely for the benefit of Gatwick Airport Limited save for the highway works in respect of which the provisions of this Order have effect for the benefit of Gatwick Airport Limited and National Highways”. It is considered art.7(1) would be clearer if the underlined words were amended to cross-refer to numbered works
6.	Art. 8 (consent to transfer benefit of order)	The consent of the Secretary of State is required for a transfer or grant of the benefit of the Order, except where it is made to certain bodies (statutory undertakers, Network Rail, local highway authorities) each of which is set out in square brackets in art.8(4)(a) to (c), suggesting the final list is of exceptions is unconfirmed. If “local highway authorities” are to remain in art.8(4)(c), we expect that provision will eventually include a cross-reference to certain numbered works or will include a description of the works which will not require the Secretary of State’s consent. The EM does not provide additional information on this point.
7.	Art 9. (planning permission)	<p>Conditions of previously granted planning permission that are incompatible...shall cease to have effect. Is there precedent for this?</p> <p>(1) Operational land – need clarification of what this means in practice and the implications of such an article.</p> <p>(2) And (3) Clarification of what is stated with regard to the actions that could be taken prior to the commencement of the order.</p> <p>(4) What does ‘incompatible’ mean in the context of the dDCO?</p> <p>(9) The Authorities believe there needs to be discussion regarding permitted development rights in relation to the NRP proposals</p>
8.	Art. 10 (application of the 1991 Act)	It is not clear which article is being cross-referred to in art.10(4). (Art.10(4) refers to “article [] (temporary stopping up and restriction of use of streets)” but there is no such article. (Art. 12 concerns power to alter layout, etc., of streets, art.13 to stopping up of streets, and art. 14 to temporary closure of streets) and in ‘application of the permit schemes. The EM does not provide an explanation with no reference to the application of permit schemes.

		The disapplications in 10(3) are broad and the highway authorities disagree with the inclusions of 74A, 73B, 73C, 77 and 78A which should all apply to the works under the provisions of the DCO.
9.	Art. 11 (street works)	<p>This Article allows the undertaker to interfere with and execute works in or under the streets within the Order limits for the purposes of the authorised development. It departs from most precedents by authorising interference with any street within the Order limits, rather than just those specified in a schedule. This is a significant departure from established precedent (and the Model Provisions).</p> <p>WSCC is therefore concerned with the drafting, and would request GAL amend art.11(1) so that affected streets are specified in a schedule. Its addition, it is requested that article 11(1) be amended as follows – <i>“The undertaker may, for the purposes of the authorised development and subject to the consent of the street authority, enter on so much of any of the streets as are within the Order limits and may ...”</i>. [Proposed amendment shown bold and underlined].</p> <p>We note the power to “enter onto and alter the layout of, or carry out any works on, any street within the Order limits” under art.12(1) (power to alter layout, etc., of streets) is subject to GAL obtaining the street authority’s consent, so the principle of our proposed amendment to art.11(1) appears already elsewhere in the dDCO.</p>
10.	Art. 13 (stopping up of streets)	<p>We consider art.13(2)(b) should be amended as follows –</p> <p>“(2) No street specified in columns (1) and (2) of Part 1 of Schedule [] (streets for which a substitute is to be provided) is to be wholly or partly stopped up under this article unless—</p> <p>... (b) a temporary alternative route for the passage of such traffic as could have used the street to be stopped up is first provided and subsequently maintained by the undertaker to the reasonable satisfaction of the relevant street authority between the commencement and termination points for the stopping up of the street until the completion and opening of the new street in accordance with sub-paragraph (a)”. [Proposed amendment shown bold and underlined]</p>
11.	Art. 14 (Temporary closure of streets)	<p>While this article is preceded in other DCOs, we would expect the following paragraph to be included after existing paragraph (5) –</p> <p>“(X) No street specified in column (2) of Part 2 of Schedule [] (Streets to be temporarily closed) may be wholly or partly closed under this article unless— (a) the new temporary street to be substituted for it, which is specified in column [] of that Part of that Schedule, is open for use, and has been completed to the reasonable satisfaction of the street authority; or (b) an alternative temporary route for the passage of such traffic as could have used the street to be temporarily closed between the commencement and termination points for the temporary closure of the street is first provided and is subsequently</p>

