NORTHAMPTON GATEWAY
STRATEGIC RAIL FREIGHT INTERCHANGE

APPLICANT'S POST HEARING SUBMISSIONS (ISH1: DCO HEARING 9 OCTOBER 2018)

DOCUMENT 8.1

The Northampton Gateway Rail Freight Interchange Order 201X

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THE NORTHAMPTON GATEWAY RAIL FREIGHT INTERCHANGE ORDER 201X

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A previous version of this table was submitted to the ExA in advance of the DCO ISH1 in response to the ExA's questions contained in Table 1 to Annex G of the Rule 6 Letter. The table has been amended and updated generally, but specifically in relation to questions discussed at the DCO ISH on 9 October 2018, including, but not limited to, questions 12, 19, 36, 41 – 44, 45, 51 & 64, 54, 58, 50 & 63, 107A, 107B & 107C and 108 – 110.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
1.	**General: Order, format and tracking of changes**		General drafting considerations The Applicant is asked to confirm that subsequent versions of the dDCO submitted after the latest application version (Doc 3.1A) will be: • supplied in both .pdf and Word formats and in two versions, the first forming the latest consolidated draft and the second showing changes from the previous version in tracked changes, with comments outlining the reason for the change; and • the consolidated draft version in Word is to be supported by a report validating that version of the dDCO as being in the SI template, obtained from the publishing section of the legislation.gov.uk website; and • endorsed with updated revision numbers consecutively from the application version.	Noted and confirmed. • As per the submission on 15 August 2018, it is intended to submit (together with the word and pdf versions in both tracked and clean format) an updated version of the DCO Tracker (Document 3.4) each time a new draft DCO is submitted which explains the changes made. • Noted. • It is intended that all further versions of the dDCO will have an updated sequential document

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				number (e.g. the next draft will be Document 3.1B and so on.)
2.	**General: List of Plans or Documents to be Certified**		The Applicant is asked to confirm that Schedule 15 (Certification of Plans and Documents) will be updated in each subsequent version of the dDCO provided during the Examination. This should accompany a table recording the latest version of each plan and documents required to support the Examination and the dDCO (the 'plan of plans').	Confirmed. It is intended the 'plan of plans' will be in the form of the last Document List updated during the Examination but dealing only with the Sch 15 documents and plans.
3.	**General: Plan or Document Changes and Revision Numbers**		The Applicant is asked to ensure that all application or subsequent plans and documents referred to in the dDCO in whatever provision are identified by Drawing or Document and Revision Numbers in subsequent versions of the dDCO. Where revisions are prepared to plans and documents, these should be reflected in the latest version of the dDCO. The Applicant should undertake a final audit of plans and documents referred to in the dDCO prior to submitting its final preferred dDCO to the Examination. It should ensure that the results of this audit are reflected in all references, in Schedule 15 and in the final 'plan of plans' (see Q2). It should take all reasonable steps thereafter to ensure that changes to plans and documents are not required.	It is intended to amend Schedule 15 of the dDCO to refer to the Document numbers and revision numbers in the next version of the dDCO.
4.	**General: drafting usage**		The Applicant is requested to review the dDCO to ensure that common terms are drafted consistently throughout and that current drafting conventions are observed.	Noted. The Applicant will review and amend the dDCO accordingly.

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			Examples of such issues are provided below (although this is not exhaustive): • The term 'sub-paragraph' is used with both a hyphen connecting the words and in an un-hyphenated form, as two separate words. • In appropriate context, the use of 'must' rather than 'will' or 'shall'. • All references should be gender-neutral, as in references to "engineer" in Part 1 of Schedule 13.	• The Applicant has checked the template manual and it appears that 'sub-paragraph' would be preferred. The dDCO will be amended accordingly. • Noted. • Noted.
5.	**Interpretation. Art 2 revised dDCO [AS- 005]**	Definition of "commence" and "commencement"	Whilst this is commendably simple and straightforward, is it appropriate throughout the DCO? For example, in Requirement 7 there is a reference to "commencement" of the Smart Motorway Project. As "commencement" is defined to refer to the authorised development, this does not work. Please will the Applicant and the district planning authorities review the DCO carefully for this? It may be that the phrase "save where the context indicates otherwise" would assist, but the ExA's current preference is for the individual instances to be checked and rectified.	The Applicant has reviewed the dDCO in this context and has decided to adopt the suggestion of adding "*unless the context indicates otherwise*". All individual instances throughout the dDCO will be checked in advance of the next submission of Deadline 2.
6.	**Art 2**	Definition of "maintain"	This includes "reconstruct, decommission, demolish, replace or improve". That would allow the SRFI or any part to be rebuilt at some stage in the future, which would normally require a new consent/permission. It also raises the issue	Please refer to paragraph 7.18 of the Explanatory Memorandum (Document 3.2) which explains that the definition of "maintain" is identical to the East Midlands

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			of compliance at that stage with the law on environmental impact assessment. The inter-relationship of the DCO and EIA is an issue raised separately in questions 108A - 108C below. But, for the purposes of this question, the ExA would like the Applicant to address whether such a wide definition of "maintain" is intended and, if so, how it is justified.	Gateway ("EMG") DCO (S.I. 2016 No. 17)[1] save that the restriction on what works can be carried out as part of such "maintenance" is contained in article 6(2) of the dDCO. This was included in the EMG Order, but it has been moved to article 6(2) of the dDCO in line with PINS Advice Note 15 so that the definition does not contain an operative provision. The definition of "maintain" has been reconsidered and it is proposed to remove the reference to "decommissioning", "demolition", "remove" and "replace" from the definition of maintain.
7.	**Art 2**	Definition of "maintain"	The ExA notes that "maintain" includes "decommission". However, the Waste chapter of the ES specifically excludes consideration of waste arising from decommissioning on the ground that it would require a separate consent (para 14.2.24). See also the ExA's questions on this aspect of the Waste chapter (not yet published but, in brief, the concern is that decommissioning waste is relevant to the ES). Observations from the Applicant are invited.	See response to ISH1:6 above.
8.	**Art 2**	Definition of "relevant planning authority"	Why is the meaning different depending on whether the phrase is used in relation to the requirements? Please will the Applicant give practical examples of the working of the two meanings when answering? Observations from the district planning	This definition is identical to the definition contained in the Daventry International Rail Freight Interchange Alteration Order 2014 (S.I. 2014 No. 1796) which also dealt with a situation where the Order limits lie within two administrative districts.

[1] Please note that in several places in the Explanatory Memorandum (Document 3.2) the EMG Order is erroneously referred to as S.I. 2017 No. 17.

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			authorities (relevant planning authorities to be) are also invited.	The intention behind the second limb of the definition is to make it clear, for the avoidance of doubt, that each district planning authority would be responsible for enforcing only the requirements relating to the authorised development within their district. The points made by the ExA are understood and an alternative single definition, as set out below, is suggested and will be included in the dDCO to be submitted for Deadline 2. *"relevant planning authority" means as regards the operation and enforcement of any part of this Order the district planning authority within whose administrative boundary that part of the authorised development relevant to the operation or enforcement of the provision in question is situated*
9.	**Art 2**	Definition of "Relevant traffic authority"	Is this different from the meaning as in ss.121A and 142 of the Road Traffic Regulation Act 1984 (RTRA). Why choose this formulation? What are the disadvantages of the definition in the RTRA? Comments and observations from the highways authority and Applicant are invited.	The definition of traffic authority in the Order is identical to that contained in the RTRA. The reference to "relevant" traffic authority is added solely to clarify that the articles which refer to the "relevant traffic authority" are to the authority which is responsible for the relevant roads to which a provision might relate. Currently this is either Highways England or Northamptonshire County Council (as local highway authority) depending whether or not the roads are part of the strategic road network.

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10.	**Art 2**	Definition of "trunk road"	Why is it necessary to include "an order granting development consent"? Is it the intention that this should refer to all and any such orders, or is it intended to be a reference just to this one?	This wording follows the definition in the M20 Junction 10a DCO (S.I. 2017 No. 1202) and was inserted in response to a suggestion from the Planning Inspectorate that a definition of "trunk road" would be useful. The term is used by reference to existing trunk roads (e.g. A45 trunk road) and new lengths of road to constructed as part of the authorised development and subsequently classified as trunk road by operation of article 15. Accordingly, it is suggested that item (c) be amended to refer to this DCO only. The Applicant will make this amendment in the dDCO to be submitted for Deadline 2.
11.	**Art 2(3), (5) and (6)**		How "approximate" are the sizes and distances? Should Art 2(6) also apply to Art 2(3)?	Articles 2(3) and (5) are standard wording and appear in substance to be included in in all DCOs. They are prudent provisions to avoid technical difficulties which might arise from slight mismeasurement. The sizes and distances are as accurate as is possible based on the measurements and referencing undertaken by the Applicant but this wording is included to allow for minor discrepancies which might arise. As explained in the Explanatory Memorandum (paragraph 7.7, Document 3.2), these small tolerances are still subject to the constraints in articles 4 and 45. Article 2(6) is not related to article 2(3) and is dealing with the situation where figures are expressly referred to as being

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				approximate (see Works No. 4 (2) which refers to "approximately 120 HGVs").
12.	**Principal Powers. Art 3(2)**		1. What controls will there be on such temporary development? 2. Bearing in mind that a DCO is a permissive document, what restrictions is it thought this exception covers? 3. What is meant by temporary? What would be the maximum time period?	The wording has its origins in article 3(2) of the EMG Order and article 3(3) in the recently approved A19/A184 Testo's Junction Order which have the effect of excluding preparatory works from any constraint on development applied by those Orders, however those articles are much wider than the wording proposed here. The Applicant has sought to narrow the references in article 3(2) compared to those in the other Orders and, instead, drafted the requirements to provide for approvals being obtained on a phased basis. This narrower version of article 3(2) was included in the most recent dDCO submitted on 15 August (Document 3.1A). The purpose of article 3(2) is to prevent the erection of any temporary means of enclosure or site notices being taken to be commencement of the authorised development. This is in order that those works can be carried out in advance of satisfying requirements which are required to be satisfied prior to the commencement of the authorised development. It is now proposed to deal with the issue of the temporary elements referred to in article 3(2) in a requirement. The Applicant suggested that the dDCO be amended to explicitly refer to construction period in this context.

