

Northampton Gateway Rail Freight Interchange TR050006

Commentary on the Draft Development Consent Order

Issued 5th February 2019

1 Introduction

This Commentary and Schedule of Questions has been prepared on the basis of the dDCO submitted at Deadline 4, 8 January 2019, (Document 3.1C [REP4-002]).

Responses to the Schedule at Deadline 5 (26 February) will be welcomed by the Examining Authority (ExA) and, without wishing to hurry considered thought, which the ExA encourages, submission ahead of that time is not discouraged. Please clearly label submissions – “Response to dDCO Commentary from [name]” and submit them as a separate document.

The DCO has been considered at two Issue Specific Hearings (ISHs) and Schedules of questions were issued by the ExA in preparation for both of those and, as a consequence, the ExA feels that there has been good consideration of the issues it has raised and that those who have participated are familiar with the issues raised by the ExA. It sincerely thanks all participants thus far.

A major purpose of this Commentary is to explore issues on which the ExA would particularly like further discussion. That is not to say that the ExA's mind is closed on other issues. It may be that in the course of this Commentary and ISH5 there will be considerable probing on some matters in the interest of testing the position thoroughly. The ExA does not propose to issue a preferred version of the dDCO.

2 The s.106 Agreement

The ExA is grateful to the Applicant for supplying the draft s.106 agreement (ds.106) relatively early in the proceedings. The ExA's reservations and concerns were set out orally at ISH3 and in the note on it (“Points on the s.106 agreement”, Doc 6.4 [EV-012]) issued at ISH3. It will be recalled that the limitations and constraints imposed by the terms of s.106(1) and (3) of the Town and Country Planning Act 1990 were highlighted.

In the light of that, and probably following the practice and policy in mainstream planning applications of using conditions before s.106, the Applicant has moved some topics covered by the ds.106 into the DCO. The ExA can see little reason why that policy should not in general apply to NSIPs. If there is a contrary view, the ExA invites participants to express it, preferably in writing in response to this Commentary by Deadline 5.

In order for the topics to be moved to the DCO, it will be necessary for them to fall within the powers of the Planning Act 2008. Please will the Applicant address this in the next version of the Explanatory Memorandum (which it has proposed to submit at Deadline 5), or in a table to be attached to its response to this Commentary?

It appears that not all of the matters in the ds.106 have been transferred to the DCO. Indeed it was not the ExA's intention to suggest that the issues could not be overcome by drafting. For example, in the schedule of covenants with the County Council, para 8.1, could be redrafted to read "Not to commence the Development until the HGV Monitoring Scheme has been submitted to and approved by the County Council ...".

The ExA recognises that producing drafting for other provisions in a way which both meets the restrictions of s.106 and is commercially acceptable can present challenges. And the Applicant is also referred to the reservations expressed by Belinda Bucknell QC sitting as a Deputy High Court Judge in *Westminster CC v. Secretary of State* [2013] EWHC 690 about particularly onerous enforcement – in that case she expressed concern over a suggestion that the same result could have been achieved by drafting which prohibited occupation if a parking permit was sought, drafting which could thus lead to a person being ejected from their home if they sought a parking permit.

The ExA notes there is as yet no drafting in the dDCO to address, for example, the HGV Monitoring Scheme, nor the Community Fund. (It did of course draw to the Applicant's attention in relation to the Community Fund the case of *Wright v. Forest of Dean* [2017] EWCA Civ 2102, currently on appeal to the Supreme Court). The ExA notes that Rail Central has also made submissions about this in its post-ISH3 submissions (REP4-020) at para 7).

It would be helpful if the Applicant could indicate which aspects of the ds.106 it considers it has moved into the dDCO (Doc 3.1C), and which are intended to be moved in a future version of the dDCO, together with a list of the topics to be left in the ds.106. It might be wise to prepare and submit also a short explanation of how the remaining topics and drafting are within the terms of s.106 of the Town and Country Planning Act 1990 as it is applied to NSIPs.