		<p>maintained by the undertaker to the reasonable satisfaction of the street authority until the opening of the new temporary street in accordance with sub-paragraph (a) or the re-opening of the street temporarily closed</p> <p>To ensure like-for-like is provided, we would request existing paragraph (6) is amended as follows – “(6) Where the undertaker provides a temporary diversion under paragraph (4), the new or temporary alternative route is not required to be of a higher standard, <u>and must not be of a lower standard</u>, than the temporarily closed street in column (2) of Part of Schedule []”. [Proposed amendment shown bold and underlined].</p> <p>WSCC/SCC object to the inclusion of a deeming provision within 28 days (paragraph 9).</p>
12.	Art. 15 (public Rights of Way-creation, diversion and stopping up)	<p>The space in art.15(1) for the cross-reference to the relevant schedule is blank.</p> <p>Paragraph 5.35.1 of the EM is meant to set out the explanation for the footpaths which are proposed to be permanently stopped up for which no substitute is to be provided; however, no explanation is provided. We assume an explanation will be provided in the next version of the EM; however, we request that the explanation is provided as soon as possible.</p>
13.	Art. 16 (Access to Works)	As above, WSCC object to the deeming provision, as it is necessary to seek our consent and, if needs be, we could have a clause setting out that we would not unreasonably withhold our consent.
14.	Art. 18 (Traffic Regulation)	WSCC object to the deeming provision within 28 days
15.	Art 18A (construction and maintenance of local highway works)	There is no explanation of this provision in the EM and one needs to be included
16.	Art 19. (agreement with highways authorities)	WSCC would encourage GAL to agree, with the Highway Authorities, template Highways Agreements under Section 278 and 38 of the Highways Act 1980 as early as possible.

17.	Art.22 (authority to survey and investigate land)	<p>Art.22 authorises the undertaker to enter onto any land within the Order limits or which may be affected by the authorised development to undertake various survey and investigative works. The list of works which may be undertaken under art.22(1)(b) are (slightly) more extensive than those undertaken under the corresponding provision of the precedents (Sizewell and M25 DCOs) and the EM does not explain why.</p> <p>Art.22(6) includes a 28-day deeming provision.</p> <p>As mentioned elsewhere, the Highway Authorities object to the inclusion of a deeming provision.</p>
18.	Art.23 (felling or lopping of trees and removal of hedgerows)	<p>Hedgerow works are excluded from the definition of “commencement” (art.2), but this article controls hedgerow works so further explanation is needed as to how they work together, particularly given the possibly wide-ranging exclusion under art.2 (“removal of hedgerows, trees and shrubs”).</p> <p>Art.23(4) says – “(4) The undertaker may, for the purposes of carrying out the authorised development but subject to paragraph (2), remove any hedgerow [which includes important hedgerows] within the Order limits that is required to be removed”.</p> <p>We would expect important hedgerows which are to be removed to be identified on a plan. The Sizewell DCO included such a provision (art.81(4)(b)).</p> <p>23.(7) A ‘hedgerow’ is not defined in The Hedgerows Regulations 1997 and therefore has little context/definition in this sentence. Recommend ‘hedgerow’ is defined further either in this order or as referred to elsewhere (example: a row of woody bushes or trees, usually less than 5m wide at the base, often along the boundary of a garden, field or road).</p> <p>Amendments recommended to this section:</p> <p>23.—(1) The undertaker may fell or lop any tree or shrub within or overhanging land within the Order limits, or cut back its roots, if it reasonably believes it to be necessary to do so to prevent the tree or shrub—</p> <p>(a) from obstructing or interfering with the construction, maintenance or operation of the authorised development or any apparatus used in connection with the authorised development; or</p> <p>(b) from constituting an imminent danger to persons using the authorised development, or property within the authorised development.</p>

		<p>(2) In carrying out any activity authorised by paragraph (1), the undertaker must-</p> <p>(a) carry out all tree and hedge works in accordance with British Standard 3998:2010 Tree work – Recommendations (or the most recent industry best practice); and</p> <p>(b) do no unnecessary damage to any tree, hedge or shrub by carrying out the minimum works required; and</p> <p>(c) must pay compensation to any person for any loss or damage arising from such activity.</p> <p>(3) This article does not permit the felling or lopping of trees or shrubs, or the removal of hedgerows, without first obtaining necessary consents from relative bodies where—</p> <p>(a) the felling, lopping or removal works are not required to construct the authorised development; and</p> <p>(b) legally protected species inhabit the tree, shrub or hedge to be worked on [insert relevant acts if required]; or</p> <p>(c) a felling licence would usually be required; or</p> <p>(d) a tree preservation order exists.</p> <p>(4) Any dispute as to a person’s entitlement to compensation under paragraph (2), or as to the amount of compensation, is to be determined under Part 1 of the 1961 Act.</p> <p>(5) The undertaker may, for the purposes of carrying out the authorised development but subject to paragraph (2), remove any hedgerow within the Order limits that is required to be removed.</p> <p>(6) The powers conferred by paragraphs (1) and (5) remove any obligation upon the undertaker to secure any consent under the Hedgerow Regulations 1997(a) in undertaking works pursuant to paragraphs 1 or 5.</p> <p>(7) In this article “hedgerow” has the same meaning as in the Hedgerow Regulations 1997(1) and includes important hedgerows.</p>
19.	Art.25 (compulsory acquisition of land)	<p>Art.25(1)(a) refers to land being required “for the authorised development”. This wording is found in the Manston DCO.</p> <p>The Sizewell DCO says that land must be required “for the construction, operation or maintenance of the authorised development”. This seems more restrictive as it is clear what the land needs to be used for; the formulation is consistent with that used in art.3, as mentioned above.</p> <p>Art. 25(2): in the list of ‘subject to’ provisions, the authorities note that the cross-references are all blank and, while the titles of the cross-referred provisions seem correct, we would expect such provisions the article will need to be checked carefully once updated and at this stage the authorities cannot comment until further details are made available.</p>