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13.	**Art 4 – vertical deviation**		Please explain the reason and need for vertical deviations by up to 1.5 metres, up or down.	There is a need to allow an element of vertical deviation for roads and railways. This arises from the potential need to amend the alignment due to unforeseen circumstances during construction, such as encountering unexpected utilities or ground conditions. The principle of an allowance is established within DCOs, however there is no uniformity in the level of deviation approved. The Applicant is seeking less deviation than that granted in the EMG Order and is satisfied that this provides a sufficiently robust tolerance so as to ensure delivery is not frustrated.
14.	**Art 7(1)**	"(1) Subject to paragraphs (2), (3) and (4) the undertaker shall have the benefit of the Order"	Given the terms of s156(1) of the Planning Act 2008 why is this necessary? What is the Applicant seeking to achieve by these words?	The objective of this article is to ensure that the benefit of the Order is enjoyed by all parties who are participating in the development of the main site, including subsequent parties with an interest in the main site, as provided for in s.156 Planning Act 2008. However, there are aspects of the authorised development which, it is considered, it is inappropriate for all the parties interested in the main site to have the ability to implement. These are: - the powers of compulsory acquisition, which it is considered should be solely for the benefit of the Applicant, whose bona fides in respect of funding have been demonstrated, subject to a consent to the transfer of those provisions given by the Secretary of State (article 7(2));

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				- a power to undertake highway works which it is considered should be restricted to the Applicant given that it is appropriate to ensure the highway works are carried out in a coordinated fashion (article 7(3). There is an equivalent provision in the EMG Order. There are limited circumstances in which the relevant highway authority will be in a position to carry out the authorised highway works. This is confined to circumstances in which the "step in rights" arise in default of performance by the undertaker, as contained in Parts 2 and 3 of Schedule 13. The wording added in to article 7(3) in the dDCO submitted on 15 August 2018 (Document 3.1A) makes it clear that if step in rights are used, then the relevant highway authority will have the power to carry out the highway works.
15.	**Art 7(3)(b)**	"(3) Roxhill (Junction 15) Limited has the sole benefit of the powers conferred by this Order to carry out the highway works in accordance with the provisions of Parts 2 and 3 of Schedule 13 (protective provisions) unless the Secretary of State consents to the transfer of the benefit of those provisions: (a) …; or (b) the provisions of paragraph 4(6) of Part 2 or	Are the highway authority and Highways England content with this provision? The ExA is not encouraging them to ask for more, but wishes to know there is no need for more. Please address this in a statement of common ground (SoCG).	See response to ISH1:14 above. The Applicant is seeking the SoCG requested.

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		paragraph 4(6) of Part 3 of Schedule 13 apply in which case the relevant highway authority shall have the benefit of the powers to carry out the relevant highway works."		
16.	**Art 8(1)**	" streets subject to street works"	There appears to be some confusion or an error in the drafting. Sch. 3 column 2 is entitled 'Street within the Order limits subject to highway works'. Will the Applicant please clarify and/or redraft?	Column 2 in Schedule 3 will be amended to "streets subject to street works" in the dDCO to be submitted for Deadline 2.
17.	**Art 9(1)**		These are broad powers. Is the highway authority content (please submit an SoCG on this point)? Why will the powers in the Town and Country Planning (General Permitted Development)(England) Order 2015 not suffice?	This article relates to streets within the main site only (which will remain private). It is a provision commonly used (see the Explanatory Memorandum (paragraphs 7.24 – 7.25, Document 3.2)). The provision authorises changes to onsite highways subject to the approval of the local highway authority. The provisions in article 9 are not limited to works within the boundaries of private street concerned, unlike the provisions of the GPDO (Schedule 2, Part 8, Class E). The quid pro quo for the, more flexible, article 9 is the need for the consent of the local highway authority, which is not the case with the permitted development rights in the GDPO.
18.	**Art 9(2)**	"(2) The powers conferred by paragraph (1) must not be exercised without the consent of the local highway authority but such consent	Is it appropriate to constrain the highway authority exercising its statutory powers in this way? Is 28 days a reasonable period? These issues recur in several articles. The	This is considered to be reasonable, particularly given that the article relates to the private streets. As explained in the Explanatory Memorandum (paragraph 7.25, Document 3.2), the deemed consent

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		must not be unreasonably withheld"	Applicant is asked to list them and answer these two questions for each of them.	(including 28 day period) was incorporated in the Hinkley Point C Connection Order (S.I. 2016 No 49). The crux of the matter is simply that the Applicant must be able to continue the development and not be stalled or unduly delayed from doing so due to the failure of engagement from the local highway authority. This provision is present in similar form in articles 9, 11, 13 and 17. In respect of all of those articles, it is considered reasonable to impose an obligation that consents are not unreasonably withheld so as to ensure that there is some recourse in the event of consent being unreasonably withheld. Whilst the deemed approval concept has been agreed with Highways England, Highways England, in respect of provisions relating to their interests, have requested a substantially longer period of 56 days. This defeats the purpose of this provision which is to ensure that there is reasonably prompt action in response to a request for a consent. If it is felt a positive decision cannot be made within the days before a deemed consent is triggered, then a response refusing consent will prevent the deemed consent applying. The driver behind the provision is to secure engagement within a timely period. The deemed approval provisions were also contained in the approved York Potash DCO (S.I. 2016 No. 772), both in respect

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				of the street works articles (see articles 10(6), 11(5) and 12(2) of that DCO) and the Deemed Marine Licence (see paragraph 17 of Schedule 5 of the DCO). The MMO objected to the deemed approval provisions and the issue was discussed at a hearing. See paragraphs 9.7.8 and 9.7.9 of the ExA's Report to the Secretary of State in respect of the deemed approval arguments. The Applicant would be content to have an overarching approvals article similar to article 69 of the Silvertown Tunnel DCO (S.I. 2018 No. 574).
19.	**Art 11**	"The undertaker may during and for the purposes of carrying out the authorised development, temporarily stop up, alter or divert any street and may for any reasonable time— … "	'Temporary' is not defined (the "reasonable" time limit applies to aspects of the temporary stopping up, but that is somewhat open-ended). Please give consideration to some test or limit for both the temporary stopping up and the "reasonable" time. Greater precision is desirable.	This wording is derived from a model provision and is included in other approved DCOs, most recently, in article 12 of the A19/A184 Testo's Junction Alteration Development Consent Order 2018 (S.I. 2018 No. 994). The wording in that article is the same as the M20 Junction 10a DCO which is referred to in paragraph 7.29 of the Explanatory Memorandum (Document 3.2). The ability to exercise the power in article 11(1) is subject to obtaining the consent of the relevant street authority in advance and the appropriate timescales and "reasonableness" of the works would be discussed as part of that consent. At this early stage it is impossible to define "temporary" or a "reasonable time" because those time frames will depend on future circumstances and the flexibility to

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				agree those time periods with the relevant street authority is required. However, to address the point raised by the ExA, and to require the appropriate temporary period to be considered, it is suggested that there be an amendment to article 11(3) with the insertion of the words "*including specifying the time period within which the temporary activity may take place*" after the first "consent" in the third line.
20.	**Art 11(1)**	"any street"	Some territorial limit is necessary; or a list of streets.	Whilst this wording is included in other approved DCOs, notably, most recently, in article 12 of the A19/A184 Testo's Junction Alteration DCO, the point made by the ExA is appreciated. The view is taken that the protection against any unnecessary application of this article to inappropriate streets is the fact that consent is required from the relevant street authority.
21.	**Art 12(2) – Replacement Rights of Way**	"(2) No public right of way specified in columns (1) and (2) of Part 1 of Schedule 5 may be wholly or partly stopped up under this article unless the permanent substitute public rights of way referred to in column (4) of Part 1 of Schedule 5 or an alternative temporary substitute public right of way agreed by the local highway authority has first been provided by the undertaker, to the reasonable	While this provides flexibility, is it acceptable for the final alignment to be agreed by the local highway authority, rather than be subject to examination? What restraint is there on a long or indefinite temporary period?	This is based on the East Midlands Gateway DCO, as explained in the Explanatory Memorandum. The anticipated alignment of the footpath is shown on the access and rights of way plans and is the subject of examination. If, as a result of examination, there is any need to exclude any length of footpath from the flexibility provided by the ability to agree the final alignment with the local highway authority then that length of footpath can be identified. The Applicant is not aware of any such situation. The main aim of the flexibility provided is to ensure that the precise alignment on the ground is a matter of

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		satisfaction of the local highway authority."		agreement with the local highway authority having regard to the fact that the access and rights of way plans identify the alignments at a high level and are not based on detailed specifications and cannot anticipate any unforeseen circumstances during construction, such as encountering unexpected utilities or ground conditions. The meaning of temporary is discussed at ISH1:19 above, but the Applicant would mention that the provision of a temporary alternative does not negate the ultimate obligation to provide the permanent route contained in Part 1 of Schedule 5.
22.	**Art 13(3)**	"(3) If a highway authority or street authority which has received an application for consent under paragraph (1) fails to notify the undertaker of its decision before the end of the period of 28 days beginning with the date on which the application was made, it is deemed to have granted consent."	This was not in the East Midlands DCO. Why is it needed here? And if it is, is the time period reasonable?	Please refer to the response to ISH1:18 above. It is partly based on the experience of implementation of the EMG DCO that this provision has been added, having noted its inclusion in other DCOs since the approval of EMG (e.g. Hinkley Point C Connection Project Order, the A19/A184 Testo's Order and the Silvertown Tunnel Order).
23.	**Art 14 – Maintenance of highway works**		Please supply a SoCG between the Applicant, the highways authority, and Highways England to confirm that these provisions are agreed. Is it is intended that the extended definition of the words "maintain" and "maintained" should apply (taking into account the ExA's comments on the definition of those terms in Art 2)? The SoCG should cover that question and if	Article 14 has been the subject of discussion with Highways England and, it is understood, is agreed with Highways England. The Applicant is seeking to establish the position of Northamptonshire County Council. The ExA's point is accepted and it should be made clear on the face of the DCO that

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			the answer is affirmative explain why that is justified.	the maintenance of the highway works does not fall within the umbrella definition of "maintain". It is suggested that in the next draft of the dDCO, article 6 (maintenance of authorised development) include an additional sub-paragraph stating that the authorisation to maintain the authorised development contained in article 6 does not apply to the highway works, the maintenance of which is governed by article 14 and Parts 2 and 3 of Schedule 13. In addition, the Applicant proposes a change to the wording of article 14 which disapplies the definition of "maintain" in article 2.
24.	**Art 16(6) – speed limits**	"chief officer of police"	Please define "chief officer of police".	The Applicant suggests the definition "chief officer of police" *means the chief constable of Northamptonshire Police Force or any successor in function*. The Applicant will insert this definition to the dDCO to be submitted for Deadline 2.
25.	**Art 17 – traffic regulation**		Please supply a SoCG confirming that the highways authority and Highways England agree this.	The Applicant is seeking SoCGs to confirm this.
26.	**Art 18 – clearways**		Please define "traffic officer".	The dDCO defines "traffic officer" in article 2.
27.	**Art 20 – agreements with highway authorities**	"(1) A relevant highway authority and the undertaker may enter into agreements with respect to—…"	Please explain why this power is needed? Are not the existing powers adequate?	The rationale and the need for this article is explained in the Explanatory Memorandum (see paragraphs 7.52 – 7.54, Document 3.2).