3 *Environmental assessment, tailpieces and schemes*

The ExA raised these issues in ISH1: questions 107, 107A, 107B and 107C

In relation to 107A the Applicant has accepted the need to standardise the terminology. The ExA is grateful and would just comment that that does not mean the rule has to be followed slavishly, and there may be a justifiable need for exceptions. If there are any exceptions the Applicant wishes to make which are not already in the dDCO, please can they be flagged and justified in an accompanying note?

The issue arises in relation to submissions pursuant to requirements where the requirement specifies something “unless the relevant planning authority [RPA] otherwise approves” and where there are schemes and details to be submitted to the RPA for approval or variations to details specified in the application are made.

The formulation to be found generally in the dDCO (Doc 3.1C) is whether the result “would permit development which would give rise to any significant adverse effects on the environment not identified at the time this Order was made or in any updated environmental information supplied under the 2017 EIA Regulations”. See for example Article 45¹. The Applicant has submitted that this formulation complies with the test applied to changes to Schedule 2 projects at Sch 2 para 13 to determine whether EIA is necessary.

That paragraph reads as follows:

“Any change to or extension of development of a description listed in Schedule 1 to these Regulations (other than a change or extension falling within paragraph 21 of that Schedule) or in paragraphs 1 to 12 of this Schedule, where that development is already authorised, executed or in the process of being executed, and the change or extension may have significant adverse effects on the environment;”

The relevant words for this issue are italicised for ease of reference. However, the underlined words end with “significant adverse effects on the environment”. They do not continue with the additional words “not identified at the time this Order was made or in any updated environmental information supplied under the 2017 EIA Regulations” sought by the Applicant. At first sight therefore the additional words are not justified.

The ExA queries whether the additional words are appropriate. Environmental assessment should be considered at the time of the relevant application, in the circumstances which then apply. In addition, there will have been effects assessed and identified at the time of the DCO which have been rejected as unacceptable; which have been mitigated; designed out; or which have, although significant, been accepted in the planning balance of the time. Environmental assessment is a process which requires things to be considered. But, unlike the Habitats and Wild Birds Directives, the EIA Regulations do not prescribe outcomes. Those are left to the decision-maker.

The ExA made some of these points at ISH3 in relation to Article 4. The Applicant accepted that the additional words should be removed from that article and Doc 3.1C, the latest draft DCO issued on 8 January, reflects that. It seems to the ExA that the same changes should be made throughout the DCO. If there are exceptions to this, the ExA will of course consider a specific justified

¹ Other parts of the dDCO with this issue include Art 2(6), Art 6, Art 45, and the definition of Further Works in Sch 1.

reasoning if the Applicant – or other participants, such as an RPA – makes one. Administratively it would be simplest if any such exceptions could be the subject of responses to this Commentary by Deadline 5, specifically labelled as such and made by a separate document, which would enable them to be considered at ISH5, subject to timetabling constraints.

The Applicant has adopted a slightly different approach in the case of approximate measurements, at Art 2(6). The wording is:

“Where the term approximate precedes a figure of measurement or quantum then the flexibility accorded by that word is limited by the parameters and the limits of deviation as described in article 4 and does not authorise any works *which would result in significant environmental effects* which have not been assessed in the environmental statement.”

This suffers from the same problem as the other formulation, namely that there will have been effects identified and not permitted. Also, strictly it is not effects which are assessed, but development. Would it therefore not be preferable to omit the italicised words, and thereby simply not allow works which have not been assessed? The ExA is conscious that it is important that the Applicant’s Environmental Impact Assessment and the DCO are congruent. But does not this amendment maintain congruence and ensure that the works within the limits of the word “approximate” have been assessed? The ExA would value the views of the RPAs as well as the Applicant.

Lastly on this, the ExA would be grateful if the Applicant could explain why it has included the words “or in any updated environmental information supplied under the 2017 EIA Regulations”.

4 *Screening under the EIA Regulations*

The Applicant has drawn on Sch 2 Para 13 and has pointed out that the ExA drew attention to this. For clarity, the reason the ExA did that was to show that changes to a project can require environmental assessment, and so support the case, which seems now to be accepted, that no changes by way of tailpieces or submissions pursuant to the Requirements should be permitted if they would give rise to significant adverse effects. But an application for a Schedule 2 project, which by Sch 2 para 13 includes changes, must be accompanied by an environmental statement unless the need for one has been screened out.

