Drafting Development Consent Orders

Advice note fifteen: Drafting Development Consent Orders

The Planning Act 2008 (the PA2008)\(^1\), and related secondary legislation provide the basis for orders granting development consent for Nationally Significant Infrastructure Projects (NSIPs).

A Development Consent Order (DCO) is a statutory instrument and should follow statutory drafting conventions. The DCO must also comply with all the requirements set out in the PA2008 and associated legislation. For these reasons, DCOs differ substantially from planning permissions under the Town and Country Planning Act 1990 which are granted by local planning authorities\(^2\). The DCO must be drafted in full by the Applicant and submitted, together with other prescribed documents, with the NSIP application\(^3\).

This advice note sets out advice from the Planning Inspectorate on the preparation of the draft DCO. It also reflects the views, on DCO drafting matters, of those government departments that are most involved in the PA2008 process.

It is not intended to be a comprehensive advice note on all aspects of the drafting of DCOs, but rather it focuses on a number of key issues where it is considered that advice could most usefully be given. This advice note forms part of a suite of such advice provided by the Planning Inspectorate. Although this advice note has no statutory status, applicants and others are strongly advised to follow this advice and provide justifications for any departures from this advice in compiling their applications.

Whilst this advice note is aimed primarily at applicants, it should also be helpful for other persons involved in the PA2008 process.

This advice note will be kept under review and updated when necessary.

Further advice is set out in the Planning Inspectorate’s Advice Note Thirteen: Preparation of a draft order granting development consent and explanatory memorandum, which largely deals with non-drafting aspects of DCOs and the Explanatory Memorandum, including procedural matters.

---

1. All references to the PA2008 and any other legislation in this advice note are taken to mean ‘as amended’
2. Or the Secretary of State regarding a call-in application
3. See section 37(3)(d) of the PA2008 and Regulation 512(b) of The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009
Justifying the approach

1. Explanatory Memorandum

1.1 The Explanatory Memorandum is an aid to the Examining Authority (ExA), to Interested Parties and to the Secretary of State as decision-maker to help understand what is proposed in the draft Development Consent Order (DCO), why particular provisions have been included and from where the wording has been derived. The Explanatory Memorandum explains why draft DCO provisions have been tailored to meet the specific needs of a particular Nationally Significant Infrastructure Project (NSIP) (and may be required to address novel issues). It should also explain why the provisions are required, having regard to the scope and breadth of powers contained in the Planning Act 2008 (PA2008).

1.2 A thorough justification should be provided in the Explanatory Memorandum for every Article and Requirement, explaining why the inclusion of the power is appropriate in the specific case. The extent of justification should be proportionate to the degree of novelty and/or controversy in relation to the inclusion of that particular power.

1.3 There is no longer a requirement to submit a tracked changed version of the draft DCO which compares the wording against The Infrastructure Planning (Model Provisions) (England and Wales) Order 2009.

1.4 A well-developed Explanatory Memorandum can potentially reduce the number of examination questions an ExA may need to ask about the draft provisions comprising the draft DCO. For each provision, the ExA is likely to want to be satisfied about certain matters, such as:

- The source of the provision (whether it be a previous made DCO or Transport and Works Act Order, or a novel provision).
- The section/Schedule of the PA2008 under which it is made.
- Why it is relevant to the Proposed Development.
- Why the Applicant considers it to be important/essential to the delivery of the Proposed Development.

1.5 If a draft DCO includes wording derived from other made DCOs, this should be explained in the Explanatory Memorandum. The Explanatory Memorandum should explain why that particular wording is relevant to the proposed draft DCO, for example detailing what is factually similar for both the relevant consented NSIP and the Proposed Development. It is not sufficient for an Explanatory Memorandum to simply state that a particular provision has found favour with the Secretary of State previously; the ExA and Secretary of State will need to understand why it is appropriate for the scheme applied for. Any divergence in wording from the consented DCO drafting should also be explained. Note, though, that policy can change and develop.

1.6 Where applicants are seeking to include specific wording or apply a particular approach from a different statutory regime in a draft DCO, the reasons for doing so and the relevance of this to the application should also be made clear in the Explanatory Memorandum. For example, where an applicant has used wording from an Order made under the Transport and Works Act 1992, the particular Order in question should be clearly identified and the reason for including this wording in the draft DCO explained. Applicants will again need to consider whether such a provision is within the powers of the PA2008 and include comments on this point in the Explanatory Memorandum.
DCO form and language - general approach

2. Statutory Instrument template

2.1 A DCO must be made in the form of a validated Statutory Instrument (SI) if, as is usually the case, it includes ‘legislative provisions’ that for example apply, amend or exclude other statutory provisions. SIs need to conform to a template which is publicly available on the UK Legislation Publishing website (National Archives). The template contains essential formatting for SIs.

2.2 Applicants will need to obtain access to the online SI template and associated validation system which assesses whether the drafting in an instrument agrees with the rules for drafting within the template. The Planning Inspectorate’s Case Manager will fill in the relevant application form on behalf of the Applicant and submit it to the National Archives. Please contact the Planning Inspectorate in case of any difficulty obtaining access to the template.

2.3 The SI template may be updated periodically. Applicants should contact the Planning Inspectorate’s Case Manager to ensure they are using the latest template.

2.4 All copies of the draft DCO submitted to the Planning Inspectorate (including the Applicant’s final draft DCO submitted towards the end of the Examination) must have been cleared through the validation process and be accompanied by a copy of the Validation Success email which evidences that the draft DCO is error free and on the correct version of SI template. Should draft DCOs be submitted with errors or without a successful validation email, applicants will be asked to resolve the errors and resubmit with a Validation Success email.