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				As identified in paragraph 7.53, the article is included as a precautionary measure to cover agreements which may be required with a highway authority and avoids the need to find a suitable statutory authority to do so, which might not be applicable or appropriate. The power under the equivalent article in the EMG Order has already been used to authorise an agreement between Highways England and the developer.
28.	**Art 21 – Discharge of water**		Please supply SoCG with (a) the Environment Agency and the relevant sewerage and drainage authority (who should confirm their status on such matters) to confirm that Art 21(3) is acceptable; (b) with the relevant sewerage and drainage authority (who should likewise confirm their status on such matter) to confirm that Art 21(4) is acceptable; and (c) the Environment Agency with regard to the acceptability of Art 21(5).	The Applicant is seeking SoCGs to cover this.
29.	**Art 21(8) – deemed approval**		Some approvals may have to be sought from private individuals (eg, owners of drains). Should the request for approval explain that a deemed approval occurs after (x) days, the derivation of the power (ie the Article), and a recommendation to seek professional legal and engineering advice? Also, 28 days is quite a short time for individuals. Would 42 days be more appropriate?	This wording is included in most DCOs including the most recently approved A19/A184 Testo's Junction Alteration DCO (see article 17). The Applicant does not see any reason to deviate from that wording. 28 days is a reasonable time period and this ties in with previous comments submitted in respect of the need for certainty in deliverability of the scheme. Consideration is being given to whether 42 days would be more appropriate.

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30.	**Art 22(2) – rights to enter to survey and investigate land**	"(2) No land may be entered or equipment placed or left on or removed from the land under paragraph (1) unless at least 14 days' notice has been served on every owner, who is not the undertaker, and occupier of the land."	The notice period of 14 days is short for private individuals – people often go on holiday for a fortnight. Comments and suggestions on this are sought please.	14 days does tend to be the standard period for service of such notices. However, the Applicant notes the concern in respect of holidays and suggests a period of 28 days. The Applicant will make this amendment in the dDCO to be submitted for Deadline 2.
31.	**Art 22(6)**	"(6) If either a highway authority or a street authority which has received an application for consent under paragraph (4) fails to notify the undertaker of its decision within 28 days of receiving the application the authority is deemed to have granted the consent."	Is the time period reasonable?	Please see response to ISH1:18 above.
32.	**Art 23(5)**	"Nothing in this article requires a guarantee or alternative form of security to be in place for more than 15 years from the date on which the relevant power is exercised".	A similar provision in respect of guarantees in respect of payment of compensation exists in the East Midlands made DCO. However, in that case the guarantee period was a maximum of 20 years. On what basis does the Applicant justify a period of no more than 15 years in the present case?	As explained in the Explanatory Memorandum (paragraph 7.59, Document 3.2) 15 years is considered to be a reasonable time period for such a guarantee, and indeed this time period has been accepted in more recent DCOs than the East Midlands Gateway DCO (e.g. The Triton Knoll Electrical System Order 2016 (S.I. 2016 No. 880) and the Wrexham Gas Fired Generating Station Order (S.I. 2017 No. 766)). It seems inconceivable that a claimant would legitimately take longer than 15 years from the exercise of the power to pursue a claim for compensation (of which that party will be aware), or for compensation to be resolved, even in the

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				event that a compensation claim was referred to the Upper Tribunal.
33.	**Art 24(3)(c)**		Please amend reference to article 29 to article 30 (time limit for exercise of authority to acquire land and rights compulsorily).	Noted. The Applicant will correct this cross reference in the next dDCO to be submitted.
34.	**Art 27(3) Private Rights**	"Subject to the provisions of this article, all private rights and restrictions over land owned by the undertaker which, being within the limits of land which may be subject to compulsory acquisition powers shown on the land plans, is required for the purposes of this Order are extinguished on the appropriation of the land or right by the undertaker for any of those purposes".	• Is what is intended more succinctly stated as "… all private rights and restrictions over land owned by the undertaker which, being within the Order limits, is required for the purposes of this Order…"? • What is the relevance of the phrase "… is required for the purposes of this Order…". Presumably the purpose of the provision is to clear private rights from the title of land owned by the undertaker, in which case is the phrase somewhat confusing?	• The Applicant agrees that the article could be more succinct and revised wording will be included in the revised dDCO to be submitted for Deadline 2. • The Applicant is content to delete this phrase. The intention was to link back to the fact that the power should be linked to the authorised development, but the Applicant agrees this is probably superfluous, given that the exercise of all of the CA powers must be linked to the purpose of the Order.
35.	**Art 28(3)**	"Nothing in this article authorises interference with any right of way or right of laying down, erecting, continuing or maintaining apparatus on, under or over land which is a right vested in or belonging to statutory undertakers for the purpose	The definition of 'statutory undertaker' is taken to mean that for the purposes of s127(8) of Planning Act 2008, which in turn refers to s8 of the Acquisition of Land Act 1981. This does not appear to cover electronic communications code operators. Is the Applicant content that the power to override easements and other rights of	Article 28(3) applies to operators of the electronic communications code network (see article 28(9)). The Applicant is content that the combination of article 28 and article 33 does authorise the power to override easements and other rights of electronic communications code operators.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
		of carrying on their undertaking"	such operators is adequately covered by Art 33?	
36.	**Art 38 – no double recovery**	"Compensation is not payable in respect of the same matter both under this Order and under any other enactment, any contract or any rule of law."	The principle is understood. However does not the wording go too far? For example, a nuisance claim is turned into money compensation under this Order. But if the nuisance injured a person or, say, caused a birth deformity, actionable in negligence, is it right to deny the injured person compensation? This may simply be a matter of clarification, for example adding at the end: "to the extent it the compensation relates to the same detriment".	The Applicant is content to add the proposed wording for clarification.
37.	**Art 39(2)**	(2) Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part 1 (the provision of railway services) of the Railways Act 1993	What is the purpose of this article?	The wording of article 39(2) follows the model provisions and is included to make it clear that the rail connection and operation will be subject to the provisions of Part 1 of the Railways Act 1993 and therefore there will, for example, be a need to enter into a connection agreement with Network Rail. It is noted that this replicates paragraph 19 of the protective provisions in favour of Network Rail and so this sub-paragraph can be deleted.
38.	**At 43(1) – felling/lopping of trees/hedgerows**	"(1) Subject to paragraphs (4), (5) and (6) the undertaker may fell or lop any tree, shrub or hedgerow near any part of the authorised development …"	How near is near? Please supply more information as to which trees etc, the Applicant anticipates having to fell, lop or cut back.	This is standard wording used in other DCOs. The intention is to avoid having to obtain a further consent for the felling or cutting back of trees, shrubs or hedgerows. The concern in relation to the vagueness of the word "near" is noted and the Applicant proposes that the word "near" is replaced with the words "*within 15 metres*

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
				of". This is consistent with the BS5837 (Trees in relation to design, demolition and construction – Recommendations). The British Standard identifies the maximum extent of root protection areas as being 15 metres. The trees and hedgerows proposed to be removed are identified within the Arboricultural Assessment contained in the environmental statement (Document 5.2 LVIA Appendix 4.3) and illustrated on the plans within that document.
39.	**Art 43(2)**	"(2) In carrying out any activity authorised by paragraph (1), the undertaker must not cause unnecessary damage to any tree, shrub or hedgerow and must pay compensation to any person who suffers loss for any loss or damage arising from such activity."	What will the quantum of compensation be? The cost of reinstating a tree or hedge will usually greatly exceed the financial loss.	There are two limbs to this sub-paragraph. Firstly, there is a requirement not to cause any damage to any tree, shrub or hedgerow, and secondly, a requirement to compensate for any loss arising as a result of the felling or lopping activities carried out under article 43(1). The quantum of compensation will depend on the individual circumstances.
40.	**Art 43(6) & (7)**		See para 22.2 of Advice Note 15, which states that to support the ExA including this power it should be accompanied by a Schedule and plan specifically identifying the affected trees. Please will the Applicant provide such documents?	The Arboricultural Assessment (Document 5.2, ES LVIA App 4.3) includes copies of the TPO's at Appendix C and paragraph 4.6 of the Arboricultural Assessment advises that the only loss of TPO tree cover is limited to T81 and G67 (as identified in the Tree Schedule at Appendix A and shown on Drawing No. 5772-A-14 Rev D (page 34)). Reference to the Tree Schedule at Appendix A will be made in the article in the next dDCO to be submitted.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
				The Applicant notes that, since the application was submitted, AN 15 has been revised and contains, as best practice, standard drafting for provisions dealing with the discharge of certain approvals, including an appeal mechanism. The Applicant would propose to include such provisions in the dDCO to be submitted for Deadline 2 which would affect the drafting of article 46 (1) and (2).
41.	**Art 46(5)**	"(5) The provisions of the Neighbourhood Planning Act 2017 do not apply in so far as they relate to the temporary possession of land under articles 35 and 36 of this Order"	To what provisions of the 2017 Act does this refer? Please explain what is intended and why it is justified.	This refers to the provisions relating to temporary possession in the 2017 Act, namely Chapter 1 of Part 2. As explained at paragraph 7.102 of the Explanatory Memorandum (Document 3.2), this is included so that the amendments to temporary possession provisions under that 2017 Act are not applied to the powers of temporary possession pursuant to articles 35 and 36 of this DCO. The temporary possession provisions in the Neighbourhood Planning Act 2017 are not yet in force and therefore, in order to provide certainty in respect of the applicable regime, it is considered appropriate that the current provisions are applied to this DCO. It is noted the same approach has been applied to other recent DCOs, as referenced in the Explanatory Memorandum.
42.	**Art 46(7) – Disapplication of advertisement**		What is the view of the district planning authority on this? Please supply an SoCG on this.	The Applicant is proposing to continue to disapply the advertisement control regulations, to avoid the need for a

