Southampton to London Pipeline Project

Deadline 3

Written Summary of Oral Submissions put at the Issue Specific Hearing on the Draft Development Consent Order 27 November 2019 (ISH1)

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Applicant's Written Summary of Case at the Issue Specific Hearing

on the draft Development Consent Order held at the Holiday Inn Farnborough

on the morning of Wednesday 27 November 2019

1 Introduction

1.1 This document summarises the case put forward orally by Esso Petroleum Company, Limited ("**the Applicant"**), at the Issue Specific Hearing on the draft Development Consent Order ("**draft DCO"**) which took place at the Holiday Inn Farnborough, Lynchford Road, Farnborough GU14 6AZ from 10am on Wednesday 27 November 2019 ("**ISH 1**").

1.2 The Applicant was represented at ISH 1 by:

1.2.1 Alexander Booth QC of Francis Taylor Building;

1.2.2 Angus Walker and Tom McNamara of BDB Pitmans LLP;

1.2.3 James Taylor of the Applicant; and

1.2.4 Ian Fletcher of Jacobs Engineering.

1.3 This written summary of case follows the order in which items were address by the Examining Authority ("**ExA**") at ISH 1. Where relevant, the Applicant has answered or clarified points following ISH 1 by inserting "post-hearing notes" throughout this written summary of case. Where a modification to the draft DCO has been made in response to matters arising at ISH 1, reference should be made to the revised draft DCO submitted at Deadline 3 (**Document Reference 3.1(4)**).

1.4 Appended to this written summary of case are the following:

1.4.1 a table setting out the Applicant's responses to local authorities' comments on the draft DCO contained in Local Impact Reports ("**LIRs**") submitted at Deadline 1, the Applicant's comments on third parties' responses to the ExA's written questions on the draft DCO submitted at Deadline 2 and the Applicant's responses to third party comments on the draft DCO contained in written representations submitted at Deadline 2 (Appendix 1 to this written summary of case); and

1.4.2 a table setting out where in this written summary of case the ExA's action points arising from ISH 1 have been addressed (as noted at paragraph 1.3 above, the Applicant has done this by inserting post-hearing notes throughout this written summary of case) (Appendix 2 to this written summary of case).

2 Agenda Item 2: Articles and Schedules of the draft DCO (excluding Schedules 2, 9 and 11)

2.1 The ExA invited the Applicant to provide a brief overview of the articles and schedules of the draft DCO.

2.2 Mr Walker began by explaining that a DCO was a statutory instrument whose purpose was to authorise the construction of a nationally significant infrastructure project (**NSIP**) pursuant to the Planning Act 2008 (**PA2008**). Mr Walker explained that the draft DCO was split into parts, each dealing with a series of powers grouped together for convenience into articles and with a number of accompanying schedules which provide greater detail in relation to those powers.

2.3 Mr Walker then provided a high level overview of the draft DCO, noting that:

2.3.1 Part 1 of the draft DCO dealt with preliminary matters, including the definition of terms used throughout the draft DCO;

2.3.2 Part 2 of the draft DCO dealt with the principal powers of the Applicant to construct and maintain the pipeline from Boorley Green in Hampshire to the West London Fuel Storage Terminal in the London Borough of Hounslow;

2.3.3 Part 3 of the draft DCO dealt with street works required in light of the fact that a large amount of the pipeline was to be constructed across or within streets throughout Hampshire and Surrey;

2.3.4 Part 4 of the draft DCO dealt with miscellaneous powers granted to the Applicant to construct the authorised development, including the ability to discharge water into a watercourse, carry out protective works to buildings and the ability to survey land. These were standard, precedented provisions in DCOs;

2.3.5 Part 5 of the draft DCO dealt with the Applicant's power to acquire land and rights in land or to temporarily occupy land for the purposes of the authorised development;

2.3.6 Part 6 of the draft DCO dealt with miscellaneous provisions, most of which were fairly procedural however this Part also included some important powers in relation to trees and hedgerows;

2.3.7 Schedule 1 of the draft DCO details all of the Works proposed to be constructed as part of the authorised development. Mr Walker explained that the entire pipeline had been divided into a series of smaller sections as follows:

(a) the replacement pipeline itself had been divided into eight sections, known as Works Nos. 1A to 1H.