3. Drafting conventions

3.1 As mentioned above, it is common for applicants to seek out and adopt drafting conventions from previously made DCOs. It may also assist applicants to consider the drafting conventions of made DCOs published by the same department as would authorise their DCO, which may help to identify that department’s drafting preferences. However, applicants should note that policy does change and develop.

3.2 Where Deemed Marine Licences or other deemed consents or licences are included within a draft DCO, they must also follow the statutory drafting conventions for SIs. However, note that they are also self-contained licences and need to not be dependent on definitions in the body of the draft DCO.

3.3 Guidance is publicly available from the National Archives website and should be followed by applicants. In particular applicants should:

- provide footnotes in relation to statutory provisions referred to in the SI to provide the user of the SI with information about relevant amendments or extensions to, or applications of, enactments mentioned in the instrument;
- use gender-neutral drafting (for example avoiding the use of ‘he’ or ‘she’ to refer to the Secretary of State or other persons, unless referring to a particular living individual);
- provide an adequate preamble with recitation of powers;
- avoid use of the words ‘shall’ or ‘will’ (because of ambiguity over whether they are an imperative or a statement of future intention);
- avoid the word ‘may’ (to avoid ambiguity over whether it is permissive or stating that it is uncertain whether something is to occur);

---

4. See section 117(4) and section 120(5) of the PA2008
5. https://publishing.legislation.gov.uk/tools via National Archives
● avoid archaisms (for example ‘therewith’, ‘aforesaid’);
● not use obliques in operative text (because of ambiguity whether they signify ‘and’ or ‘or’);
● spell out ‘metres’, ‘millimetres’ etc throughout (and not use ‘m’, ‘mm’ etc); and
● if a paragraph is included in the Interpretation Article saying that distances, directions, lengths, areas etc are approximate, make sure that in the rest of the order the word ‘approximately’ in conjunction with any of these dimensions does not appear.

3.4 Before an application is made to the Planning Inspectorate, the draft DCO should be thoroughly checked to remove typographical errors and to ensure consistency across the whole document. These checks should also be undertaken during the Examination, whenever changes are made that affect the draft DCO.

Other drafting considerations


4.1 Applicants are encouraged to agree Protective Provisions with the protected party(ies) prior to submitting the application for development consent. Where agreement on Protective Provisions has not been reached during the Pre-application stage, applicants should, as a minimum, submit with their application the standard Protective Provisions for all relevant protected parties with any amendments that the Applicant is seeking annotated with full justification included within the Explanatory Memorandum.

4.2 Where the Applicant is not proposing to include draft Protective Provisions for a Statutory Undertaker that has been identified as such by the Inspectorate, the Applicant needs to ensure that the Consultation Report explains why Protective Provisions for that Statutory Undertaker are not sought or required. Ideally this information will be provided as a table listing all of the Statutory Undertakers identified by the Inspectorate with either:

● a link to the proposed draft Protective Provisions; or
● a brief explanation why the Statutory Undertaker is not affected by the application and/or why Protective Provisions are not required.

4.3 Submitting blank Protective Provisions Schedules is not acceptable and is likely to pose a serious risk to the acceptance of an application under s55 of the PA2008.

4.4 It is common for Protective Provisions to be drafted in unison with the protected party(ies) or by them first hand. Applicants should ensure that any Protective Provisions drafted by others appropriately align with the terminology and style of the draft DCO and are suitably drafted for use in an SI. If Protective Provisions for more than one protected party are included in a single Schedule, SI drafting requires the numbering of the paragraphs to follow sequentially throughout the Schedule and not re-start at ‘1’ with each part (as with all textual Schedules in several parts). This approach should be adopted in the draft DCO submitted with the application and in each amended draft submitted during the Examination where Protective Provisions are changed.

4.5 If, for good reason, an applicant prefers to provide a separate Schedule for each protected party, the paragraph numbering can re-start at paragraph 1 for each Schedule.

5. References

5.1 References to Articles in the draft DCO or sections of Acts should include the heading of the provision (or other concise, explanatory wording) on the first occasion that the reference appears in each Article or each paragraph of a Schedule.

7. Under Regulation 11 of The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017
5.2 Applicants should take care to ensure that the efficacy of any cross-references used in the draft DCO are maintained and checked. These checks are particularly important if and when the draft DCO is revised during the Examination.

6. Definitions

6.1 Definitions should be applied consistently throughout the draft DCO and should be in lower case. Applicants should note that:

- terms defined in the parent legislation (ie the PA2008) or in the Interpretation Act 1978 do not need to be re-defined in the DCO;
- they should define, either in the relevant Article or paragraph (if only used once) or in a general definitions Article (if used more frequently), all terms not defined in the PA2008 or the Interpretation Act 1978, or where the term uses its ordinary meaning;
- the use of different definitions for the same term within different parts of the draft DCO should be avoided wherever possible (for example setting out two different meanings of 'apparatus'). If this is unavoidable, then the definition in the Interpretation Article should make clear that it is subject to another definition elsewhere in the draft DCO;
- generally, a definition for 'The Secretary of State' should not be provided (government departments ask for a general Secretary of State to be assumed to allow for future changes to government machinery);
- care should be taken to ensure that the definitions provided in draft DCOs do not conflict with any of the definitions provided in s235 of the PA2008 (where there is conflict, applicants should explain and provide justification in the Explanatory Memorandum); and
- definitions should not be used to try to make substantive provision about what can and cannot be done under a DCO, nor to try to give effect to or introduce Schedules.