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
	control to various advertisements at S1 and S2			separate consent, but proposes to include a requirement in the dDCO to be submitted for Deadline 2 that the details of the advertisements are agreed with the relevant planning authority prior to their erection.
43.	**Art 46(8) – CIL not to apply, whether or not there is a charging schedule in force now**		What is the view of the district planning authorities and county planning authority? Please supply an SoCG on this.	The Applicant is seeking the requested SoCG.
44.	**Art 46(10) – effect of other enactments (known and unknown)**		The ExA notes the comment in the Applicant's Explanatory Memorandum. The ExA would like to hear submissions on the effect of this on known statutes, for example the Environment Act controls on discharges to the water environment, or the on-site disposal of waste when the development is operational.	This provision was included given its inclusion in the A14 Cambridge to Huntingdon DCO (S.I. 2016 No. 547), however the Applicant confirmed at the DCO ISH1 that it is content for this provision to be removed in light of the implied concerns of the ExA.
45.	**Art 49 – Arbitration**		The ExA notes the comments in the Explanatory Memorandum. How does this provision work when there are issues over compensation, or enforcement? Or is it thought that these are differences "otherwise provided for"?	The Applicant confirmed it would review this article and, although it follows a fairly standard form, takes the view that it would benefit from more sophistication, along the lines of Article 63 of the Thames Tideway Tunnel DCO which identifies different professional disciplines for different types of dispute. The Applicant will therefore provide a revised article in the dDCO to be submitted for Deadline 2. As regards the two aspects referred to by the ExA:

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
				• matters of enforcement would be dealt with in the redrafted Art 49; and • compensation will be excluded from article 49 by operation of the words "other than a difference which falls to be determined by the tribunal", as provided for in the Thames Tideway Tunnel DCO (S.I. 2014 No. 2384) and the recently approved A19/A184 Testo's Order. The expression "otherwise provided for" is a reference to some of the protective provisions which include their own dispute resolution mechanism.
46.	**Sch 1 Pt 2 – Further Works (1)(g), (2)(m) & (3)(p)**		These allow for "such other works as may be necessary or expedient for the purpose of or in connection with the construction of the authorised development". This seems very wide even if constrained by environmental impact assessment legislation. Please supply a better indication as to the scale and detail of the potential further works. Also (1)(g), 2(m) and (3)(p) are circular – see the definition of "authorised development" in Art 3.	The words "such other works as may be necessary or expedient for the purpose of or in connection with the construction of the authorised development" are included in most DCOs, most notably, in the recently approved A19/A184 Testo's DCO (see "(o)" of Schedule 1). The view is taken that they are appropriate to ensure that an essential element of the development is not frustrated by the failure to list it, or anticipate it, in specific drafting in Schedule 1. This seems a prudent measure and is acceptable having regard to the caveat which ensures that nothing is permitted which would give rise to materially new or materially different environmental effects which have not been assessed.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
				The Applicant would suggest that the caveat under the heading "Further Works" be amended to accord with the wording of Schedule 2, paragraph 13(1) of the EIA regulations. The Applicant will ensure that other similar references will be changed throughout the dDCO to be submitted for Deadline 2. With regard to the suggested circularity of (1)(g), 2(m) and (3)(p), consideration is being given to replacing the words "*the authorised development*" with "*Works Nos. 1 to 17*".
47.	**Sch 1 Pt 2 – Further Works (1), (2) & (3)**		As to all, please explain why the location, extent and design of the further works cannot be specified at this stage; alternatively supply those details.	The need for the inclusion of these "further works" is explained in the Explanatory Memorandum (paragraphs 7.114 – 7.116, Document 3.2). The further works list is provided to avoid repetition of a long list of items within each works number. For example, all highway works will include traffic signs, the detailed design of which would be approved in accordance with Schedule 13 Parts 2 and 3, but the wording removes the need to list traffic signs under every Works No. that is part of the highway works.
48.	**Sch 1 Pt 2 Further Works (2) (h) & (i)**		Some sort of time limit would seem necessary – temporary can go on for quite a long time. Could the Applicant please suggest the appropriate limit?	It is suggested that the period be commensurate with the period that is allowed for temporary operations in the GDPO, which is specified as, effectively, the length of the construction period. The dDCO to be submitted for Deadline 2 will be amended accordingly.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
49.	**Sch 1 Pt 2 Further Works (3) (c)**		Please specify a height limit for the fencing.	The maximum height of any fencing along the bypass is 3 metres as identified on Figure 8.6 in chapter 8 of the environmental statement (Document 5.2). The dDCO will be amended to reflect those heights. Other fencing will be restricted to the maximum height of 3 metres. This will be specified in the dDCO to be submitted for Deadline 2.
Requirements (R)				
50.	**General**		A number of requirements require compliance unless the local planning authority agrees otherwise (eg R9, 13, 15 and 17). Is this necessary and justified?	Requirements 9,13,15 and 17 referred to by the ExA require details to be agreed, but also give the ability for those details to be amended by agreement with the local planning authority. Article 45(2) ensures that such details will not stray outside of that which has been assessed, albeit the wording of Article 45(2) will be amended to accord with the wording in the EIA regulations in the dDCO to be submitted for Deadline 2. This approach is believed to be consistent with paragraph 17.5 of AN15.
51.	**R3 Components of development and phasing**	*"(3) A rail terminal capable of handling at least four goods trains per day must be constructed and available for use prior to…"*	How is a "Component" determined?	The components for the purposes of requirement 3 are listed in (a) to (g). The components relate to defined infrastructure items or to specific areas of the site. From experience at EMG SRFI it is considered that "component" is a more appropriate term than "phase" because works are not necessarily undertaken

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
				sequentially and do not always relate to a particular area of the site i.e. the works are layered. It is thought the use of the term "component" could be improved by the following: The list in requirement 3(1) (a) – (g) (because it is utilised for the purpose of other requirements) should not be subject to change. The words "*component of the authorised development on the main site*" utilised in requirements 8, 10, 13, 15, 18, 20 and 27 should be defined by reference to the list in requirement 3(1). The word "*component*" in requirements 12 and 14 (which do not relate just to the main site) should be replaced with the word "*part*". The above changes will be included in the dDCO to be submitted for Deadline 2
			Please specify the length for the trains – this could otherwise be meaningless.	The terminology in (3) is taken directly from the criteria for RFI in section 26 of the Planning Act 2008. However, the terminal will be capable of accommodating 775 metre trains prior to the occupation of the warehousing. This is requested in the NPS "where possible" (para 4.89). The Applicant will amend the wording to clarify this.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
52.	**R3(3)**		Should not the occupation of the non-rail-served warehousing also be restricted pending completion of the rail terminal?	All of the warehousing in the authorised development is rail served. The expression "rail served warehousing" is defined in the dDCO by reference to the definition of warehouses included in section 26(6) of the Planning Act 2008. The effect of this requirement is to restrict the occupation of all of the warehousing pending completion of the rail terminal. Rail connected warehouses are provided for in Zones A2a, A2b, A3 and A4 as shown on the Parameters Plan (Document 2.10). Those warehouses have the ability to be directly connected by rail. There is no distinction between any of the warehousing in respect of the constraint on occupation in advance of the availability of the terminal.
53.	**R6**	*"The undertaker must use reasonable endeavours to complete the highway works identified in column (1) of the table below by …"*	An obligation to use reasonable endeavours to deliver the highways works seems unlikely to meet the test of precision and enforceability. It is certainly difficult for a planning authority to decide whether or not to commence enforcement proceedings. This condition relates to works to offset highways congestion and prohibits occupation of certain buildings unless the improvement works are completed. An absolute restriction would be normal and prevent the congestion arising from the development concerned from occurring. As it stands this Requirement appears unacceptable. Observations and comments from the district planning authorities, highways authority and Highways England as well as the Applicant would be welcome.	This requirement is, in its inclusion of the term "reasonable endeavours" identical to requirement 5 of the EMG Order. Nonetheless, having regard to the ability to agree an adjustment to the timing of the provision contained in this requirement, the Applicant feels that the term "reasonable endeavours" can be deleted in light of the ExA's comments.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
54.	**R6(2)**	*"(2) This requirement is enforceable by the relevant body or bodies identified in column (4) of the table contained in requirement 6(1)."*	Why is enforcement not by the district planning authorities? Highways England will not have experience or expertise in planning enforcement and the County planning authority's expertise will lie in minerals and waste planning. In addition, the functions of the County Council are in the course of being re-arranged and redistributed in a local government re-arrangement in Northamptonshire so it would be preferable to allocate enforcement by statutory designation (eg local planning authority, or relevant planning authority) rather than name (Northamptonshire County Council). It is a criminal offence to breach a requirement, which allows for private prosecutions, so to limit the enforcing authority may be inappropriate for that reason also. The ExA invites observations from the district planning authorities, highways authority and Highways England as well as the Applicant.	Following the discussion at the DCO ISH1, it has been determined that the proper approach is for enforcement to be by the relevant local planning authority which is consistent with Part 8 of the PA 2008. The appropriate amendments will be made to the dDCO to be submitted for Deadline 2.
55.	**R7(a) Highway alternatives**	*"not programmed to be commenced".*	This drafting is ambiguous. The difficulty is with the words "not programmed to be commenced". Programmed by whom? Is it the programme which must be in existence within six months of commencement of Works No. 8 or commencement of the Smart Motorway Project (SMP) within 6 months? Is it within six months before or after commencement of Works No 8? Is this to avoid a clash between the construction of Works No 8 and the SMP? Will the Applicant please explain how this works, with a worked example(s), eg at the point	This is not related to avoiding clashes but is necessary to allow the authorised development to proceed in the event that the SMP works do not proceed as currently envisaged and are delayed or even cancelled. The alternative plans show alternative highway works which address the scenario where the SMP works have not proceeded. It is accepted that the drafting could be improved. Consideration will be given to this in the next dDCO.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
			of commencement of Works No 8 and at the letting of the contract for Works No 8. The ExA notes what is said in the Explanatory Memorandum.	
56.	**R7(b)**	*(b) "the undertaker so elects."*	Please consider adding "that having elected, notice of election must be given to Highways England the district planning authorities and the highway authority."	This will be included in the revisions to requirement 7 referred to at ISH1:55 above.
57.	**R8(1) –detailed design approval**	*"The details of each component of the authorised development on the main site referred to in requirement 3 must be in general accordance with the parameters plan and the design and access statement."*	Details "must be in general accordance with the parameters plan and design and access statement"; surely they must not exceed the limits in the parameters plan, be in general accordance with the design and access statement and be based on the principles set out in that statement? Comments and observations from the Applicant, the district planning authorities and the highway authority are invited.	This is accepted and the Applicant will make the amendment to the dDCO to be submitted for Deadline 2.
58.	**R8(2)**	*(a) "(2) No component of the authorised development on the main site (excluding archaeological investigation, soil movement, geotechnical or ground contamination investigation and ecological mitigation works) is to commence until the details of that component have been submitted to and approved in writing by the relevant planning authority. The details of each component must*	"Soil movement" is one of the exceptions to the prohibitions on commencing a component without obtaining detailed approvals for that component. However, the details to be sought include "embankments and bunds", "site levels". Those works are obviously soil movements. Other works whose details are sought may also include soil movement, or affect it. Can it be right to allow soil movement therefore while such details are being approved? The Applicant is asked to give consideration to this and to make submissions at the DCO ISH. This exception occurs against several requirements. Will the Applicant please consider and make submissions on them all? Submissions from the district	The requirement sets out the details that are required to be agreed for the development when it will be completed. The exceptions are included to allow for certain temporary or preliminary works to take place so that development can proceed without unnecessary delay. Soil movement was included for this purpose and was not intended to conflict with works that would be associated with the creation of embankments and bunds and final site levels. However, it is appreciated that the exclusion of soil movement may lead to an inappropriate degree of uncertainty and therefore it is proposed to remove the reference to "*soil movement*" from requirement 8(2) and all other