Regulation 15 of the Infrastructure Planning (EIA) Regulations 2017 requires screening where an application is made for a Schedule 2 development without an environmental statement. This is similar to the position in mainstream planning. Why should this not be the case for applications made under tailpieces, or for other variations pursuant to Requirements? There is a form of screening in Art 4 of the DCO, though it is not at the level of formality stated in the Regulations. But there is no screening even of that nature elsewhere.

The ExA has no wish to make the process more onerous than it would otherwise be, but on the other hand it is anxious to ensure that any DCO made is compliant with the law. It is also conscious that the question now being addressed has been encountered in earlier NSIPs, which has led to a range of devices and drafting, in what might fairly be called an evolving thinking. It is hoped that any DCO made on this application evolves in the right direction and the ExA looks forward to the legally informed assistance of the Applicant and RPAs in addressing this question at ISH5. If they would like to make brief written outline submissions at Deadline 5, or earlier, that could be very helpful in focussing the discussion at ISH5 and giving preparation time.

5 *Ex p Hardy*

The ExA is grateful for the Applicant's note on this case at Appendix 1 to its post-ISH1 submissions. The ExA would seek to summarise that and the Applicant's submissions at ISH3 as that the issue is whether there is sufficient information at this stage to consider what are the likely significant effects, and to come to a conclusion on them, which is a judgment for the Examining Authority and Secretary of State to make. If there is, the later survey or investigative work can be required and carried out, provided its purpose is not to ascertain environmental effects. In the case of the archaeological Requirement 14, the purpose was specifically stated by Mr Smalley at ISH3 in answer to the ExA's questions that it was to define the areas in which any further recording would be required and not to identify likely significant effects. This is largely derived from *ex p Milne*, the second Rochdale case.

If this is not the correct understanding the ExA would be grateful if the Applicant would say so and revise the previous paragraph.

The ExA would make the following observations on Appendix 1:

- 1 The Applicant says that *Hardy* turns on its own facts and that the impact on bats was a material concern. Would the result in *Hardy* have been any different if the effect had been on a non-protected species?
- 2 The quoted paragraph (132) of *ex p Milne*, by Sullivan J (who as the Applicant has noted was later elevated to the Court of Appeal, though not to the Supreme Court) appears to be of considerable significance in distinguishing *ex p Hardy*.

Please will the Applicant consider and address those observations and also whether or not some amendment to Requirement 14 should be made to put the matter beyond doubt, provided that can be done without restricting the intended investigations and their usefulness in informing the further recording?

Submissions from the County Council on the law and the suggestion above as to the wording of the Requirement would also be appreciated by the ExA.

6 The divergence between the Applicant and Highways England (HE) on timescales for approvals – Arts 9, 13, 17(7), 21(4), and (10), 22(6); and deemed approvals (Sch 13 Pt 2. Para 15)

Firstly, please will the Applicant and HE confirm this is the full list of provisions on which there is a difference?

The ExA has raised some questions about this in the accompanying Schedule. It appears that the ExA will have to determine the dispute between the Applicant and HE, or at least make a recommendation to the Secretary of State how to do so. The ExA will expect the Applicant and HE to make final oral submissions to them at ISH5. Please can these submissions particularly cover the criteria to be adopted and how the policy on requirements assists in reaching a decision?

7 The divergence between Applicant and Network Rail (NR) – Sch 13 Pt 1 para 4, possibly para 11(11) (omitted from Doc 3.1C – dDCO, but included in NR's Deadline 3 submission of 30 November), para 22

Firstly, please will the Applicant and NR confirm this is the full list of provisions on which there is a difference?

The ExA has raised some questions about this in the accompanying Schedule. It appears that the ExA will have to determine the disputes between the Applicant and NR, or at least make a recommendation to the Secretary of State how to do so. The ExA will expect the Applicant and NR to make final oral submissions to them at ISH5. Please can these submissions particularly cover the criteria to be adopted and how the policy on requirements assists in reaching a decision?