(b) the works beginning with the number "2" were the works that would appear above ground. These include the pigging station (Work No. 2A), a number of valves (Works Nos. 2B to 2G (inclusive) and 2I to 2O (inclusive)) and one pressure transducer (Work No, 2H);

(c) Works Nos. 3A, 3B and 3C comprised the above ground installations at Boorley Green, Alton and West London Terminal respectively;

(d) Works Nos. 4A to 4AE (inclusive) and 5A to 5T (inclusive) were the temporary construction compounds in Hampshire and Surrey respectively, which were located at intervals along the replacement pipeline route;

(e) the works beginning with "6" and "7" were the logistic hubs in Hampshire and Surrey respectively, of which the Applicant originally intended to have six (Works Nos. 6A – 6C (inclusive) and 7A to 7C (inclusive)) but was at that time proposing to reduce to two (that is to say, only Works Nos. 6B and 6C would be retained), with three of those hubs which were originally proposed being removed from the application in their entirety (Works Nos. 6A, 7B and 7C) and the remaining hub (Work No. 7A) becoming a construction compound instead; and

(f) the works beginning with "8" and "9" related to the construction accesses in Hampshire and Surrey, and works beginning with "10" and "11" dealt with permanent access routes to the authorised development in Hampshire and Surrey.

2.3.8 In order to see physically where the Works in Schedule 1 of the draft DCO were to take place, Mr Walker referred to the Works Plans and Land Plans;

2.3.9 Schedule 2 listed the Requirements which the Applicant must comply with in order to carry out the authorised development. Mr Walker confirmed that these were similar to planning conditions in the case of development authorised under the Town and Country Planning Act 1990;

2.3.10 Schedule 3 related to the powers in article 9 of the draft DCO and sets out those streets which were to be temporarily altered and those which were to have works being carried out within them (in fact, there was only one of those – Station Road in Ashford);

2.3.11 Schedule 4 related to the powers in article 10 of the draft DCO and confirmed the list of streets which the pipeline was running in or across and which were therefore subject to street works under the draft DCO;

2.3.12 Schedule 5 related to the powers in article 12 of the draft DCO and was divided into two parts. Mr Walker explained that the first part deals with streets and public rights of way which were being temporarily stopped up, diverted, altered and restriction and a temporary diversion was to be provided as the pipeline went past them. The second part dealt with streets and public rights of way which were being temporarily stopped up, altered, diverted or restricted but in relation to which no temporary diversion was to be provided;

2.3.13 Schedule 6 dealt with modifications to the underlying compulsory acquisition legislation to enable coexistence with the PA2008 regime;

2.3.14 Schedule 7 related to article 29 of the draft DCO and detailed the parcels of land of which the Applicant was only seeking powers of temporary possession. Mr Walker explained that the Applicant was seeking temporary possession of these parcels of land for the duration of the construction work(s) listed in the schedule (plus one year

following completion of those works), after which the land would be handed back to the relevant landowner;

2.3.15 Schedule 8 related to article 42 of the draft DCO and listed the trees which were subject to Tree Preservation Orders and which might have works carried out to them under article 42 in order to construct the authorised development;

2.3.16 Schedule 9 contained Protective Provisions, generally for statutory undertakers, who had apparatus in the path of the replacement pipeline. Mr Walker explained that these provisions were to protect the interests of these statutory undertakers. The draft DCO contained three sets of protective provisions at present: for the protection of electricity, gas, water and sewerage undertakers (part 1), for the protection of telecommunications code network operators (part 2) and for the protection of railway interests (part 3);

2.3.17 Schedule 10 related to article 41 of the draft DCO and listed the important hedgerows which might be removed in order to construct the authorised development; and

2.3.18 Schedule 11 listed the application documents which would be certified by the Secretary of State if and when a decision to make the draft DCO was made.