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
		include details of the following where they are located within that component— … ; embankments and bunds;"	planning authorities and the county council will also be welcome.	requirements where it is similarly referred to.
59.	**R9 – landscaping**	*Details subject to alteration by agreement*	Why "agreement"? The conventional wording is "approval".	This is accepted and the Applicant will make the amendment to the dDCO to be submitted for Deadline 2.
60.	**R10**	*Provision of landscaping*	This is another example of a requirement with the "soil movement" exception. Are the other exceptions justified before approval of the written landscaping scheme given that they involve ground disturbance?	Please see ISH1:58 in relation to soil movement. The inclusion of the remainder of the words within the brackets has been dealt with in the requirements rather than article 3(2), as was the case in the EMG Order for reasons explained in ISH1:12. The purpose of the activities included within the brackets is to enable preparatory works to be undertaken whilst other details are being approved. This is principally a phasing issue which is, it is felt, more appropriately dealt with in the requirements than in an overarching article equivalent to EMG article 3(2). For example, there is no need to approve the landscaping scheme for any part of the main site in advance of undertaking ground investigations or archaeological investigations.
			Why are large trees alone singled out, and what is the test for a "large tree"?	The reference to "large" trees follows the EMG Order but the Applicant is content to remove the word "*large*".
			There is no requirement to ensure the landscaping works are carried out, nor a finish date. Please comment and suggest	The Applicant suggests the inclusion of the words "*carried out*" after "*must be*" and before "in accordance" on the fifth line.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
			suitable wording. The formatting of (c) and (d) appears to be incorrect '"Tree Works Recommendations" prior to construction commencing' should surely follow on at the end of (c) as it is the title of BS 3998?	The requirement includes at (f) the need for implementation timetables to be agreed this will establish when the works need to be undertaken and the finish date. it is agreed that the formatting of (c) and (d) is incorrect and requires amendment. This will be amended in the dDCO to be submitted for Deadline 2.
61.	**R12(1)**	*Construction Environmental Management Plan*	The East Midlands made DCO has reference to having regard also to any relevant protective provisions. Please comment on whether that is necessary here?	It was felt that the reference to protective provisions was unnecessary given that the protective provisions do not deal specifically with CEMPs and there is no particular relationship therefore between Schedule 13 Parts 2 and 3 and this requirement. It is effectively freestanding from the protective provisions.
62.	**R12(2)**		Should there be an addition – 'or in the case of highway works to the relevant highway authority', as in Requirement 11 of the East Midlands made DCO?	This is accepted and the Applicant will make the amendment to the dDCO to be submitted for Deadline 2.
63.	**R13**	*Earthworks*	This requirement calls for an earthworks strategy and other details relating to soil movement prior to commencement of each component. Yet the following are to be permitted whether or not such earthworks strategy and other details have been submitted: archaeological investigation, soil movement, geotechnical or ground contamination investigation and ecological mitigation works. Given that with the possible exception of some aspects of ecological mitigation these are all earthworks, is this appropriate? This is another case where the "agreement" of the relevant planning authority can be sought	Please see response to ISH1:58 above. Geotechnical or ground contamination investigation and archaeological investigation are temporary works and are not relevant to the ultimate site levels which is what the earthworks strategy deals with.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
			to alterations. Is "agreement" appropriate when "approval" is the norm?	
64.	**R14(1)**	*Archaeology – "No component of the authorised development is to commence …"*	Do all the components add up to the entirety of the development authorised by the DCO? This question is applicable to all other prohibitions in commencing "components". Please will the Applicant respond and demonstrate – if it is the case – how one can know the components add up to the whole?	Yes, if restricted to the main site, they add up to the whole. Please see suggested amendment referred to in ISH1:51.
65.	**R14(2)**	*(2) "No component of the authorised development is to commence until a programme of archaeological mitigation measures informed by the exploratory investigations referred to in sub-paragraph (1) and by earlier phases of investigation has been implemented in accordance with a written scheme of mitigation measures which has been approved in writing by the local planning authority"*	• The ExA invites submissions from the Applicant and the district planning authorities as to the compatibility of this with the requirements for environmental assessment and, in particular, the judgment in R. v. Cornwall CC ex p Hardy [2001] Env L R 25; [2001] JPL 786. • Is the reference to "local planning authority" appropriate? Should it not be consistent with the use of "relevant planning authority"? See however also the ExA's question above about the use of that phrase in Art 2.	• Please see submissions in relation to Hardy, and archaeology, attached at **Appendix 1**. • This will be amended to "relevant" in the dDCO to be submitted for Deadline 2.
66.	**R15**	*Lighting details*	Another example of "agreement" rather than "approval".	This is accepted and the Applicant will make the amendment to the dDCO to be submitted for Deadline 2.
67.	**R16**	*"No development of a warehouse may take place until … "*	"Commence" for "take place"?	The Applicant agrees this should be amended to "commence". This will be

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
				included in the review referred to in the response to ISH1:5.
68.	**R16(2)**	*" … a certificate must be provided within three months … "*	Provided to whom?	The Applicant suggests the addition of "*to the relevant planning authority*" after the words "*must be provided*".
69.	**R17**	*" … or be carried out in accordance with any variation to these measures agreed in writing with … "*	There were no provisions for variation in the East Midlands DCO. Please comment on why it is suitable in this case.	The additional words are included for consistency with other similar requirements and to allow flexibility for amended details to be agreed if necessary, subject to the safeguards referred to in the response to ISH1:50.
70.	**R18 – Flood risk and surface water drainage**	*"No component of the authorised development on the main site (excluding archaeological investigation, soil movement, geotechnical or ground contamination investigation and ecological mitigation works) may commence until a surface water drainage scheme for that component…"*	Again, is the exclusion appropriate given that those operations may affect the existing surface water drainage and land profile?	The Applicant is of the view that the works specified, aside from soil movement, would not permanently affect the land profile and therefore would not affect existing surface water drainage features. It is, however, proposed to delete "*soil movement*".
71.	**R18 - Flood risk and surface water drainage**	*"…based on sustainable drainage principles and an assessment of the hydrological and hydrogeological context of the development in accordance with chapter 7 of the environmental statement…"*	Why has the assessment not already been carried out? Please comment also in relation to ex parte Hardy (referred to above in relation to Art 14(2)).	The Applicant agrees that the words "*an assessment of the hydrological and hydrogeological context of the development*" should be deleted as this work has already been undertaken, and therefore any concerns in relation to Hardy are not relevant. The Applicant has discussed this requirement with the county council and agreed some alternative wording. The requirement will be updated

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
				in the next dDCO to be submitted for Deadline 2.
72.	**R19**	*Flood risk*	"The floodplain compensation scheme" or " floodplain compensation scheme"? "local planning authority" or "relevant planning authority"?	The Applicant will make any necessary amendment to the dDCO to be submitted for Deadline 2.
73.	**R19**	*Flood risk "…or within any other period as may subsequently be agreed in writing by the local planning authority…"*	"Agreed" or "Approved"?	This is accepted and the Applicant will make the amendment to the dDCO to be submitted for Deadline 2.
74.	**R21**	*Construction hours*	Please explain why landscaping works, which can be noisy and dusty, are excluded from this prohibition. The construction hours are currently in square brackets. Will the Applicant please clearly state its proposed hours to enable informed comments to be made by participants?	The concern is noted and the Applicant considers that the reference to landscaping can be removed. The square brackets will be removed in the dDCO to be submitted for Deadline 2, as the hours set out are the proposed hours.
75.	**R21**	*Construction hours – exclusion of "works which do not cause noise that is audible at the boundary of the main site"*	What about vibrations, both air- and ground-borne?	The Applicant suggests a change to the wording so that vibration is covered and will add in the dDCO the words *"nor cause vibrations which are detectable at the boundary of the site"*
76.	**R24**	*Monitoring of complaints*	Is it local planning authority or "Relevant planning authority"? Please explain why, and taking into account the ExA's earlier questions on the definition of "relevant planning authority".	This is accepted and the Applicant will make the amendment to the dDCO to be submitted for Deadline 2.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
77.	**R25**	*Contamination risk " No development is to commence on any specifically identified localised areas of the site potentially affected by contamination".*	There needs to be a definition of "site"	It is suggested the reference to "*site*" be changed to "*Order limits*".
Schedules				
78.	**Sch 3**	*Heading to Column 2*	See the comment above on Art 8 (question 16).	As per ISH1:16, the Applicant will correct this in the dDCO to be submitted for Deadline 2.
79.	**Sch 5 Pt 1**	*Heading to Column 5 " Stage of the authorised development"*	Is this the point at which the stopping up must be completed, or before which it cannot occur? Or is the action just part of that stage?	This is specified in article 12(1)(b) – the substitute must be provided at that stage (e.g. on completion of Work No. 6, the footpath between points 1-6-7-3 shown with a brown dashed line on Document 2.3A must be provided). If it is helpful, it can also be specified in the heading to the column.
80.	**Sch 7, Pt 1 and Pt 2**	*Classification of Highways*	Please produce a SoCG with Highways England and Northamptonshire CC to confirm these are agreed.	The Applicant is seeking the requested SoCG.
81.	**Sch 8 – all parts**	*Speed limits*	Please produce a SoCG with Highways England and Northamptonshire CC to confirm these are agreed.	The Applicant is seeking the requested SoCG.
82.	**Sch 8 Pt 4**	*Column 4*	There is ambiguity here. Commencement of what – is this Works No 8 or the authorised works? This question applies to every instance of this wording/approach. The Applicant is requested to list with the	Noted. As mentioned in the response to ISH1:5, the Applicant will review each reference to "commencement" in the dDCO. In this instance, it is intended to refer to the commencement of the relevant