6.2 Where there is more than one relevant planning authority (or other authority), this should be made clear in the definitions.

7. Footnotes

7.1 There should be clear footnotes provided for all Acts, SIs, European Union or other international legislation, or external documents referenced in a draft DCO, which must conform to the guidance on footnotes in SI practice (for legislation, the footnote should identify relevant amendments to specific provisions). This practice should apply throughout the draft DCO and its Schedules. This includes any draft Deemed Marine Licence because these also form part of an SI and must therefore meet SI standards, as mentioned above.

7.2 Applicants must ensure that all footnotes in their final draft DCO submitted to an Examination are still up to date (ie legislation referred to has not been amended or repealed), and reflect the preferred practice in the relevant decision-making department.

8. Schedules

8.1 Schedules in DCOs must be given effect by an operative Article in the main body of the DCO. This may be by an express provision that the Schedule is to have effect or by clear implication (such as where the Article which grants development consent does so by reference to the Schedule which describes the Authorised Development). The Schedule should also include a shoulder reference to that operative Article, and such references should either be the first Article that mentions the Schedule, or all the Articles that mention the Schedule. A consistent approach should be adopted throughout the DCO.

8.2 To assist the reader in navigating the draft DCO, Schedules should be numbered according to the order they are mentioned in the substantive Articles in the draft DCO.
9. Paragraphs

9.1 Paragraphs in the draft DCO should usually consist of a single sentence and applicants should avoid the use of long sentences.

10. Numbering

10.1 Numbering within Articles and Schedules should follow the guidance. Please see advice above (paragraph 4.4) in relation to the numbering of Protective Provisions where included in draft DCO multi-part Schedules. This practice applies to all textual Schedules in several parts.

10.2 Applicants should avoid the use of very long lists where the contents need to be numbered with roman numerals or lettered (for example, sub-divisions of a single numbered Work in Schedule 1, where a recent example extended to ‘(ttt)’). The SI template is unable to cope well with the formatting of such long numbering/lettering.

10.3 In the font mandated by the template for SIs, the character for the numeral ‘one’ and the lower case equivalent of the letter ‘l’ are indistinguishable from one another visually. When determining a numbering/lettering scheme (for example, for individual land plots) which also needs to be referred to in the draft DCO, applicants should use a scheme that does not run the risk of ambiguity between these two characters.

11. Certification Articles

11.1 In a draft DCO certification Article, applicants should avoid referring to ‘any other plans or documents referred to in this Order’ since this is insufficiently clear and lacks precision.

11.2 Plans and other documents which are required to be certified such as the Land Plans and Works Plans should be specifically listed in the relevant Article. Applicants should set out the titles and numbers of such documents, either in the certification Article or, if there are a large number of documents, in a separate Schedule or Schedules to the DCO.

11.3 It is common for the Environmental Statement (ES) to be certified, not least because adherence with the assessment findings may be relevant when a discharging authority is considering whether or not to discharge Requirements. However, during the course of an Examination, applicants may also provide ‘environmental information’ which affects the findings of the ES and which may be relied upon for the purposes of the Examination required by Regulation 21 of The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017. If during the course of an Examination ‘environmental information’ is provided which affects the findings in the ES then applicants should consider if this information should also form part of the certification of the ES since it may have been relied upon by the decision maker and incorporated into the Requirements as mitigation measures.

12. Preambles and explanatory notes

12.1 Draft DCOs must include a preamble, briefly setting out details of the submission, examination and determination of the application, citing relevant statutory provisions.

12.2 Draft DCOs must also, after the Schedules, include a brief explanatory note, explaining the purpose of the DCO, and what it would permit the Applicant to do if consented. This must also set out where copies of the plans and other documents, to be certified under the DCO, may be inspected and when. The agreement reached with the document host/venue should be confirmed to the Examination.

13. **DCO revisions**

13.1 Changes to the draft DCO may well be put forward by the Applicant and others during the course of the Examination. This may be for several reasons as follows:

- responding to questions raised by the ExA;
- responding to representations made by Interested Parties; or
- responding to agreements reached with other Interested Parties, for example in relation to Protective Provisions or revisions to Requirements.

13.2 The Examination Timetable will make provision for revised version(s) of the draft DCO to be submitted by the Applicant. Where this is not expressly required in the timetable, applicants may choose to submit revised drafts at other times during the Examination; for example to meet timetabled deadlines for the submission of Written Representations. It is important that there is a clear audit trail to identify both changes to the draft DCO made during the Examination and the reasons why those changes have been made. This will greatly assist the Secretary of State in understanding how the form of any draft DCO that is recommended by the ExA has come about.

14. **Providing a DCO audit trail**

14.1 It is important to maintain a clear audit trail of changes made to the draft DCO. To achieve this, applicants should ensure that each revised draft DCO is accompanied by:

- a track changed version of the draft DCO highlighting any changes made from the previous version (and identified by a suitable filename) or a version using suitable comaprite software which similarly identifies the changes;
- a track changed draft DCO version highlighting all of the changes made from the version of the draft DCO originally submitted with the application (and identified by a suitable filename) or a version using suitable comaprite software which similarly identifies the changes must be submitted at the end of the examination and, depending on the number of versions, at points during the examination; and
- a supporting explanatory document, such as drafting notes or table of proposed changes. This should explain any amendments in a proportionate and concise way and be appropriately updated during the Examination. This is so that Interested Parties and the ExA are sufficiently aware of the purpose and effect of any proposed revisions to draft DCO provisions.