2.4 The ExA asked the Applicant whether it would be responding to the comments raised by Surrey County Council ("**SCC**") on the draft DCO in its LIR, as these comments did not appear to have been addressed by the Applicant as yet.

2.5 Mr Walker confirmed that the Applicant was grateful for the comments on the draft DCO which had been provided by SCC (and by other parties) and explained that the draft DCO had indeed been amended at Deadline 2, in part to accommodate two points raised by SCC in its LIR. Mr Walker also confirmed that the Applicant had resolved that it would be more appropriate to respond substantively to SCC's comments on the draft DCO, and those of other interested parties, at Deadline 3, with the benefit of further informed discussion at ISH 1.

Post-hearing note: the Applicant has appended at Appendix 1 to this written summary of case a table which sets out the Applicant's response to comments on the draft DCO set out in LIRs, written representations and in third party responses to the ExA's written responses on the draft DCO.

Deemed consent under Schedule 2 and other provisions of the draft DCO

2.6 The ExA sought the Applicant's and interested parties' views regarding the deemed consent periods contained within the draft DCO. Specifically, Mr Walker made oral submissions regarding the South Downs National Park Authority's ("**SDNPA**") request to amend the period within which deemed consent would apply under the Requirements in Schedule 2 of the draft DCO from 28 days to 56 days.

2.7 Mr Walker explained that the Applicant had reviewed previous made DCOs and considered SDNPA's suggestion of 56 days to be excessive in this instance. Mr Walker referred to the model drafting in the Planning Inspectorate's (**PINS**) Advice Note 14, which stipulated 42 days as the appropriate timescale. Mr Walker therefore accepted that, with regard to Requirement 18 of Schedule 2, the 28 day period would be substituted for 42 days.

Post-hearing note: the Applicant has now modified the time period within which deemed consent would apply under Requirement 18(1) (which is now Requirement 21(1)) from 28 days to 42 days in the revised draft DCO submitted at Deadline 3 (Document Reference 3.1(4)).

2.8 In response to SCC's concern that those local authorities being consulted under Articles 9, 10, 12 and 14 and Schedule 2 of the draft DCO could miss the fact that deemed consent would be granted after a specific period, Mr Walker explained that the Applicant was happy to note in any correspondence to local authorities that there was a deadline after which deemed consent will be assumed. Mr Walker also confirmed that the Applicant would consider whether it would be appropriate to amend the draft DCO to make this a legal requirement.

Post-hearing note: the Applicant has considered SCC's comment further but, whilst reiterating that it is content to make clear in any correspondence the terms upon which deemed consent would apply, has opted against making this an express legal requirement under the draft DCO. The Applicant considers that it is more appropriate to deal with practical, working arrangements such as these on a more informal basis. Breach of the terms of a DCO is a criminal offence, thus any inadvertent failure to give notice of the fact that deemed consent applies in correspondence could in theory amount to a criminal offence.

In the Applicant's view, this would be an unwelcome and no doubt unintended result. The Applicant has checked but is not aware that previous DCOs have sought to include express wording to this effect and it should also be noted that the drafting of these provisions does itself already provide clarity about the circumstances in which deemed consent would apply. The Applicant does not therefore consider that further wording is required.

The definition of "maintain" in article 2(1): diversion of the pipeline as a maintenance activity

2.9 The ExA asked the Applicant to explain why the term "divert" had been included in the definition of "maintain" at Article 2 of the draft DCO if "divert" applied only within the Limits of Deviation ("**LoD**").