8 The Defence to nuisance claims

The National Policy Statement for National Networks says at para 5.88 "If development consent is granted for a project, the Secretary of State should consider whether there is a justification for all of the authorised project (including any associated development) being covered by a defence of statutory authority against nuisance claims. If the Secretary of State cannot conclude that this is justified, then the defence should be disappplied, in whole or in part, through a provision in the Development Consent Order."

Please can the Applicant explain what the evidence is which justifies the application of the defence to nuisance claims?

9 The timetable for dealing with submissions and appeals – Part 2 of Sch 2

Please see questions 29-33 in the Schedule. The ExA would like to hear submissions and argument at ISH5 on Question 31.

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Schedule of Questions on the Draft Development Consent Order

Issued 5th February 2019

Questions in this table should be cited as follows: DCO: question number, eg DCO:1 – refers to question 1 in this table.

Question No	Person, in addition to the Applicant to whom the question is directed	Part of DCO	Drafting example (where relevant)	Question
1.	NCC	Art 2,	definition of HGV referring to operational rather than max gross weight	The Applicant's reply to ISH3:23 was that 7.5 tonnes maximum gross weight is the usual weight applied to HGV. What is the difference between maximum gross weight and operational weight? As the definition is to be used for weight restrictions, the ExA is anxious that this may cause confusion and difficulty for drivers who are not acquainted with Art 2 of the DCO.
2.	NCC	Art 2	Definition of Public Transport Strategy	Will NCC please state whether the definition accords with the document they were expecting to be used as shown in the draft s.106 agreement (Doc 6.4A [REP1003])
3.	NCC, HE	Art 17	Revoked traffic	The ExA asked at ISH1:25 for an SoCG with HE and NCC on this. Has this been reached and submitted? The ExA cannot see it on the

			regulation orders	Examination Library List.
4.	HE	21	Discharge of water	Is this now agreed with HE? The ExA notes HE's response to ExAQ1.29 [REP1-114]. Art 21(4) was added to address HE's concerns but the ExA understand they remain. The ExA would like to hear final submissions on this from the Applicant and HE at ISH5.
5.	NR	39		Is NR content with the deletion of Art 39(2) (which happened in the 20 Nov submission - Doc 3.1B [REP2-005])? The ExA had asked its purpose in ISH:37 and the Applicant replied that it replicates para 19 of the protective provisions in favour of NR and can therefore be deleted.
6.	NCC	46(1)(a)	Disapplication of s.23 Land Drainage Act 1991	Has this been agreed yet? What is the dispute?
7.	NCC, SNC, NBC	46(4) and Reqts 3(1)(g) and 8(2)(n)		These deal with advertisements in lieu of the normal advertisement control regime. Please will the County Council and RPAs say if they are content with the provisions and, if not, propose any modifications they feel are necessary, in accordance with the necessary policy tests?
8.		49	Arbitration	The response to ISH1:45 which asked how Art 49 relates to enforcement was that enforcement would be dealt with in the redrafted Art 49. However the ExA cannot see that this has been done. Breach of a DCO or its requirements is a criminal offence, and injunctions are available. Please could the Applicant explain how Art 49 would not cut across that, or alternatively supply additional drafting.
9.		Schedule 1	Plans	Now that the Works are identified by reference to plans, as suggested by the ExA, it will be necessary to check they are the right ones. The ExA will do this after the Second Written Questions have been issued, with a view to raising any issues with the agenda for ISH5 although

				the Applicant is similarly asked to double check Sch 1 and the cross-referencing in the meantime.
10.		Sch 1, Further Works		The answer to ISH1:49 said that a three metre height limit for fences would be incorporated in the dDCO submitted at Deadline 2. Please could that Applicant do this in the next dDCO and confirm in replies to these questions that it will be done. Or if the ExA has missed it, explain what is proposed instead.
11.		Sch 2	definition of ecological mitigation works	This definition has become out of alphabetical order. Please could the Applicant re-order it?
12.	RC	Sch 2	Definition of Rail Central footpath connections, and Rail Central footpath connections plan	Please can RC and the Applicant confirm that this wording is agreed, or otherwise explain what is being done and why?
13.	NCC, SNC, NBC	Reqt 3(4)	“unless the timing of the provision of the rail terminal is otherwise agreed in writing with the relevant planning	To be an SRFI and therefore an NSIP the project must be capable of handling at least four goods trains per day. Please comment on why this wording is justified (or not). The ExA will wish to hear final submissions on this at ISH5