14.2 A fully updated Explanatory Memorandum must be submitted with the final version of the Applicant’s draft DCO submitted towards the end of the Examination. It will therefore be necessary for applicants to keep a detailed and comprehensive audit of changes made to the draft DCO during the course of the Examination to inform the final version of the Explanatory Memorandum. It would therefore seem in the best interests of applicants to update the Explanatory Memorandum in conjunction with each update to the draft DCO during the course of the Examination. If an updated Explanatory Memorandum could be submitted with each update to the draft DCO this would seem to help everyone involved in the examination of the application. The increased clarity provided by regular updates to the Explanatory Memorandum may also reduce the number of questions posed to the Applicant and/ or challenges raised in response to suggested changes.

14.3 Where Interested Parties other than the Applicant have suggested amended or new draft DCO provisions during the course of the Examination, they should also provide a reasoned explanation in support of the proposed amendment or new provision.
Key issues for DCO drafting

15. Requirements – general considerations

15.1 Section 120 of the PA2008 provides that a DCO may impose Requirements in connection with the development for which consent is granted. Such Requirements may correspond with conditions which could have been imposed on the grant of any permission, consent or authorisation (for example planning permission under the Town and Country Planning Act 1990 (the TCPA1990)) which would have been required for the development if it had been consented through a different regime.

15.2 The law and policy relating to planning conditions, imposed on planning permissions under the TCPA1990, will generally apply when considering Requirements to be imposed in a DCO in relation to the terrestrial elements of a proposed NSIP. Requirements should therefore be precise, enforceable, necessary, relevant to the development, relevant to planning and reasonable in all other respects.

16. Securing mitigation

16.1 An application may have significant adverse environmental effects that require mitigation; such effects will be identified in the accompanying ES and/or relevant environmental information. Any mitigation measures relied upon in the ES must be robustly secured and this will generally be achieved through Requirements in the draft DCO. Mitigation that is identified in the ES as being required must also be clearly capable of being delivered.

16.2 Mitigation may include adherence with control measures established through relevant management plans. Requirements can be used to secure the preparation and specification of details for such plans. The plans can be applicable to various stages in the life-cycle of the Proposed Development but may typically include: a Code of Construction Practice, a Construction Environmental Management Plan and a Site Waste Management Plan.

16.3 A ‘Table of Mitigation’ should be provided, usually as part of the ES, setting out precisely how and where mitigation measures relied upon in the ES are secured in the draft DCO.

---

17. Providing flexibility – approving and varying final details

17.1 When preparing the draft DCO, applicants should consider carefully the aspects of the Proposed Development that require flexibility, particularly where later stage approval by a relevant discharging authority is required. Any provisions in the draft DCO that allow for flexibility must be thoroughly justified within the Explanatory Memorandum\(^\text{10}\), and assessed within the ES.

17.2 Paragraph 82 of the government’s Planning Act 2008: guidance on the pre-application process advises that a Requirement may be proposed which allows details of ‘particular finalised aspects’ of a development to be submitted later to the relevant discharging authority.

17.3 Applicants should be aware that details fixed by the terms of the DCO can only be changed if authorised, and following adherence with the prescribed approach explained in section 153 of and Schedule 6 to the PA2008. Furthermore, it is not acceptable to circumvent the prescribed process in Schedule 6 by seeking to provide another route to approving such changes or variations, by a person other than the Secretary of State who made the DCO, for example by applying the provisions of section 73 and/or section 96A of the TCPA1990.

17.4 Therefore, adding a tailpiece\(^\text{11}\) such as the one below would not be acceptable because it might allow the discharging authority to approve a change to the scope of the Authorised Development applied for and examined, thus circumventing the statutory process:

“The authorised development must be carried out in accordance with the principles set out in application document [x] [within the Order limits] unless otherwise approved in writing”

17.5 On the other hand, a Requirement might make the development consent conditional on the discharging authority approving detailed aspects of the development in advance (for example, the relevant planning authority approving details of a landscaping scheme). Where the discharging authority is given power to approve such details it will be acceptable to allow that body to approve a change to details that they had already approved. However, this process should not allow the discharging authority to approve details which are outside the parameters authorised within any granted DCO.

17.6 There is limited scope for allowing corrections to a granted DCO. Corrections are not an opportunity to include something which was accidentally omitted by the relevant parties

---

\(^{10}\) The general approach to flexibility can be set out in other application documents and cross-referenced to the Explanatory Memorandum, where appropriate

\(^{11}\) A tailpiece is a mechanism inserted into a condition (or by analogy a Requirement) providing for its own variation
18. Complying with Environmental Impact Assessment requirements

18.1 A DCO should only authorise Environmental Impact Assessment (EIA) development which has been assessed in accordance with the EIA Regulations.

18.2 Particular care should also be taken when drafting a power to ‘maintain’ so that it does not authorise development which may result in significant environmental effects not already assessed\(^{12}\). Applicants are encouraged to engage in sufficiently early consultation with the appropriate bodies to seek to agree a definition of maintain and the wording of the corresponding maintenance Article.

19. Discharging Requirements

19.1 Section 120(2)(b) of the PA2008 allows for Requirements to include the obtaining of approvals from the Secretary of State ‘or any other person’. In many cases, the relevant planning authority for the area(s) within which the development is situated, is likely to be the relevant ‘person’ from which to obtain such approvals. For clarity, such Requirements should generally be drafted to identify the relevant planning authority or authorities by name. This could be made clear in the definitions, for example when defining the ‘relevant planning authority’.