2.10 Mr Walker explained that the word "divert" had been included because the Applicant might need to replace sections of the pipeline in future, should they malfunction, and that it may be the case that those replacement sections could not be replaced in exactly the same location (i.e. within the 6.3 metre easement strip in respect of which the Applicant is seeking to acquire permanent rights). Mr Walker added that the original drafting of the draft DCO stated that the diversion had to be within the Order Limits as opposed to the LoD, however that was modified in the revised draft DCO submitted at Deadline 2 (**Application Document 3.1(3)**) in response to Written Question DCO.1.4.

Mr Taylor also added that the land deeds which the Applicant had offered contained 'lift and shift' provisions, and therefore a landowner could request that the Applicant move the pipeline to reflect the suggested use of the landowner's land. Mr Taylor clarified that it would be incumbent upon the Applicant to seek to secure any land rights required to divert the pipeline away from the permanent easement strip by voluntary agreement, assuming that the power to acquire those rights by compulsion would at point have expired.

Definition of "maintain" in article 2(1): replacement of the pipeline as a maintenance activity

2.11 In response to the ExA's suggestion that article 4 of the draft DCO should be amended to exclude the possibility of the wholesale replacement of the pipeline, Mr Walker explained that the Applicant would not seek to replace the whole of the pipeline under article 4 as the pipeline would need to stop operating for the duration of any works and this would not be a viable solution in terms of maintaining sufficient fuel supplies at the West London Fuel Storage Terminal. As set out in response to Written Question DCO.1.5, the Applicant also considered that the replacement of the whole of the pipeline would be precluded by the proviso which was built into the definition of "maintain" that any maintenance works must not give rise to any materially new or materially different environmental effects to those identified in the environmental statement ("**ES**").

2.12 Mr Walker also noted that in drafting the definition of "maintain", a number of previously made DCOs were considered. That included the Thorpe Marsh Gas Pipeline Order 2016, where the word "replace" did appear, without moderation, in the definition of "maintain" in article 2(1) of that Order. This notwithstanding, Mr Walker suggested that the words "part but not all", or words to that effect, could be inserted into article 4 of the draft DCO to address the ExA's concern that the Applicant could in theory seek to replace the whole pipeline at any one time.

Post-hearing note: the Applicant has now modified the definition of "maintain" in the revised draft DCO submitted at Deadline 3 (Document Reference 3.1(4)) to address the concerns raised by the ExA regarding the replacement of the entirety of the pipeline as a maintenance activity.

Definition of maintain in article 2(1): decommissioning of the pipeline as a maintenance activity

2.13 Mr Walker confirmed that the Applicant was seeking the right to abandon or decommission the pipeline under the definition of "maintain" in article 2(1). In response to the ExA's question as to how the Applicant would decommission the pipeline, Mr Walker explained that the decommissioned pipeline would be retained in situ and filled with neutral grout rather than being dug up and removed, as that method served to minimise disruption to local communities and stakeholders.

2.14 The ExA expressed concern that, by including the terms "decommission" and "abandon", the definition of "maintain" was potentially too broad. Mr Walker explained that the set of verbs used in the current drafting of the definition were reflective of those set out in the definition of maintain in article 2(1) of the Thorpe Marsh Gas Pipeline Order 2016. Mr Walker explained that the Thorpe Marsh Project was an appropriate parallel for this scheme, as both related to the construction of a pipeline.

Article 6(2)

2.15 The ExA asked the Applicant to explain why the tailpiece remained in article 6(2) of the draft DCO, given in particular that PINS' Advice Note 15 expressed a reluctance for the inclusion of tailpieces in Orders granting development consent.

2.16 Mr Walker explained that whilst the tailpiece in article 6(2) would allow the LoD in article 6(1) to be exceeded, this would only be permitted in very limited circumstances and only where the Secretary of State agreed that such exceedance would not give rise to any materially new or materially different environmental impacts to those identified in the ES. Mr Walker confirmed

that the need for approval of the Secretary of State provided an appropriate check upon the Applicant's powers under article 6, to ensure that no additional significant environmental impacts were caused.