			authority”	
14.	NCC, SNC, NBC	Reqt 3(4)	Following the provision of the rail infrastructure no rail infrastructure must be removed which would impede the ability of the rail terminal to handle four goods trains per day unless otherwise agreed in writing by the relevant planning authority	The ExA notes the Applicant’s response to ISH3:2 and the comments on this in the Changes Tracker. The ExA is currently minded to include this Reqt 3(4), but is willing to hear arguments from the named parties in column 2 at ISH5. As the Applicant has set out its position already, it would be helpful to have the views of NCC, SNC and NBC in writing at Deadline 5, which may make the discussion at ISH5 on the dDCO on 13 March 2019 more focussed and shorter.
15.	NCC	Reqt 4(4)		Will the County Council please comment on whether reasonable endeavours meets its requirements. Will both the Applicant and NCC reflect on the vagueness inherent in the phrase? In earlier responses on the same phrase the Applicant readily accepted that there would be difficulties in enforcing on that test.
16.	NCC	Reqt 4		Will both the Applicant and the County Council please explain how they consider Reqt 4(3) – (7) meets the legal and policy tests for Requirements. What do they consider are the effective sanctions for

				breach?
17.		Reqt 7	within six months of the date upon which the undertaker wishes to commence Works No. 8;	Following up on ISH1:55 the ExA concludes this is referring to six months AFTER the undertaker wishes to carry out Works No. 8? Please can the Applicant confirm this?
18.	NCC	Reqt 8(2)(e)	Electrical charging points	Please will NCC confirm (or otherwise) that this, which is part of mitigation (see Applicant's response to ExQ1.1.33) is agreed with them.
19.		Reqt 14	Archaeology and ex p Hardy	Would the Applicant please consider whether it would like to add a statement of the purpose of the further investigation, which the ExA understands is <u>not</u> to ascertain whether there are likely significant effects, so as to demonstrate that <i>ex p Hardy</i> and <i>ex p Milne</i> are met? The posing of this question does not mean the ExA has yet reached a conclusion on this issue.
20.	NCC	Reqt 18		Please will NCC confirm (or otherwise) that this Reqt now conforms with the SoCG between it and the Applicant, and is acceptable.
21.		Reqt 21(1)		Please will the Applicant specifically exclude Sundays (which the ExA assumes is the intention, perhaps by adding "and not at all on Sundays, nor on public holidays" after "on Saturdays"; deleting the words "excluding public holidays".
22.	SNC	Reqt 21(1)(c)	Construction hours noise and vibration	This appears rather vague. Please will SNC and the Applicant consider and comment on whether this is sufficiently certain to be enforceable. The previous draft had "audible" and "detectable".

			- "cause an adverse impact"	
23.	SNC	Reqt 23	Noise monitoring 2032-2042	Does this work? This imposes a requirement for the undertaker to carry out a scheme of monitoring in 2042 if there is an increase in the number of train movements at night arising between 2032 and 2042. What happens if the number increases in the early years of this period? There appears to be no obligation for the undertaker to do anything for many years during which there may be significant unmitigated effects. Also, how is 'increase' measured? Is it an average over a ten year period? Is it year by year compared to 2032? The ExA notes that Reqt 23(2) is concerned with 'significant adverse effects' while Reqt 23(3) concerns the numbers of trains.
24.	NBC, SNC	Reqt 28	Employment	<p>1 Please will the relevant planning authorities state if they agree to these provisions, which derive from the earlier s.106 agreement.</p> <p>2 Please will the Applicant and relevant planning authorities comment on whether they consider this requirement would be enforceable, including enforcement against employers, bearing in mind that employers will not necessarily be lessees or landowners.</p> <p>3 In relation to Reqt 28(2); there will be changes in the occupiers of each warehouse. Is it intended that new occupiers will be able to submit their own employment schemes? And what will be the position in cases where there is more than one occupier?</p> <p>4 Please will the Applicant give consideration to and comment upon</p>