19.2 Applicants should engage with the discharging authorities and other key stakeholders at the earliest opportunity (at the Pre-application stage) about the Requirements proposed to be included in the draft DCO and to agree the best approach to discharging the Requirements, for example to agree a proportionate timescale for discharge depending on the extent or complexity of detail reserved for subsequent approval.

19.3 If an applicant proposes that the approval of matters be required from a discharging authority other than the relevant planning authority, the Applicant should consult with that discharging authority ahead of submitting the application and consider whether it has the required resources and expertise to perform that function.

---

*Good practice point 2*

Applicants should take care to ensure that the definition of maintain (if included in the draft DCO) does not seek to authorise activities which may generate significant effects beyond those assessed in relevant environmental information, notably the ES.

*Good practice point 3*

It is recommended that a mechanism for dealing with any disagreement between the Applicant and the discharging authority is defined and incorporated in a draft DCO Schedule. For example, including arrangements for when the discharging authority refuse an application made pursuant to a DCO Requirement, or approve it subject to conditions or fail to issue a decision within a prescribed period. The mechanism could also address the fees payable for discharging the Requirements.

The Planning Inspectorate has produced standard drafting for a DCO mechanism to deal with the resolution of such disagreements. The standard wording is provided at Appendix 1 to this advice note. Where an applicant seeks for any amendment(s) to be made to the drafting of this standard wording, it should be justified in full in the Explanatory Memorandum.

Applicants are also encouraged to confirm in the Explanatory Memorandum that the discharging authority has been consulted about and is willing to assume a discharging role. The same applies to any arbitrator named in arbitration provisions.

---

\(^{12}\) Neither should the power to maintain permit the construction of what is effectively a different project from that consented or its removal (although the removal and replacement of part(s) only of an Authorised Development may in certain circumstances be appropriate)
20. Environmental information for subsequent applications

20.1 Applicants should note that the procedures under The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017\(^{13}\) (the 2017 EIA Regulations) must be followed for any subsequent application (to a discharging authority) for approval of matters in pursuance of a Requirement before all or part of the development may be started. The 2017 EIA Regulations include transitional provisions which (where relevant) maintain the applicability of The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009. When submitting an application to the discharging authority the Applicant should therefore consider whether the transitional provisions apply. Where transitional provisions do not apply applicants should consider if the 2017 EIA Regulations require them to provide an updated ES or to request a Screening Opinion from the discharging authority responsible for determining the subsequent application (usually the relevant planning authority) together with a Scoping Opinion.

20.2 If an applicant intends to provide an updated ES with the subsequent application it must notify the discharging authority and this will trigger the Applicant’s publicity requirements. The discharging authority will also need to consider any obligations\(^{14}\) it has to notify prescribed consultation bodies.

20.3 If the relevant authority considers that the environmental information previously provided in the ES is adequate to assess the ‘environmental effects of the development’\(^{15}\) this must be taken into consideration when deciding the application for approval. Alternatively, if the relevant authority considers that the environmental information is not adequate it must adhere with the requirements of the EIA Regulations including giving reasons. Relevant authorities are advised to take their own legal advice on this point.

20.4 Whether or not an updated ES is required to meet the obligations under the 2017 EIA Regulations does not detract from the fact that the Applicant must still provide all of the information sought by the Requirement for approval before any part of the Authorised Development can commence.


21.1 In some decisions the Secretary of State has removed definitions of ‘commence’ and/or ‘preliminary works’ which could have allowed for a range of site preparation works (such

---

13. Note The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 continue to apply for projects falling under Regulation 37 of the 2017 EIA Regulations
14. For example under Regulation 11(1)(a)
15. Regulation 22(2)
16. For example, by confining the scope of what may be approved in a subsequent application to matters which were the subject of the original ES
17. Or when a bespoke procedure is created for discharging Requirements – see section 21
as demolition or de-vegetation) to take place before the relevant planning authority had approved details of measures to protect the environment under the Requirements.

21.2 The definitions were removed because the Secretary of State considered them to be inappropriate, particularly where such advance works were themselves likely to have significant environmental effects, for example, in terms of noise or impacts on protected species or archaeological remains.

22. Hedgerows and trees

22.1 Applicants may wish to include an Article within the draft DCO to allow the removal of hedgerows (if necessary) for the purposes of carrying out the Authorised Development. The draft DCO can include an Article with powers which remove the obligation on the Undertaker to first secure consent under The Hedgerows Regulations 1997. It is recommended that DCO Articles of this kind are made relevant to the specific hedgerows intended for removal. To support the ExA, the Article should include a Schedule and a plan to specifically identify the hedgerows to be removed (whether in whole or in part). This will allow the question of their removal to be examined in detail. Alternatively, the Article within the DCO could be drafted to include powers for general removal of hedgerows (if they cannot be specifically identified) but this must be subject to the later consent of the local authority.

22.2 Applicants may also wish to include powers allowing them to fell, lop or cut back roots of trees subject to a Tree Preservation Order (TPO). This power can extend to trees which are otherwise protected by virtue of being situated in a conservation area. To support the ExA inclusion of this power should be accompanied by a Schedule and plan to specifically identify the affected trees.

22.3 Trees subject to TPO and/or are otherwise protected (and likely to be affected) should be specifically identified. It is not appropriate for this power to be included on a precautionary basis. Proper identification of affected trees will enable the ExA to give full consideration to the particular characteristics that gave rise to their designation and the desirability of continuing such protection.