2.17 The ExA and some of the local authorities expressed concern that the tailpiece in article 6(2) might allow the Applicant to undertake work outside the LoD on land which had not been subject to environmental impact assessment. In response, Mr Walker explained that any departure from the LoD would need to be accompanied by evidence that a deviation in excess of the limits in article 6(1) would not exceed the environmental effects presented in the ES and that no new significant environmental impacts were expected.

2.18 To illustrate the circumstances in which article 6(2) might apply in practice. Mr Walker gave the example of where the Applicant was installing the replacement pipeline and, during construction, encountered a large rock which the pipeline would need to route around. Mr Walker explained that a non-material change application could take up to nine months to be approved and that, more significantly, disruption would be caused to the public during this period of delay. As such, Mr Walker clarified that the Applicant did not wish or indeed expect to resort to this power but sought a more agile way of dealing with that potential issue. It was for this reason that the Applicant had sought to include the power in article 6(2) of the draft DCO.

2.19 In response to the ExA's question whether the LoD in article 6 applied to vertical and lateral limits of deviation, Mr Walker confirmed that, as drafted, article 6 applied to both vertical and lateral LoD.

Post-hearing note: the Applicant has considered the position further following ISH 1 and can confirm that the power to deviate beyond the limits of deviation described in article 6(1) of the draft DCO is only intended to apply as regards the vertical limits of deviation described in articles 6(1)(b), (c) and (d) of the draft DCO. The power would not be sought in relation to the lateral limits of deviation described in article 6(1)(a). The Applicant has therefore amended article 6(2) of the draft DCO to clarify that the power only applies to the vertical LoD.

2.20 There was a further request at ISH 1 for the Applicant to consider the extent to which any application for consent under article 6(2) should be dealt with under the procedure for discharge of Requirements in Part 2 of Schedule 2.

Post-hearing note: the Applicant considers that the fact that any application under article 6(2) would need to be considered and approved by the Secretary of State provides an appropriate degree of control over the exercise of this power. Planning authorities would not be excluded from this process, since article 6(2) confirms that the Secretary of State would need to consult with the relevant planning authority upon receipt of any application under that article.

Article 41(1) of the draft DCO: works to trees or shrubs which are "near any part of the authorised development"

2.21 The ExA asked the Applicant to explain the meaning of the words "near any part of the Authorised Development" in article 41(1) of the draft DCO.

2.22 Mr Walker confirmed that the Applicant considered the ordinary meaning of words was sufficient in this instance. Mr McNamara also pointed out that this wording was used in the Richborough Connection Order 2017. In response to the ExA's suggestion that the Applicant's powers under article 41 should be further constrained, Mr Walker explained that the Applicant's power to undertake works to trees under that provision was not unlimited. In particular, the Applicant was only able to undertake works if it reasonably believed it to be necessary to prevent trees or shrubs from obstructing or interfering with the construction, operation or maintenance of the authorised development or from constituting a danger to those using the authorised development.

2.23 The inclusion of the words "reasonably believes" in article 41(1) also added a layer of objectivity to the exercise of this power. Mr Walker therefore emphasised that in deciding to exercise powers under article 41, it had to be reasonable not only in the Applicant's view but in the view of the objective person.

Post-hearing note: noting the ExA's concerns regarding the use of the words "near any part of the authorised development" in article 41(1), the Applicant has modified that provision so that it is now limited to trees and shrubs within or overhanging land within the Order limits or the roots of trees or shrubs which extend into the Order land.

Article 41: ecological considerations

2.24 The ExA expressed concern that the power in article 41 did not take into account the fact that trees and vegetation are habitats for protected wildlife. Mr Walker explained that provisions dealing with ecological mitigation operated separately to article 41. Mr Walker explained that the Applicant was obliged to replace vegetation where practicable under commitments G87 and G91 of the Code of Construction Practice ("**CoCP**"). Requirement 13 (protected species) at Schedule 2 (Requirements) of the draft DCO dealt with protected species and would apply to any activity under the draft DCO, including activity undertaken in accordance with article 41. Mr Walker also clarified that the Applicant could not do anything to interfere with bats until mitigation measures were approved by Natural England as they were a legally protected species.