				<p>SNC's proposed reqt, to be found at para 4 of their post ISH2 and 3 submissions [REP4-015]:</p> <p>'No development shall commence until a Local Employment and Training Strategy along with a timetable for its implementation and monitoring/reporting mechanisms has been submitted to and approved in writing by the Local Planning Authority. The Strategy shall set out initiatives to engage the local labour force and local businesses and to develop training opportunities in construction skills and logistics operations associated with the the development. The approved strategy shall then be implemented.'</p> <p>'Reason - In order to secure the promotion of employment opportunities to the local labour force and to support local based skills training to strengthen labour force skills and reduce unemployment."</p>
25.	NBC, SNC	Reqt 29	Community Liaison Group (CLG)	<ol style="list-style-type: none"> 1 Please will the Applicant explain what the functions and duties of the CLG will be. 2 If there is a breach of Reqt 29, against whom would enforcement action be taken? The ExA seeks the views of the Applicant, NBC and SNC. 3 Please will the Applicant and relevant planning authorities comment on whether they consider these provisions would be fully and practicably enforceable as a requirement. 4 When in the s.106 agreement, there was considerably greater detail about functions. The ExA appreciates that Reqt 29(3) is a powerful provision, but asks whether some skeleton of functions might not be helpful especially in case of dispute or enforcement.
26.	RC, Applicant	Reqt 30	Rail Central footpath connections	Does the NG undertaker have the necessary land rights? Should this be dealt with by the s.106? Can RC please confirm the locations are agreed? What will be the consequence if the connections cannot be

				made for (a) RC and (b) NG? Will there be any likely significant environmental effects if they are not made and what will be the implications for each SRFI individually and cumulatively?
27.	RC, Applicant	Reqt 31	Rail Central and Jn 15A	<p>1 Do the works expected by the Rail Central Order mitigate the likely significant effects for which Works No 11 are designed? And as this is akin to a tailpiece, should not this be subject to EIA safeguards at the time?</p> <p>2 What happens if, after Rail Central DCO is made (if it is made), HE or the LHA take the view that the works to Jn 15A in the Rail Central DCO, do not satisfactorily address the combined effects with Northampton Gateway and therefore do not give the counter-notice? There could be other reasons why the counter-notices are not given. It would appear that NG will have to construct their Jn 15A works and RC will have to construct theirs.</p> <p>3 Please will the Applicant and Rail Central comment.</p> <p>4 How are the environmental effects properly mitigated in such a case?</p> <p>5 Is it necessary to have corresponding provisions in any RC DCO? If so, how will that be achieved given that the Secretary of State must not fetter his own discretion?</p>

28.	Historic England			Historic England asked for the inclusion of a Requirement regarding the recording of the buildings that are to be demolished on the Main Site (see also the suggested wording in unsigned SoCG [REP1017]). Please can the Applicant and Historic England comment and indicate if it should be included, as drawn.
29.	NBC, SNC	Sch 2 Pt2	Applications and appeals under Reqts	<ol style="list-style-type: none"> 1 Is this the same as the form in Advice Note 15? If not, please can the Applicant explain and justify the changes? 2 Why has para 3 on fees been removed? Comments from Applicant and the relevant authorities and any other "discharging authority" within this procedure are invited. .
30.		Sch 2 Pt2 continued (a)		<ol style="list-style-type: none"> 1 3(2)(b) – square bracketed section. AN15 advises against being specific since the machinery of government changes. 2 3(3) - why so specific a time scale? Appx 1states " The appointed person must make a decision and notify it to the appeal parties, with reasons, as soon as reasonably practicable". 3 3(8) and 3 (9) – "must" is used rather than "may" in Appx 1.