23. Extinguishment of private rights over land

23.1 Sub-sections 120(3) and (4) of and paragraph 2 of Schedule 5 to the PA2008 allow a DCO to make provision for the extinguishment of rights over land.

23.2 An applicant may wish to extinguish private rights over land when it is acquiring land by the use of a Compulsory Acquisition power in the draft DCO or by agreement with the landowner. An applicant may also wish to extinguish private rights over land it already owns or land which is otherwise required for the NSIP.

23.3 The Land Plan accompanying the application must identify any land over which it is proposed to exercise powers of Compulsory Acquisition including any land in relation to which it is proposed to extinguish private rights.

Good practice point 6

Hedgerows affected by the Proposed Development should be identified in a Schedule to and on a plan accompanying the draft DCO. The Schedule and plan could also helpfully identify those hedgerows that are ‘important’ hedgerows. This would enable parties such as the relevant planning authority to make submissions on the appropriateness of including such provisions, and the ExA to consider these.

The draft DCO should also include a relevant Schedule and plan identifying the trees likely to be affected that are protected by TPOs and/or are otherwise protected.

---

18. In Wales, such a power can only be included with the consent of Natural Resources Wales
23.4 Where an applicant is seeking powers in the DCO to acquire land compulsorily, the drafting of the Article containing the powers should make it clear whether or not the Applicant is also seeking a power to clear the title of the land of all private rights. The Applicant should consider whether the Article should be subject to a power under a separate Article which would allow the Applicant to exclude a particular private right from the blanket extinguishment power.

23.5 Section 14A(6) of the Transport and Works Act 1992 and section 134(6A) of the PA2008 (both inserted in the respective Acts by SI 2017/16) each provide that a confirmation notice should be sent to the Chief Land Registrar and that it shall be a local land charge. Where land in an order is situated in an area for which the local authority remains the registering authority for local land charges (ie where the changes made by Parts 1 and 3 of Schedule 5 to the Infrastructure Act 2015 have not yet taken effect in that local authority area), the acquiring authority should comply with the steps required by section 5 of the Local Land Charges Act 1975 (prior to it being amended by the Infrastructure Act 2015) to ensure that the charge is registered by the local authority as the registering authority.

Good practice point 7
It is suggested that a procedure is set out in the relevant Article such as the giving of notice or reaching agreement with the person who benefits from the right. This would ensure that only those rights which it is essential to extinguish are dealt with in this way. Any private rights, not just private rights of way, could be dealt with in this way. This Article could also give the Applicant a power to extinguish all private rights over land it already owns and which is required for the purposes of the development. Again, this power could be subject to the giving of notice or agreement.

Good practice point 8
The changes made to Compulsory Acquisition legislation by the Housing and Planning Act 2016 has necessitated amendments to the Compulsory Acquisition provisions in DCOs. The Silvertown Tunnel Order 2018 provides an example of updated drafting which takes account of these changes, however applicants should be aware that these could be subject to further refinements and may vary depending on a department’s drafting preferences.

24. Restrictive Covenants

24.1 It may be appropriate to include a power to impose Restrictive Covenants over part of the land which is subject to Compulsory Acquisition or use under the DCO. Before deciding whether or not the power is justified the Secretary of State will need to consider issues such as proportionality, the risk that the use of land above or below a structure could be sterilised if it has to be acquired outright in the absence of a power to impose Restrictive Covenants or whether there is for example a policy of establishing a continuous protection zone for the infrastructure network which could be secured more efficiently with the benefit of this power.

Good practice point 9
Applicants should provide justification which is specific to each of the areas of land over which the power is being sought, rather than generic reasons and include a clear indication of the sorts of restrictions which would be imposed and wherever possible the power should extend only to the particular type of Restrictive Covenant required.

---

21. By way of background, the inclusion of such powers has been accepted in the case of a few orders made under the Transport and Works Act 1992 where this has been considered justified in the particular circumstances of each case; for example in the circumstances where the proposed railways were to be located on a viaduct or in a tunnel and there was no compelling need to acquire outright the surface of the land above or below the structure but still likely to be an ongoing need for measures to protect the structure and to obtain access to it

22. This was the case in the Docklands Light Railway Orders
24.2 The power to impose Restrictive Covenants over land above a buried cable or pipe, or where a slope contains artificial reinforcement, has been granted in DCOs23.

24.3 In order to enable the Secretary of State to consider whether the imposition of Restrictive Covenants is necessary for the purposes of implementing a DCO, and appropriate in human rights terms, applicants should be prepared to fully explain and justify the need for including such powers in the Statement of Reasons. DCO provisions seeking to impose Restrictive Covenants should not be broadly drafted and should identify the land to which they relate and the nature of the Restrictive Covenant.

25. Application, modification or exclusion of statutory provisions

25.1 Under section 120(5)(a) of the PA2008 DCOs may apply, modify or exclude an existing statutory provision which relates to any matter for which provision may be made in the DCO.

25.2 The power to apply, modify or exclude an existing statutory provision should be set out in an Article in the main body of the draft DCO. Those provisions that are proposed to be applied, modified or excluded by a DCO should be clearly identified, and, if extensive, identified in a Schedule or Schedules.

25.3 In this context, applicants should also be aware of the opportunities and restrictions24 under section 150 of the PA2008 on removing consent requirements.

DCOs and Deemed Marine Licences

26. Geographical scope

26.1 A DCO may ‘deem’ consent for a Marine Licence under Part 4 of the Marine and Coastal Access Act 2009 (MCAA2009), subject to specified conditions25.