Article 41: removal of non-important hedgerows

2.25 The ExA asked the Applicant whether it would be possible to include a list of all hedgerows affected by the construction of the authorised development in a Schedule to the draft DCO, whether categorised as important or not.

2.26 Mr Walker explained that the Applicant had listed important trees in Schedule 10 as this reflected the special status afforded to those hedgerows under the Hedgerow Regulations 1997. The Applicant had explained the rationale for the distinction in response to written question DCO.1.28 and stood by that rationale. Mr Walker did however confirm that, in light of the ExA's comments, the Applicant would consider further whether it would be appropriate to list all hedgerows (including non-important hedgerows) in Schedule 10 of the draft DCO and confirm its position at Deadline 3.

Post-hearing note: the Applicant stands by its rationale for distinguishing between important and other hedgerows in article 41 and Schedule 10 of the draft DCO, for the reasons explained at ISH 1 and in response to written question DCO.1.28. The Applicant

would emphasise that the approach taken to the drafting of the article accords with precedent. In this regard, the Applicant refers to article 37(4) of the Thorpe Marsh Gas Pipeline Order 2016.

Part 3 of the draft DCO: street powers

2.27 The ExA asked the Applicant to clarify why there was a need for broad powers in articles 9 (power to alter layout of streets) and 10 (street works) of the draft DCO.

2.28 In relation to article 9 of the draft DCO, Mr Walker explained that article 9(1) referred to the temporary alterations to streets which the Applicant was aware of, whereas article 9(2) provided a general power to alter streets which were not listed in Schedule 3 but which could only be exercised with the consent of the street authority. This was a standard approach in made DCOs. Mr Walker added that the Applicant was confident that the list at Schedule 3 detailing those roads requiring temporary layout alterations was complete (indeed there is only one street which the Applicant seeks powers to temporarily alter under article 9). Mr Walker explained that article 10 was drafted in a similar way to article 9 except that it applied to street works as opposed to alterations to the layout of streets.

2.29 In response to the ExA's question as to why powers relating to layout alterations and street works had been spread over two separate articles as opposed to being contained in one article, Mr Walker explained that, so far as the Applicant was aware, this separation of the two powers is precedented in almost all previously made DCOs and was therefore common practice. The Applicant has simply sought to follow drafting convention which was precedented and well understood; and it would be a risk to depart from it. Moreover, the Applicant could be undertaking works within a street without altering its layout, so there was a distinction to be made between the two powers.

2.30 The ExA asked the Applicant to clarify the circumstances in which the power to permanently alter streets under article 9(2) might be deployed. Mr Walker explained that this might be used where the street could operate perfectly well after its alteration and there was no need to cause disruption and reinstate it, provided the street authority agreed and was content that the street did not need to be reinstated to its former condition. Mr Booth also added that the power under article 9(2) could be used where an alteration was made to a street which was relatively minor and it would cause disruption to the local community to require reinstatement works to be undertaken.

2.31 In response to Hampshire County Council's ("**HCC**") concern that the 28 day consultation period in article 9(5) and 10(3) might be too short, Mr Walker also confirmed that the Applicant would consider lengthening this period to 42 days.

Post-hearing note: the Applicant can confirm that the 28 day period referred to in articles 9 and 10 has been extended to 42 days in the revised draft DCO submitted at Deadline 3 (Document Reference 3.1(4)). The Applicant has also replicated these changes in articles 12, 14 and 15.