				<p>4 3(11) There are differences in wording here which follow from 3(1)(a): "If an approval is given by an appointed person under this Schedule, it is deemed to be an approval for the purpose of any consent, agreement or approval required under the requirement as if it had been given by the discharging authority." Appx 1 has: "If an approval is given by the appointed person under this Schedule, it is deemed to be an approval for the purpose of any consent, agreement or approval <u>required under the Order or for the purpose of Schedule [X] (requirements)</u> as if it had been given by the discharging authority". Please will the Applicant comment on the effect and reason for the differences?</p>
31.	NBC, SNC	Sched 2 Pt 2 continued (b)		<p>NBC have raised three points in their D4 post-hearing (ISH3) submission; firstly the timeframes for decision (42 days), secondly on the effect that will have on the opportunity for consultation, and thirdly the 10 day period for requesting further information. SNC make similar submissions.</p> <p>Whilst the ExA appreciates that the timeframes are those set out in the Appendix to Advice Note 15, please will the Applicant comment and explain why the timeframes for applications pursuant to conditions on a planning permission are inappropriate, or might properly be adopted for this NSIP.</p>
32.		Sched 2 Pt 2 continued (c)		<p>Note also that AN15 uses 'business days' rather than 'working days' and Schedule 13 Part 1 – protective provisions for rail interests - has a newly inserted definition of 'working day'. Please will the Applicant</p>

				explain why "working days" is used in the dDCO.
33.		Sched 2 Pt 2 continued (d)		<p>Part 2 Appeals. There are some differences compared with Appendix 1 of AN15, with the Appendix indicating that where amendments are to be made to the standard wording they should be justified in full in the Explanatory Memorandum. Please could the explanation also be given in replies to this Schedule, for ease of reference. The differences include:</p> <p>3(1) (a) Appx 1 refers to " the discharging authority refuses an application for any consent, agreement or approval required or contemplated by any provisions of this Order or grants it subject to conditions" , rather than as the wording in the dDCO which states; "the discharging authority refuses an application for any consent, agreement or approval required or contemplated under the requirements or grants it subject to conditions"</p>
34.		Scheds 5 and 6	Change to Inset plan 1A of Doc 2.3A	Please note that the ExA will check this after the issue of Second Written Questions and raise any questions with the agenda for ISH5.
35.		Sch 6 Pt 1	Row 9	The ExA regrets to say that it does not find the explanation for the deletion of (ii) in row 9 of Pt 1 of Sch 6, given in the DCO Changes Tracker Doc 3.4B [REP4-005], to be very clear. The use of the words "remove" and "removed" appears to be ambiguous. Please could the Applicant clarify and produce the confirmation from the owner of Parcels 4/10, 4/12, 4/14-4/17 that they agree this wording
36.		Sch 7		In its reply to ISH1:80 (Doc8.1 [REP1-019]) the Applicant indicated

				that it would seek the SoCG confirming agreement to this classification from HE and NCC. Has that SoCG been obtained and submitted (or perhaps the ExA has missed it)? Please could the Applicant clarify?
37.		Sch 8		In its reply to ISH1:80 (Doc8.1 [REP1-019]) the Applicant indicated that it would seek the SoCG confirming agreement to this classification from HE and NCC. Has that SoCG been obtained and submitted (or perhaps the ExA has missed it)? Please could the Applicant clarify?
38.	NR	Sch 13 Pt 1, protection of Network Rail		The Changes Tracker says Sch 13 Pt 1 para 11(11) is not agreed by NR. But it is deleted now. What is the up to date position please?
39.	NR	Sch 13, Pt 1, para 22		Are the time limits and expert determination provisions now agreed with Network Rail?
40.				<p>The DCO Changes tracker says, when explaining the position on Sch 13, that the SoCG with NR (Doc 7.13, REP1-016) states:</p> <p>"Amendments to several paragraphs in Part 2 as agreed with Network Rail. The protective provisions are agreed except for paragraphs 4(1), 11((11) and 22, as explained in the Statement of Common Ground agreed with Network Rail (Document 7.13) (REP1-016)."</p> <p>Please could the Applicant help the ExA by indicating which pages of the 129 page document do this.</p>