26.2 This power only applies where the activity is to be carried out wholly in one or more of the following: in England; in waters adjacent to England up to the seaward limits of the territorial sea (twelve miles offshore); in a Renewable Energy Zone; and/or in an area designated under section 1(7) of the Continental Shelf Act 1964, except where the Scottish Ministers have functions.

26.3 If, for example, a Deemed Marine Licence is required for activities in Welsh inshore or internal waters (out to 12NM from the baseline) then it could not be deemed by a DCO and consent would have to be sought separately from Natural Resources Wales, to whom this function has been delegated by the Welsh Ministers.

---

23. Article 22 of the Silvertown Tunnel Order (2018)
25. Sub-section 120(4), paragraph 30A of Schedule 5 and section 149A of the PA2008
27. Multiple Deemed Marine Licences

27.1 It is considered that there is nothing in the relevant legislation which would prevent a DCO deeming more than one Deemed Marine Licence. This could be advantageous in particular developments, where there may be severable elements to the overall development project.

27.2 If an applicant proposes that a draft DCO should include more than one Deemed Marine Licence, then they will need to give careful consideration as to how the respective elements of the proposed NSIP are allocated between the draft licences, for example applicable conditions. This is so as to ensure all elements of the NSIP in the marine environment for which development consent is sought are included in one or other of the draft licences, the split between those elements is clearly described in the licences and they are consistent with the authorised NSIP as set out in the DCO. If possible the approach taken should be agreed sufficiently early with the Marine Management Organisation.

28. Transfer provisions

28.1 Section 156 of the PA2008 provides that a DCO has effect for the benefit of the land and all persons for the time being interested in the land; although this is subject to any contrary provision made in a DCO.

28.2 DCOs usually include an Article setting out who enjoys the benefit of the DCO and terms for the transfer of the benefit of any or all of the provisions of the DCO, including any consent that may be required.

28.3 Sub-section 72(7) of the MCAA2009 provides that, on application by the licensee, the licensing authority which granted (or is deemed to have granted) a Deemed Marine Licence may transfer it from the licensee to another person. Whilst this provision does not expressly allow only part of a Deemed Marine Licence to be transferred, sub-section 120(5) (a) of the PA2008 provides that a DCO may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in a DCO, which would include this provision. It is therefore considered that there is no legal reason to prevent a DCO from allowing part of a Deemed Marine Licence to be transferred, although there may be operational difficulties with such an approach including monitoring compliance and taking enforcement action.
29. Conditions

29.1 Sub-section 71(1)(b) of the MCAA2009 allows a Deemed Marine Licence to be granted subject to such Conditions as the licensing authority thinks fit. These may, under sub-section 71(2), relate to the activities authorised by the licence and precautions to be taken or works to be carried out (whether before, during or after the carrying out of the authorised activities) in connection with or in consequence of those activities. Sub-section 71(3) sets out six matters that may in particular be dealt with by conditions.

29.2 Whilst the law and policy relating to planning conditions does not necessarily apply to DCO Requirements relating to the offshore elements of an NSIP or to Deemed Marine Licence conditions, it is considered that similar principles should apply when drafting these (see paragraph 15.2).

Good practice point 12

Applicants should give careful consideration to which matters should be dealt with in DCO Requirements and Deemed Marine Licence Conditions respectively, and avoid duplication of the same matters in both Requirements and Conditions. If post-decision changes are required to such Requirements/Conditions, both instruments would need to be altered.

Deemed Marine Licences become self-contained documents and therefore should not be reliant on definitions in or cross-references to other elements of the main DCO. In addition, the Secretary of State is unable to amend a Deemed Marine Licence post-consent.

Applicants should engage sufficiently early at the Pre-application stage with key relevant consultees so as to seek to agree the wording of draft Requirements and Conditions as much as possible prior to submission of the application for development consent.

Good practice point 13

If, by the end of the Examination, applicants have failed to reach agreement with certain parties on any matter regarding the drafting of the draft DCO, they should continue to seek such agreement following the Examination, and notify the Planning Inspectorate of any progress (prior to the decision on the DCO application being issued).
Appendix 1

Standard drafting for Article dealing with procedure for discharge of certain approvals

This appendix is provided in conjunction with ‘Good practice point 3’ in the main body of Advice Note Fifteen. Where an applicant seeks for any amendment(s) to be made to the drafting of the standard wording provided in this appendix, it should be justified in full in the draft Explanatory Memorandum accompanying the draft Development Consent Order.

Schedule [X]

**PROCEDURE FOR DISCHARGE OF CERTAIN APPROVALS**

**Applications made for certain approvals**

1.—(1) Where an application has been made to a discharging authority for any consent, agreement or approval required or contemplated by any of the provisions of this Order the discharging authority must give notice to the undertaker of its decision on the application before the end of the decision period.

(2) For the purposes of sub-paragraph (1), the decision period is—

(a) where no further information is requested under paragraph 2, 42 days from the day immediately following that on which the application is received by the discharging authority;

(b) where further information is requested under paragraph 2, 42 days from the day immediately following that on which the further information has been supplied by the undertaker under paragraph 2; or

(c) such longer period as may be agreed by the undertaker and the discharging authority in writing before the end of the period in paragraph (a) or (b).

**Further information**

2.—(1) In relation to any application to which this Schedule applies, the discharging authority has the right to request such further information from the undertaker as is necessary to enable it to consider the application.

(2) If the discharging authority considers such further information to be necessary it must, within 10 business days of receipt of the application, notify the undertaker in writing specifying the further information required.