The Applicant has also considered whether it would be appropriate for relevant planning authorities to be consulted where an application is made to exercise the powers in articles 9, 10, 12 and 14 of the draft DCO. Ultimately, however, the Applicant considers that these are properly matters for determination by the street authority and this is the

approach which has consistently been taken in the drafting of previous DCOs and which the Applicant wishes to replicate, through a desire to avoid the process of implementing the DCO becoming unworkable and / or unduly complex.

Article 11 of the draft DCO and the South East Permit Scheme ("SEPS")

2.32 The ExA asked the Applicant to respond to submissions made by SCC at ISH 1 regarding article 11 of the draft DCO and, more particularly, SCC's case that SEPS should apply to works proposed to be constructed by the Applicant within local highway authority streets along the length of the pipeline route.

2.33 Mr Walker explained that, whilst the Applicant was generally content to mirror the provisions of SEPS (and the equivalent scheme enforced by HCC) in terms of notification of works, the Applicant remained concerned that certain provisions of SEPS could substantially affect the works. Mr Walker drew attention by way of example to SCC's power, where significant road works had recently been undertaken, to impose a moratorium on all other street works within that street for a period of six months.

2.34 Mr Walker explained that it was the Applicant's position that the provisions of SEPS (and the HCC equivalent) could generally be mirrored / applied by the draft DCO, with certain provisions disapplied in the same manner that elements of the 1991 Act were disapplied by article 11.

2.35 Mr Walker conformed that the Applicant appreciated the concerns of both SCC and HCC in relation to that issue, and explained that the Applicant would like to engage in further discussions with both authorities in order to reach a positive outcome for all parties.

Post-hearing note: the Applicant can confirm that it has held further discussions with both SCC and HCC in relation to this issue following ISH 1. The Applicant is in discussion with SCC and HCC regarding proposed wording for the draft DCO which would seek to apply (insofar as relevant and subject to limited exceptions) SEPS and the Hampshire County Permit Scheme to the construction and maintenance of the authorised development. The Applicant will update the draft DCO at Deadline 4 to reflect the latest drafting in this respect.

Article 14: access to works

2.36 The ExA asked the Applicant to explain whether there was a need to include a requirement for the consent of the local planning authority to be obtained in order to exercise the powers under article 14 of the draft DCO.

2.37 Mr Walker explained that, as a matter of general principle, the purpose of a DCO was to bring together as many of the powers and consents needed to build and operate the project as reasonably possible without the need for separate consents. Therefore, the Applicant did not accept that the power in article 14 should be subject to a general condition which would require the consent of the relevant planning authority to be obtained before that power could be exercised. In any event, it was the Applicant's view that the street authority would be the appropriate body to determine such matters, as opposed to the relevant planning authority.

2.38 As regards the specific drafting of the provision, Mr Walker confirmed that, when exercising the powers under article 14(1), the Applicant was not required to obtain the consent of the relevant street authority. Mr Walker explained that no consent was required in this scenario because

the accesses referred to in article 14(1) had been specifically identified in Schedule 1 to the DCO and interested parties, including the street and planning authorities, had the opportunity to provide comment during the examination period. Mr Walker also added that no consent was required here as these access points had been assessed in the ES and therefore no additional significant environmental impacts were expected to arise as a result of the works.

2.39 By contrast, Mr Walker clarified that the consent of the relevant street authority was required when exercising the powers under article 14(2), as these access points had not been identified in Schedule 1 and, as such, the street authority would not have had the opportunity to comment on them as part of this examination. Mr Walker therefore confirmed that any access points identified which were not set out in the draft DCO would require the consent of the street authority before such works could begin in accordance with articles 14(2) and (3).

2.40 In response to some of the local authorities' suggestion that the local planning authority should be consulted upon proposals to form or alter the layout new or existing means of access under article 14(2), Mr Walker confirmed that the Applicant would consider the drafting of that provision and respond in writing at Deadline 3 to state its position. Mr Walker also confirmed that, since there was confidence on the part of the Applicant that it has identified all of the accesses required in Schedule 1, it would consider removing article 14(2) from the draft DCO altogether.