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
			next iteration of the dDCO all the places where they change the wording in response to this question.	works and not the "authorised development" generally.
83.	**Sch 13 – protective provisions**	*General*	As noted in question 4, there is inconsistency between the use of "sub paragraph" and "sub-paragraph" and also "subparagraph". The ExA suspects "sub-paragraph should be the preferred approach.	Noted. The Applicant will make these changes in the next dDCO to be submitted.
84.	**Sch 13, Protective Provisions, Part 1**	*For the protection of railway interests*	The Applicant and Network Rail should submit a SoCG confirming that the protective provisions in Sch 13 Pt 1 are agreed and that no further protective provisions are contemplated. The Applicant should check the Provisions for gender-neutral wording. "with all reasonable dispatch" – the wording in the East Midlands DCO was "without unnecessary delay" – the parties should consider which is preferable. Para 11(11); there is no reference in Art 49 (Arbitration) to the institution of Civil Engineers. Is what is meant that any reference in article 49 (Arbitration) to the Lands Chamber of the Upper Tribunal shall be read as a reference to the Institution of Electrical Engineers?	The protective provisions included in Schedule 13 Part 1 are the standard protective provisions provided to the Applicant by Network Rail. It is intended to review and discuss the contents with Network Rail having regards to the ExA's comments.
85.	**Sch 13, Protective Provisions, Part 2**	*For the protection of Highways England*	The Applicant and Highways England should submit a Statement of Common Ground confirming that the protective provisions in Sch 13 Pt 2 are agreed and that no further protective provisions are contemplated. "Cash surety" – the ExA notes the amount has yet to be inserted.	There are ongoing discussions between the Applicant and Highways England with regard to the protective provisions and it is noted that the ExA wish to receive a SoCG in respect thereof. The protective provisions included in Part 2 of Schedule 13 have been the subject of

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
				extensive discussion between the Applicant and Highways England with a view to the protective provisions contained in the EMG DCO being improved upon, in light of the experience of implementation of East Midlands Gateway. It is for that reason that the Part 2 protective provisions vary from those contained in the EMG DCO.
86.	**Sch 13, Protective Provisions, Part 2, Interpretation – para 2**	*"'Detailed Design Information' means drawings, specifications and other information calculations as appropriate for the following which shall all be in accordance with the general arrangements of the HE Works shown…"*	Will the Applicant please explain why this formulation has been chosen over the wording in the East Midlands DCO ""detailed design information" means the following drawings, specifications and other information which must be in accordance with the general arrangements shown…"?	This wording has been agreed with Highways England in order to obviate the need for references to drawings and calculations and so forth in the list which follows.
87.	**Sch 13, Protective Provisions, Part 2, para 3(1)**	*"approved by Highways England"*	Should this be "approved in writing by Highways England"?	The Applicant believes that all approvals under the Part 2 protective provisions should be in writing and therefore will include an amendment to paragraph 15 (approvals) in the next dDCO to reflect this.
88.	**Sch 13, Protective Provisions, Part 2, para 3(6)**	*Walking, Cycling and Horse Riding Assessment and Review*	Should this be defined?	The Applicant will include a definition in the next dDCO.
89.	**Sch 13, Protective Provisions, Part 2, para 4(1)**	*(3) Each Phase of the HE Works shall be carried out to the satisfaction of…"*	The drafting convention is to replace "shall" with "must" (see question 4 above).	The Applicant will change this in the next dDCO to be submitted.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
90.	**Sch 13, Protective Provisions, Part 2, Para 12**	*"PROVIDED THAT"*	Should this not be in lower case?	The Applicant is content for this to be amended to lower case and will change this in the next dDCO to be submitted.
91.	**Sch 13, Protective Provisions, Part 2, Para 16(1)**	*"Schedule"*	Should this not be "Part"?	Yes. The Applicant will correct this in the next dDCO to be submitted.
92.	**Sch 13, Protective Provisions, Part 3**		The Applicant and Northamptonshire County Council (or Highway Authority at the time) should submit a SoCG confirming that the protective provisions in Sch 13 Pt 3 are agreed and that no further protective provisions are contemplated.	Noted.
93.	**Sch 13, Protective Provisions, Part 3, para 9(2)**		The reference needs to be inserted in the square brackets.	Noted.
94.	**Sch 13, Protective Provisions, Part 3, para 13(2)(b)**	*"4 days"*	Should this be 14?	Yes. The Applicant will correct this in the next dDCO to be submitted.
95.	**Sch 13, Protective Provisions, Part 4**	*Protection of Cadent Gas*	The Applicant and Cadent Gas Limited should submit a SoCG confirming that the protective provisions in Sch 13 Pt 4 are agreed and that no further protective provisions are contemplated.	The Applicant is seeking a SoCG with Cadent Gas to reflect this, as requested.
96.	**Sch 13, Protective Provisions, Part 4, para 15**	*"The plans submitted to Cadent by the undertaker pursuant to paragraph 8(1) must be sent to Cadent Gas Limited Plant Protection at*	Should this be "Plan and scheme" rather than just "plans" – to refer properly to para 8(1).	Noted. The Applicant will include this amendment in the dDCO to be submitted for Deadline 2.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
		[ ] or such other address as Cadent may from time to time appoint instead for that purpose and notify to the undertaker"		
97.	**Sch 13, Protective Provisions, Part 5**		The Applicant and Anglian Water should submit a SoCG confirming that the protective provisions in Sch 13 Pt 4 are agreed and that no further protective provisions are contemplated.	The Statement of Common Ground with Anglian Water submitted on 13 August 2018 (Document 7.4) contains the identical protective provisions to those contained in the dDCO (Document 3.1A), and confirms at paragraph 4.9 that those protective provisions are agreed. It is not believed that the amendment required in respect of the comment made at ISH1:98 warrants a further SoCG.
98.	**Sch 13, Protective Provisions, Part 5, Para 4(b)**	*"company"*	Should this be "undertaker"?	Yes. The Applicant will update this in the next version of the dDCO to be submitted.
99.	**Sch 13, Protective Provisions, Part 6**	*Protection of Electricity Undertakers*	With whom is this Schedule being negotiated? Please supply the names of the parties. As for the other Protective Provisions, the ExA requires a SoCG with the protected parties to confirm the provisions are agreed and no more are contemplated.	This Part of Schedule 13 is being discussed with Western Power Distribution. They are in a form which is standard for such undertakers and the Applicant is seeking an SoCG in this regard.
100.	**Sch 13, Protective Provisions, Part 7**	*Protection of Electronic Communications Code Networks Undertakers*	With whom is this Part of the Schedule being negotiated? Please supply the names of the parties. As for the other Protective Provisions, the ExA requires a SoCG with the protected parties to confirm the provisions are agreed and no more are contemplated.	This Part of Schedule 13 is being negotiated with the parties who have the benefit of leases on the site for the two existing communications masts; CTIL and Hutchinson 3G. Both masts would need to be relocated to accommodate the authorised development and Schedule 1 is

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
				drafted to allow this. The CTIL mast is located hear the Collingtree bridge over the M1 and the Applicant understands that the operator of this mast intends to relocate off site, regardless of the DCO (and has already secured arrangements on a new site). The Hutchinson 3G mast is located near to junction 15 of the M1. The protective provisions contained in the dDCO submitted on 15 August (Document 3.1A) have been agreed with this operator. The Applicant is seeking an SoCG with these parties which will reflect the above.
101.	**Sch 14, Miscellaneous controls**		Can the Applicant please explain the effects of each of these, and justify them. As a general comment, would it not be better to redraft these and place them in the relevant sections? To leave them here is likely to be a trap for the unwary. Submissions on this from the Applicant and affected interested parties are invited at the DCO ISH.	The approach to this Schedule follows the Thames Tideway Tunnel DCO. It is thought sensible to keep these provisions in a Schedule however, if preferred, they could be distributed to the most relevant article. The provisions were all included in a longer list of statutory controls which was contained in the Thames Tideway Tunnel DCO. Only those thought appropriate for and relevant to Northampton Gateway SRFI have been included. This is for the following reasons: **Highways Act 1980:** The constraints upon planting of trees (s141) and retaining walls (s167) are disapplied during construction because the planting of trees and construction of any