				<p>Is the position that para 4 is acceptable to both parties, but that in the Applicants' case that is subject to para 22 as it appears in the Deadline 4, January 2018 draft DCO, Doc 3.1C [REP4-004]?</p> <p>Is the result that the ExA is required to consider and recommend to the Secretary of State whether there should be a timeline for decision and if so what the timeline should be?</p> <p>Please could Network Rail and the Applicant confirm that there are no other issues between them?</p> <p>The ExA will expect to hear concise final submissions from the Applicant and NR on the matters in dispute at ISH5 on 13th March 2019.</p>
41.	HE	Sch 13 Pt 2, Protection of Highways England		<ol style="list-style-type: none"> 1 Please will the Applicant and HE confirm that the drafting of the DCO (Doc 3.1C and onwards [REP4-004])) now reflects all the drafting set out in the SoCG (Doc 7.1C, REP 1-007) and that the only items where they have not been able to agree are those set out in the Applicant's responses to HE's written representation [REP1-115] and HE's responses to ExQ1 (REP1-114)? 2 Please will the Applicant and HE confirm that the result is that the only matters between the Applicant and HE and which are for the ExA to decide are the time limits for certain approvals and the principle of deemed approvals (para 15). 3 What is the HE position on ExQ1.102 (Sch 14 Misc Controls para 3. In its response [REP1-114] an update by Deadline 2 was promised.

42.	HE	Sch 13, Pt 2,	Bond sum	This is under discussion with HE according to the Changes Tracker (Doc3.4B [REP4-005]). Has the amendment to the definition of Bond Sum now been agreed with Highways England? Is the Commuted Sum to be included in the Bond Sum?
43.	HE	Sch 13 Pt 2		The ExA will wish to hear concise final submissions from the Applicant and HE on the issues in dispute at ISH5 on 13th March 2019.
44.	NCC	Sch 13 Pt 3 - Protective provisions for NCC		<p>The ExA understands from the SoCG with NCC and the DCO Changes Tracker Doc 3.4B [REP4-005] that the only issues between the Applicant and NCC on the protective provisions are:</p> <p>(i) the scope of the undertaker's liability during the Defects and Maintenance Period, and</p> <p>(ii) the duration of the Defects and Maintenance period.</p> <p>Please will the Applicant explain, using the DCO Doc 3.1C, what changes are necessary to para 6 of Sch 13 Pt 3 (Protective Provisions for NCC) to make it acceptable to the Applicant.</p> <p>Please will the NCC explain, using the DCO Doc 3.1C [REP4-002], what changes are necessary to para 6 of Sch 13 Pt 3 (Protective Provisions for NCC) to make it acceptable to NCC.</p> <p>The ExA will wish to hear concise final submissions from the Applicant</p>

				and NCC on these issues at ISH5 on 13th March 2019.
45.	Applicant, Cadent	Sch 13 Pt 4 – Protective Provisions for Cadent		Since Cadent agreed its SoCG the Aug 2018 version (3.1A) and Art 49 has changed. Please will the Applicant obtain Cadent's approval, or otherwise explain why it is unnecessary.
46.	Applicant, Anglian Water	Sch 13 Pt 5 – Protective Provisions for Anglian Water		Please will Anglian Water and the Applicant confirm that these Protective Provisions are exactly those contained in the SoCG with AW dated May 2018 [AS-016]?
47.		Sch 13, Pt 3 - Protective provisions for Electricity Undertakers		Please can the Applicant update the ExA on the progress of this and the SoCG requested at ISH1:99?
48.		Sch 13, Pt 3 - Protective provisions for ECC		Please can the Applicant update the ExA on the progress of this and the SoCG requested at ISH1:100?
49.		Schedule 15	Membership Role and Protocol of the STWG	Please will the County Council and HE confirm that they agree these provisions. Do they require anything in addition?
50.		Schedule 15 (g)		Should the Northampton Gateway Transport assessment be more precisely defined by reference to the Environmental Statement?
51.			Defence to nuisance	NNNPS says at para 5.88 "If development consent is granted for a project, the Secretary of State should consider whether there is a

			claims	justification for all of the authorised project (including any associated development) being covered by a defence of statutory authority against nuisance claims. If the Secretary of State cannot conclude that this is justified, then the defence should be disapplied, in whole or in part, through a provision in the Development Consent Order." What is the evidence to justify the application of the defence to nuisance claims?
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