(3) If the discharging authority does not give such notification as specified in sub-paragraph (2) it is to be deemed to have sufficient information to consider the application and is not subsequently entitled to request further information without the prior agreement of the undertaker.

**Fees**

3.—(1) Where an application is made to the discharging authority for consent, agreement or approval in respect of a requirement, a fee of £[X] is to be paid to that authority.

(2) Any fee paid under this Schedule must be refunded to the undertaker within 42 days of—

(a) the application being rejected as invalidly made; or

(b) the discharging authority failing to determine the application within the decision period as determined under paragraph 1,
unless within that period the undertaker agrees, in writing, that the fee is to be retained by the discharging authority and credited in respect of a future application.

Appeals

4.—(1) The undertaker may appeal in the event that-

(a) the discharging authority refuses an application for any consent, agreement or approval required or contemplated by any of the provisions of this Order or grants it subject to conditions;

(b) the discharging authority does not give notice of its decision to the undertaker within the decision period specified in paragraph 1;

(c) on receipt of a request for further information under paragraph 2 the undertaker considers that either the whole or part of the specified information requested by the discharging authority is not necessary for consideration of the application; or

(d) on receipt of any further information requested, the discharging authority notifies the undertaker that the information provided is inadequate and requests additional information which the undertaker considers is not necessary for consideration of the application.

(2) The appeal process is as follows:

(a) any appeal by the undertaker must be made within 42 days of the date of the notice of the decision or determination, or (where no determination has been made) expiry of the decision period as determined under paragraph 1;

(b) the undertaker must submit the appeal documentation to the Secretary of State and must on the same day provide copies of the appeal documentation to the discharging authority and the requirement consultees;

(c) as soon as is practicable after receiving the appeal documentation, the Secretary of State must appoint a person to determine the appeal (“the appointed person”)\(^1\) and must notify the appeal parties of the identity of the appointed person and the address to which all correspondence for that person’s attention should be sent;

(d) the discharging authority and the requirement consultees must submit written representations to the appointed person in respect of the appeal within 20 business days of the date on which the appeal parties are notified of the appointment of a person under paragraph (c) and must ensure that copies of their written representations are sent to each other and to the undertaker on the day on which they are submitted to the appointed person;

(e) the appeal parties shall make any counter-submissions to the appointed person within 20 business days of receipt of written representations under paragraph (d).

(3) The appointed person must make a decision and notify it to the appeal parties, with reasons, as soon as reasonably practicable.

(4) The appointment of the person pursuant to sub-paragraph (c) may be undertaken by a person appointed by the Secretary of State for this purpose instead of by the Secretary of State.

(5) If the appointed person considers that further information is necessary to enable consideration of the appeal the appointed person must, as soon as practicable, notify the appeal parties in writing specifying the further information required, the appeal party from whom the information is sought, and the date by which the information is to be submitted.

(6) Any further information required under sub-paragraph (5) is to be provided by the party from whom the information is sought to the appointed person and to other appeal parties by the date specified by the appointed person. Any written representations concerning matters contained in the

\(^1\) Appointed by the Planning Inspectorate on behalf of the Secretary of State
further information must be submitted to the appointed person, and made available to all appeal parties within 10 business days of that date.

(7) On an appeal under this paragraph, the appointed person may-

(a) allow or dismiss the appeal; or

(b) reverse or vary any part of the decision of the discharging authority (whether the appeal relates to that part of it or not),

and may deal with the application as if it had been made to the appointed person in the first instance.

(8) The appointed person may proceed to a decision on an appeal taking into account only such written representations as have been sent within the prescribed time limits, or set by the appointed person under this paragraph.

(9) The appointed person may proceed to a decision even though no written representations have been made within the prescribed time limits, if it appears to the appointed person that there is sufficient material to enable a decision to be made on the merits of the case.

(10) The decision of the appointed person on an appeal is to be final and binding on the appeal parties, and a court may entertain proceedings for questioning the decision only if the proceedings are brought by a claim for judicial review.

(11) 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 required under the Order or for the purpose of Schedule [X] (requirements) as if it had been given by the discharging authority. The discharging authority may confirm any determination given by the appointed person in identical form in writing but a failure to give such confirmation (or a failure to give it in identical form) is not to be taken to affect or invalidate the effect of the appointed person’s determination.

(12) Except where a direction is given under sub-paragraph (13) requiring the costs of the appointed person to be paid by the discharging authority, the reasonable costs of the appointed person are to be met by the undertaker. [2]

(13) On application by the discharging authority or the undertaker, the appointed person may give directions as to the costs of the appeal parties and as to the parties by whom the costs of the appeal are to be paid. In considering whether to make any such direction and the terms on which it is to be made, the appointed person must have regard to the Planning Practice Guidance published by the Department for Communities and Local Government on 6th March 2014 or any circular or guidance which may from time to time replace it.

Interpretation of Schedule [X]

5. In this Schedule—

“the appeal parties” means the discharging authority, the undertaker and any requirement consultees.

“business day” means a day other than Saturday or Sunday which is not Christmas Day, Good Friday or a bank holiday under section 1 of the Banking and Financial Dealings Act 1971;

“requirement consultee” means any body named in a requirement which is the subject of an appeal as a body to be consulted by the discharging authority in discharging that requirement.

---

[2] The costs of the appointed person are calculated based on the applicable day rate for a Single Inspector as if he or she were appointed under s78/ s79 of the PA2008. See the National Infrastructure Planning website for more information: [https://infrastructure.planninginspectorate.gov.uk/application-process/application-fees/](https://infrastructure.planninginspectorate.gov.uk/application-process/application-fees/)