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
				retaining walls is already governed by the approval of details under the requirements and, in respect of highways, the protective provisions. This avoids the need for a separate approval process. **New Roads and Street Works Act 1991:** The disapplication of elements of the New Roads and Street Works Act 1991 reflects the fact that the governance of the highway works is dealt with within Schedule 13 Parts 2 and 3. **Local Government (Miscellaneous Provisions) Act 1976:** The Planning Act 2008 is intending to provide a single consenting procedure for matters relating to planning and heritage. It is therefore entirely appropriate that these provisions are disapplied as has been the case in other DCOs. The disapplication of section 42 is consistent with s120(5) of the Planning Act 2008 to ensure that any inconsistency or contradiction with elements of the Acts to which s42 applies does not undermine the effect of the Order.
102.	**Sch 14, Miscellaneous controls, paragraph 3**		What does the street authority say about these provisions? Please submit a SoCG confirming they are acceptable and any areas of difference by Examination Deadline 2.	The Applicant is seeking the requested SoCG.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
103.	**Sch 14, Miscellaneous controls, para 3(8)**	*"(8) The powers conferred by section 73A(1) and 78A(1) of the 1991 Act(a) (requirements for undertaker to re-surface street) may not be exercised in relation to the authorised development."*	There is no s.73A of that Act. S.55 of The Traffic Management Act 2004 which creates it is not yet in force. Please explain the need for this. Submissions from the street authority will be welcome.	This is consistent with the approach taken in Thames Tideway Tunnel. It is noted that this provision is not yet in force, however, it is suggested that the power should be disapplied if and when the power under s73A does come into force. The Applicant can update the wording to clarify this. The intention is that re-surfacing of the streets within the Order limits should not be applicable. Once the works have been completed the streets will either remain private (on the main site) or be adopted public highway.
104.	**Sch 14, Miscellaneous controls, para 3(10), (11), (13) and (14)**	*"(10) Schedule 3A to the 1991 Act"*	There is no such schedule. This point applies to all four sub-paragraphs. Please explain the need for this. Submissions from the street authority will be welcome.	The Applicant understands that Schedule 3A to the New Roads and Street Works Act 1991 (defined as the 1991 Act in article 2 of the dDCO) was inserted by s.52(2) and Schedule 4 of the Traffic Management Act 2004. This came into force on 29 June 2007 and is subject only to transitional provisions in Article 7 of SI 2007/1890 – this provides that the Schedule shall only apply where a street authority receive notice under section 54 or 55 of the 1991 Act on or after 1st April 2008. The Applicant therefore believes that Schedule 3A does exist and is in force. The provisions in that Schedule should be disapplied in respect of the authorised development because the works to be carried out to the streets will be approved pursuant to the provisions of the DCO and

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
				should not be subject to any further mechanism for approval.
105.	**General matter: "not to be unreasonably withheld"**		This phrase appears on a number of occasions. What is the position if consent is reasonably withheld? Is Art 49 the dispute resolution provision? Is it appropriate in all cases?	Please see response to ISH1:18. Article 49 is the relevant dispute resolution mechanism, where there is a dispute in most cases, but see also response to ISH1:45.
106.	**General matter: Descriptions of the Works in schedule 1**		The ExA is considering whether it would be helpful to have a reference to the relevant plans in the description of the Works. This was done for East Midlands and provides a degree of additional clarity and certainty. The ExA invites submissions on this.	The Applicant is content to add these references if it is considered helpful. This would be by replacing the reference to "highway plans" with the specific highway plan and Document number. The Applicant will amend Schedule 1 to include these references in the dDCO to be submitted for Deadline 2.
107.	**Environmental assessment and the DCO**	Background The DCO provides in a number of places for the authorised development to be altered. For example, in article 4 where the limits in the parameters plan can be exceeded in some circumstances, article 2 in the definition of maintenance, article 45 (works required by the protective provisions), and Further works in Schedule 1. Requirement 4 allows the travel plan to be varied with the agreement of the relevant planning authority. Requirement 8 provides for the submission of details which must be in general accordance with the parameters plan, but this does not appear to preclude details which exceed those limits. By Requirement 9 they can be altered with the agreement of the relevant planning authority. Requirements 11 (Landscape and Ecological Management Plan), 13 (Earthworks), 15 (Lighting), and 17 (Flood risk and surface water drainage) 18 (Surface water drainage) and 19 (Flood risk) are examples of requirements which allow for approved details to be changed, or for schemes and protections to be varied, with the agreement of usually the local planning authorities. Requirement 21, which controls		

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
		the hours of construction working, allows those hours to be changed. This is not a complete list. The proposed development has been subject to environmental assessment as a Schedule 2 project under the Infrastructure Planning (Environmental Assessment) Regulations 2017. Issue A Article 4 provides that the authorised development must be carried out within the parameters on the parameters plan and the limits of deviation. In the case of highways works and railway works in Works Nos 1 and 2 some leeway is given to the extent of an upwards or downwards deviation of up to 1.5 metres in either direction. However, in the case at least of the limits of deviation, in respect of the highway works and the railway works in Works Nos 1 and 2, those limits do not apply where the relevant planning authority is satisfied that a deviation in excess of those limits "would not give rise to any materially new or materially worse environmental effects in comparison with those assessed in the environmental statement". Measurements are approximate – see article 2(3). By article 2(6) where the term "approximate" appears before a measurement that word "does not authorise any works which would result in significant environmental effects which have not been assessed in the environmental statement". There is a power to maintain the authorised development in article 6 and that is constrained by Art 6(2) which states that the power "does not extend to any maintenance works which would give rise to any materially new or materially worse environmental effects in comparison with those assessed in the environmental statement". The Further works in Schedule 1, which form part of the authorised development, are extensive, and are subject to the proviso that "such works do not give rise to any materially new or materially worse environmental effects than those assessed in the environmental statement".		

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
		The ExA notes that the tests used in the dDCO vary. The principal tests are whether the change would "give rise to any materially new or materially worse environmental effects in comparison with those assessed in the environmental statement" and "would result in significant environmental effects which have not been assessed in the environmental statement". Where comparison with effects already assessed is to take place, the draft DCO usually compares with the assessment in the environmental statement. However environmental assessment is a process as the 2014 directive emphasises. The test in the environmental assessment directive (2011/92/EU, as amended by 2014/52/EU) is whether the project is "likely to have significant effects" (see Art 1 of the 2014 directive, amending Art 3 of the 2011 directive). Question 107A The Applicant, district planning authorities and county council are requested to consider the different formulations and to be ready to answer questions at the DCO ISH on (a) the need for consistency, (b) what they consider should be the correct approach, (c) the intent, meaning and drafting of article 4, (d) whether comparisons should be against the ES or effects identified and assessed in the EIA as a whole and (e) any other relevant issues concerning the test and its application in the dDCO. Other interested persons may also wish to participate on these issues at the ISH and should identify themselves in advance. They should avoid duplication and ensure their submissions are focussed on these points. Please see Annex F (Notification of Hearings) and provide the Case Manager with the information there requested. All persons making submissions at the ISH on this issue should be ready to submit them in writing following the ISH.		Question 107A As explained in the Explanatory Memorandum (Document 3.2, paragraph 7.15), the proviso to article 4 is consistent with an approach expressly endorsed in the A14 Cambridge to Huntingdon Improvement Scheme DCO following specific consideration of the provision in the ExA's report. However, please see ISH1:46 with regard to the need to standardise terminology. It is proposed to align the formulation with the test of EIA development in Schedule 2, paragraph 13(1) of the 2017 EIA Regulations throughout the dDCO. In the case of article 4 this will mean that the words "*any likely significant effects*" would be replaced by "*any significant adverse effects*". This then provides consistency in the determination of whether any change

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
				is acceptable in the context of article 4. It is the consideration of the change and whether it will have significant adverse effects on the environment which is relevant rather than referring back to a comparison against the ES or the EIA as a whole.
			Issue B Submissions pursuant to Requirements. A number of Requirements in the draft DCO allow for variations of limits with the agreement of the local planning authority. There does not appear to be any testing for environmental effects. The use of tailpieces is discouraged by advice note 15. Question 107B The Applicant is asked to consider whether the provisions for variations are consistent with the requirement for environmental assessment of the development or are satisfactorily constrained, and be ready to answer questions from the ExA at the DCO ISH. There has been considerable litigation around the multi-stage consent process and environmental assessment. One outcome of this has been the ability to require EIA where "subsequent applications" are made. Would the application of the subsequent application regime in the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 to applications for such variations be a way to address this issue? It is recognised that the subsequent applications provisions of the 2017 regulations currently only apply to approvals needed before development is begun so some amendment for the purposes of this DCO would be required. As with question 107A, district planning authorities and the county council are asked to be ready to participate and answer questions. Other interested persons may also wish to participate on these issues and are asked to identify themselves in advance and be ready to answer questions. The	Question 107B It would be appropriate for the regime for the consideration of subsequent applications within the relevant EIA Regulations to apply to all matters to be agreed by the relevant planning authority under the requirements and accordingly it is proposed in the dDCO to be submitted for Deadline 2 to include drafting to provide that any application under the requirements is caught within the definition of "subsequent application" irrespective of whether or not it is a matter required to be agreed before all or any part of the development has begun.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
		same comments about duplication, focus and making submissions in writing apply. Issue C Requirement 14 requires a further archaeological investigation to be carried out, following which mitigation is to be devised. See also question 65 above. Question 107C The Applicant is requested to be ready to answer questions at the DCO ISH on the compatibility (or otherwise) of this and the judgment in in R. v. Cornwall CC ex p Hardy [2001] Env L R 25; [2001] JPL 786. The Applicant should consider whether there are any other requirements affected by ex p Hardy. As with questions 107A and B, district planning authorities and the county council are asked to be ready to participate and answer questions. Other interested persons may also wish to participate on these issues and are asked to identify themselves in advance and be ready to answer questions. The same comments about duplication, focus and making submissions in writing apply.		Question 107C Please see Appendix 1.
108.	**Section 106 and similar agreements**		Please will the Applicant supply any draft s106 or similar agreements for Examination Deadline 1?	Please see Document 6.4A submitted for Deadline 1.
109.	**Section 106 and similar agreements**		The Applicant should note that the ExA will require confirmation that any s106 agreements and any similar documents have been properly executed in accordance with the constitutions of the parties entering into them, all other legal requirements, and are enforceable against them. This confirmation will need to be issued by the solicitors for the relevant parties. The form of the confirmation	Noted. Please see draft Document 8.5 submitted for Deadline 1.

Q. No	Part of DCO	Drafting Example (where relevant)	ExA Question	Applicant's Response
			should be submitted to the ExA in due course for approval, and should be for the benefit of the local planning authorities and Secretary of State.	
110.	**Section 106 and similar agreements**		The local planning authorities (ie the districts and the county) should note that the ExA will expect them to carry out proper title investigation of the parties entering into the s.106 agreement(s) and any similar documents, and to confirm that they are satisfied that the appropriate persons have been joined in; with the title of the persons entering into the s.106 agreement(s); and that the obligations will be enforceable against persons deriving title from the original covenantors.	
Typographical matters				The Applicant will review and correct all typing errors in the next dDCO.