20.	Art. 26 (compulsory acquisition of rights and imposition of restrictive covenants)	<p>It is not clear from the EM why this approach has been taken; moreover, not all relevant schedules have been completed and so it is not possible to review these.</p> <p>Art.28(3) and (4) of the M25 DCO includes a specific provision that the power to impose restrictive covenants can only be exercised in respect of certain plots and we query if the same restriction should apply here.</p>
21.	Art. 29 (time limit for exercise of authority to acquire land compulsorily)	<p>No time limit has been included in art.29(1) yet but elsewhere there are references to 10 years. We would need to see justification from GAL as to why 10 years rather than the normal 5 years, particularly given that normally the period does not run from the date of the Order but from the 'start date' (art. 29(2)) which excludes the period for legal challenge and the time for the determination of a challenge.</p>
22.	Art. 32 (application of the 1981 Act and modification of the 2017 Regulations)	<p>Art.32(16) to (19) seeks to amend the Compulsory Purchase of Land (Vesting Declarations) (England) Regulation 2017. The Authorities note that similar amendments have recently been sought in dDCOs and omitted by the Secretary of State (including, coincidentally, in the M25 DCO where the Secretary of State said at para 141: "... the Secretary of State has made the following modifications to the draft DCO ... article 32 (modification of the 2017 Regulations) has been removed as it is unprecedented and there is a lack of justification as to why needed in this matter").</p>
23.	Art. 35 (temporary use of land for carrying out the authorised development)	<p>The Authorities are of the view that Art.35(1)(d): includes the right for the undertaker to construct permanent works even though this relates to temporary land is unreasonable and should be excluded.</p> <p>Similarly, Art.35(1)(e): includes a right for the undertaker to construct mitigation works for the authorised development. This seems wide ranging and uncertain and should also be excluded.</p> <p>Art.35(4): In accordance with the PINS Ref No.44 states: "The Applicant may wish to explain its reasoning regarding the exemptions that are sought in 30(sic)(4)(a) to (f)". We cannot see an explanation in the EM.</p>
24.	Art.36 (time limit for exercise of authority to	<p>Art.36(1): the time limit is currently unknown so we cannot comment on it yet.</p>

	temporarily use land for carrying out the authorised development)	
25.	Art.37 (temporary use of land for maintaining the authorised development)	By art.37(3), a notice period of 28 days must be given before the undertaker enters on and takes possession of land under art.37. Similar DCO's have set out a period for up to 3 months. The Authorities believe GAL should include a longer notice period than currently proposed and that a 3-month period would be considered more appropriate.
26.	Article 44 (disapplication of legislative provisions)	(b) LLFA input needed – disapplication of various provisions of the Land Drainage Act 1991. Also, I can't see any Protective Provisions for the Drainage Authority – these would be required if agreement to disapplication of s23 LDA 1991 was going to be agreed. 44(3) authorities would wish to review how this would apply to ancillary uses.
27.	Art.49 (certification of documents etc.)	A drafting point: not all the documents which are set out in Schedule 14 (documents to be certified) are identified as documents to be certified in article 2; similarly, not all of the documents mentioned in article 2 are listed in Schedule 14.
28.	Schedule 1 (authorised development)	The highway works set out in schedule 1 (pages 45-47) are clearly still to be agreed and there is a need for additional work to address all matters and comments already provided by the Highway Authority.
29.	Schedule 2 (requirements)	General: some requirements state things must be done "in general accordance" with other things (requirements 5, 6, 14, 17 to 19); others state things must be done "substantially in accordance with ..." (requirements 7, 11 and 12). The difference in meaning between these terms is unclear; similarly, it's not clear why these things will not be done "in accordance with" (say) control documents. The EM deals with requirements briefly; we would expect more detail to be included in the next draft when we would expect greater detail to be included in the Requirements themselves.
30.	Schedule 2 (requirements)	Several requirements are clearly at an early drafting stage and the Councils will need to see the next dDCO before being able to comment properly e.g., requirements 7 (code of construction practice), 8 (construction environmental management plan),

		14 (air noise mitigation) to 19 (air quality plan). Similarly, requirement 14 (protected species) is struck-through and so it is not clear how protected species (defined in paragraph 1) will be dealt with.
31.	Schedule 2 (requirements)	<p>Paragraph 1(3) states –</p> <p>“References in this Order to materially new or materially different environmental effects in comparison with those reported in the environmental statement 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”.</p> <p>This seems unnecessary and if it is to be included, it should be included in art.2 (interpretation).</p>
32.	Schedule 2 (requirements)	As mentioned previously the Authorities believe that the Time limit for commencement (requirement 4) at 10 years seems unreasonable and appears unprecedented. Any time limit should be explained in the EM.
33.	Schedule 2 (requirements)	<p>Requirements 10 (surface and foul water drainage), 11 (traffic management), and 13 (archaeological works) indicate discharged by the “relevant planning authority”. These items may be more appropriately assigned to other specific agencies or an authority. Also, reference to only National Highways grant approval for highways works details under requirement 6(1) should also refer to the respective highway authorities.</p> <p><u>Biodiversity</u></p> <p>It is of concern that the Requirements section makes limited reference to biodiversity. In addition to the Outline Landscape and Biodiversity Management Plan, one might also expect:</p> <p>Construction Environmental Management Plan (CEMP)</p> <p>Vegetation clearance plans</p> <p>Vegetation retention plans</p> <p>A Biodiversity Net Gain (BNG) assessment and plan</p> <p>Habitat creation method statements/plans</p> <p>Site specific method statements where works are taking place in ecologically sensitive locations</p> <p>Protected species mitigation plans</p> <p>Biodiversity Monitoring Plan</p> <p>Landscape and biodiversity aftercare plan</p>

		Will there be a Requirement detailing timescale for submission of reports such as an Annual Management/Aftercare & Monitoring Report?
34.	Schedule 2 (Requirements)	<ul style="list-style-type: none"> • Requirement 6 Highway Works – this requires approval in writing from National Highways. It is not clear why approval is only being sought from National Highways, should be LPA in consultation with Highway Authorities as necessary. Also 6(3) and 6(4) should refer to the Highways authority. • Requirement 8 CEMP – no details provided; the Highway Authority will comment as details are worked up by GAL. • Requirement 11 Traffic Management –approved in writing by the relevant planning authority, following consultation with relevant highway authority on matters related to its function. • Schedule 2 Requirement 12 Construction Traffic Workers – as above, should this be approved by the relevant LPA in consultation with the relevant Highway Authority.
35.	Schedule 4 (Streets to be permanently stopped up)	These are still to be agreed.
36.	Schedule 7 (New and realigned classified trunk roads)	These are still to be agreed.
37.	Schedule 8 (Traffic Regulation)	WSCC have not presently received sufficient justification to agree to all these TRO changes.
38.	Schedule 14 (procedure for approvals, consents and appeals)	Paragraph 3 (fees for dealing with applications under the Order) is currently blank. The EM states: “[The Schedule] also provides for the payment of fees in respect of the discharge of requirements. The fee rates for discharge of requirements of different types is based upon the fees payable for the discharge of similar types of condition under the Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012 (as amended in 2017).

		The Authorities wish to ensure that any costs in handling the discharge or requirements are fully met and that the Authorities can ensure they have the resources to be able to handle the discharge effectively. In this regard the authorities would seek discussions with GAL to consider the most appropriate way forward either through specific application fees or through the potential
39.	E.M 3.4.1	It is stated that 'The undertaker should be permitted to carry out low impact preparatory works following the grant of the Order, while it is working to discharge the pre-commencement Requirements, thereby helping to minimise the construction timetable.' Such low impact preparatory works would need to be specified and agreed with the relevant LPA in advance.
40.	E.M 3.6	<i>Article 2(3) provides that measurements within the Order are approximate.</i> Have previous orders included this provision in the same form?
41.	E.M 4.24	<i>This is necessary to ensure the airport operator can continue, in particular, to rely on its extant permitted development rights to facilitate the on-going operation of the airport and to allow for minor works to be separately consented without needing to rely on an amendment to the DCO which would be disproportionate and impractical in the circumstances.</i> Consideration would need to be given as to where some permitted development rights may be restricted by 'Requirement' or by other means as appropriate.