APPENDIX 1

ISH1: DCO HEARING 9.10.18 - RESPONSE TO ISH1:107C

Preliminary

1. The Examining Authority ('ExA') have raised an issue as to the approach adopted in Requirement 14 of Schedule 2 to the draft Development Consent Order ('dDCO'). In this context, the ExA points to the decision of Harrison J in R v Cornwall County Council ex parte Hardy [2001] Env LR 473.

2. Requirement 14 relates to archaeology, and as proposed to be worded in the dDCO to be submitted for Deadline 2, it provides as follows:

> *'(1) No part of the authorised development is to commence until the undertaker has commissioned a programme of further exploratory investigation which has been submitted to and approved in writing by the local planning authority. The exploratory investigation must be carried out in accordance with the approved programme and must be timed so that the results can inform the scope of the further archaeological mitigation measures, referred to in sub-paragraph (2).*
> *(2) No part of the authorised development is to commence until a programme of archaeological mitigation measures informed by the exploratory investigations referred to in sub-paragraph (1) and by earlier phases of investigation has been implemented in accordance with a written scheme of mitigation measures which has been approved in writing by the local planning authority'.*

3. In Hardy Harrison J quashed planning permission for development in circumstances where the local planning authority had imposed a condition requiring the carrying out of bat surveys. In reaching his decision, the Judge concluded[2]:

> "*Having decided that those surveys should be carried out, the Planning Committee simply were not in a position to conclude that there were no significant nature conservation issues until they had the results of the surveys. The surveys may have revealed significant adverse effects on the bats or their resting places…*".

4. The Applicant understands the ExA's query to be that of whether the decision in Hardy precludes the inclusion within the dDCO of a requirement providing for the carrying out of further survey/investigative work.

Decision in Hardy

5. The Applicant is of course aware of the decision in Hardy. However, the Applicant respectfully proposes that in the present case that decision does not engage in the manner which the ExA suggests. In particular, and turning to the dDCO, Hardy does not bear on the position as regards Requirement 14 and the direction to carry out further investigative work in connection with archaeology.

6. In this regard, the Authority first notes two points about Hardy, which case necessarily turned on its own particular facts.

Point 1

- In that case there was a material concern as to the impact which the proposed development (an extension to a landfill site) would have on bats.

[2] Paragraph 71 of Hardy

- The particular nature of this concern – ie an ecological concern relating to a protected species – was central to the decision. In this context, in reaching his conclusion Harrison J noted expressly that[3]:

  "*The bats are a European protected species. They and their roosts, or resting places, are subject to* ***strict protection under the Habitats Directive***".

  "If [the presence of bats] was found by the survey and if it were found that they were likely to be adversely affected by the proposed development, it is, in my view, an inescapable conclusion, ***having regard to the system of strict protection for these European protected species****, that such a finding would constitute a 'significant adverse effect'…"* (emphasis added)

Point 2

- In Hardy the materials submitted to the planning authority suggested that bats may be present on the development site. Further, the survey work regarding bats that had been undertaken at the point when permission was granted, was limited. In this regard Harrison J noted[4]:

  "*preliminary surveys of mine shafts for roosting bats [had been] undertaken*";

  "*There [was] known to be a roost of lesser horseshoe bats of international conservation importance to the south-west of the site*"; and

  "*There was evidence in the ecological report that bats or their resting places may be found in the mine shafts if surveys were carried out*".

7. The position as regards the Applicant and the dDCO is not comparable to that in Hardy. Notably the matter at issue is not an ecological one concerning a European protected species; rather it relates to archaeology. Further, the position here is not that inadequate analysis/investigation has been undertaken; on the contrary, sufficient work has been carried out having regard to the 'application stage' which the proposal has reached (see below). The conclusion of this work is that there are not likely to be any significant environmental effects (See ES Chapter 10, Table 10.5). It is nonetheless proposed to address the less than significant effects that have been identified through mitigation, which is the purpose of Requirement 14.

Applicant's Approach to Archaeology

8. In this regard, the Applicant respectfully refers the Examining Authority to Paragraph 5.127 of the National Policy Statement for National Networks ('NPSNN'), which expressly addresses the basis on which an applicant should address archaeological issues. The guidance states:

   "*Where a site on which development is proposed includes or has the potential to include heritage assets with archaeological interest, the applicant should include an appropriate desk-based assessment and, where necessary, a field evaluation*".

9. In 2017, the Applicant's heritage consultants undertook an archaeological desk based assessment in line with best-practice as provided by the Chartered Institute for Archaeologists ('CIfA'). This first stage of assessment included analysis of the Northamptonshire Historic Environment Record, the Historic England Archive and Historic England's Nation Heritage List for England. It also had regard to previous archaeological investigations on the Main Site, including geophysical survey and ground investigations.

[3] Paragraph 70 of Hardy

[4] Paragraphs 4 and 70 of Hardy

10. This assessment concluded that whilst there was potential for settlement activity on the Main Site and Roade Bypass areas, these were likely to be of no more than regional significance and would not preclude development.

11. As a second stage of assessment the Applicant commissioned a geophysical survey of both the Main Site and Roade Bypass area, which survey was also undertaken in accordance with CIfA best practice, as well as guidance from Historic England.

12. Finally, and informed by both the desk based assessment and geophysical survey, the Applicant commissioned sample trenching to be undertaken. This exercise was carried out by Cotswold Archaeology, one of the country's leading archaeological contractors, pursuant to a Written Scheme of Investigation submitted to and approved by Northamptonshire County Council ('NCC'). The trenching work was also monitored by NCC as it was undertaken. None of the archaeological remains identified were of significance to preclude development.

13. As such, the Applicant's position is that it has addressed archaeological matters in a manner that is wholly consistent with guidance set out in the relevant National Policy Statement. The extent of investigation and analysis undertaken to date more than satisfies the requirement for scrutiny of archaeological impacts at the application stage.

Conditions providing for further survey/investigation

14. Quite apart from the factually distinct position in Hardy, it is important to recognise that caselaw has longsince established that, when granting planning permission for development, it can be acceptable to impose conditions requiring the carrying out of further survey work – even in a sensitive ecological context, such as regards protected species.

15. By way of example in R v Rochdale Metropolitan Council (ex parte Milne) [2001] Env LR 22, Sullivan J (as he then was, before elevation to the Court of Appeal and the Supreme Court) determined a claim for judicial review where it was alleged that the relevant planning authority had been wrong to approve development on account of the fact that the environmental statement did not provide sufficient information, and required the carrying out of further surveys in respect of species including bats and great crested newts.
16. In rejecting the claim Sullivan J found firstly that[5]:

> *"The local planning authority are entitled to say, 'We have sufficient information about the design of this project to enable us to assess its likely significant effects on the environment. We do not require details of the reserved matters because we are satisfied that such details, provided they are sufficiently controlled by condition, are not likely to have any significant effect'"*.

17. The judge then rejected criticism as to the need to undertake further surveys in respect of ecological matters, observing (at Paragraph 132):

> *"In the case of the bats and the greater crested newts that may be on this site (see above), I do not see why the "measures envisaged to avoid, reduce or remedy" possible harm to them should not comprise the undertaking of further surveys, discussion of the findings of those surveys with English Nature and devising detailed mitigation in the light of those discussions. Where there are well established mitigation techniques for dealing with disturbance to the habitat of certain creatures, such a description will be perfectly adequate. Indeed, it is difficult to see what more could be done".*

18. Subsequently Richards J (as he then was, before elevation to the Court of Appeal) when rejecting another challenge to a grant of planning permission in R (on the application of Jones) v Mansfield District Council [2003] EWHC 7, observed:

5 Paragraph 114 of Milne

> *"The passage in Paragraph 132 of the judgment in Milne, quoted above, shows that it can properly be decided that significant effects are not likely even if further surveys are to be undertaken. In circumstances of the kind there referred to, where creatures such as bats may move around, further surveys are a common sense way of ensuring that their location is identified and appropriate mitigation techniques are applied at the time of development".*

Requirement 14

19. The question of whether, in the present instance, it is appropriate that Requirement 14 provide for the carrying out of further surveys regarding archaeology turns on the adequacy of the information provided to the Examination regarding archaeological matters.

20. In this regard the courts have long recognised that the question of whether there is sufficient environmental information to determine if a development is likely to have a significant environmental effect, is a matter for the decision-maker (in this case the Secretary of State ('SoS') advised by the ExA) to decide. In this regard see decisions including Hardy, Milne and Jones, where Richards J noted[6]

> "*Whether sufficient information is available to enable a judgement to be made as to the likelihood of significant environmental effects is a matter for the authority*".

21. In addition, in this context the ExA should remember that as Sullivan J noted in Milne, in order for a decision-maker to have 'sufficient information' it is not necessary that it have "'every conceivable scrap of information' about a project"7.

22. In the present case, the Applicant maintains that there is sufficient information regarding archaeological matters for the ExA/SoS to reach an informed decision as to whether the proposed development would be likely to have a significant adverse environmental effect. The investigative work undertaken by the Applicant's heritage consultants is extensive, and the Environmental Statement provides sufficient analysis in respect of this issue.

23. In this context, it should of course be noted that the process of environmental assessment is concerned with "*identifying and mitigation the 'likely significant effects', not every conceivable effect, however minor or unlikely, of a major project*" (see Sullivan J in Milne). As Moore-Bick LJ noted in R (on the application of Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157, the prospect of significant effect must be "*something more than a bare possibility*"[8].

24. Lastly, and crucially, as stated on behalf of the Applicant during the Issue Specific Hearing ('ISH') on 9 October, the purpose of the survey work envisaged by Requirement 14 is not to determine whether or not the development is likely to have a significant adverse effect on archaeological interests. The Applicant maintains that the investigation work already undertaken – coupled with the absence of any evidence to suggest harm would result from the development – is such that the SoS (advised by the ExA) can determine the Application in the knowledge that it is not likely to have significant effect as regards archaeology. The purposes of the surveys is akin to those considered by Sullivan J in Milne (albeit the factual position is clearly different); it is to ensure that in undertaking the proposed development, appropriate mitigation techniques and approaches are applied.

25. As such the wording of Requirement 14, and the commitment to undertake further survey work, is entirely appropriate.

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6 Paragraph 49(iv) of Jones

7 Paragraph 135 in Milne

8 Paragraph 17 of Bateman