Post-hearing note: as set out in the post-hearing note at paragraph 2.31 of this written summary of case, the Applicant has reflected further upon the drafting of this provision and has, in the revised draft DCO submitted at Deadline 3 (Document Reference 3.1(4)), modified article 14(2) to extend the period within which deemed consent would apply from 28 days to 42 days. However, for the reasons set out in paragraph 2.31, the Applicant considers that applications for approval under article 14 are properly matters for consideration and determination by the street authority.

Notwithstanding the Applicant's confidence that Schedule 1 contains a comprehensive list of the permanent and temporary accesses which are required to be constructed, the Applicant also considers that it is appropriate to retain a general power (subject to the consent of the street authority) to form and layout means of access under article 14(2), should practical circumstances arise during construction which necessitate recourse to that power. Since the power is subject to the prior consent of the street authority, the Applicant does not consider that there is any prejudice to its inclusion in the draft DCO and it is a power that has been consented very frequently in previous made Orders.

Article 12: temporary stopping up of streets

2.41 The ExA asked the Applicant to clarify the intent behind the table at Part 2 of Schedule 5 which refers to streets being "temporarily stopped up where no diversion is to be provided".

2.42 The table at Part 2 of Schedule 5 is a list of those streets which the Applicant may need the ability to temporarily stop up during construction of the authorised development. It is the Applicant's intention that these streets would only be temporarily stopped up for a very short duration and indeed in many cases the Applicant considers that it would be possible to maintain a single lane of traffic, subject to the room available in any given street. Mr Walker confirmed that the Applicant would consider further the drafting of article 12 and Part 2 of Schedule 5 following ISH 1 in the light of discussion at ISH 1.

Post-hearing note: as noted, the streets listed in Part 2 of Schedule 5 are those which the Applicant may need to temporarily stop up for very short periods of time in order to lay the replacement pipeline and which have been discussed with the relevant highway authority. This is because the LoD approach adopted by the Applicant means that the pipeline could in principle be located anywhere within the carriageway in each case. This means that the Applicant may need the ability to temporarily stop up the streets listed in Part 2 of Schedule 5, depending upon the final location of the replacement pipeline within the LoD. However, article 12 and Schedule 5 also provide for the alternative scenario, that is to say that the Applicant may restrict access along the streets in Schedule 5 instead of temporarily stopping them up, where works are capable of being undertaken without requiring the full closure of the street.

In the revised draft DCO submitted at Deadline 3, the Applicant has made minor modifications to article 12 to make the intention clearer in this regard.

Agenda Item 3: Schedule 2 (Requirements)

2.43 The ExA raised a number of questions in relation to the Requirements in Schedule 2 of the DCO.

Requirement 3 (stages of the authorised development)

2.44 The ExA asked the Applicant to explain how it was proposed, given the number of local planning authorities along the route of the replacement pipeline, to ensure that there was a coordinated approach in the information being submitted to local planning authorities and consistency more generally as regards the process of discharging Requirements.

2.45 Mr Walker explained that Requirement 3 was a notification process and does not involve an approval being sought. Mr Walker explained that the Applicant did not consider that it was appropriate to seek approval of a staging plan from the numerous local planning authorities as those authorities could disagree with each other, resulting in an impasse before the Works could commence.

2.46 Mr Walker added that it was the Applicant's prerogative to determine how the project was divided and it was usual for this division to take place at the start of the project. Mr Walker added that the way the pipeline was divided might not necessarily correspond to the way in which the Works were divided in Schedule 1, as the stages would ultimately depend on the construction contracts which were agreed by the Applicant. As such, Mr Walker confirmed that the division of the pipeline may follow the order of Works 1A to 1H but this cannot be guaranteed (and nor was it necessary that it had to follow that order) until construction contracts were secured.

Post-hearing note: the Applicant confirmed at ISH 1 that it would give further consideration to the drafting of Requirement 3 and the relevant stages of the authorised development. As explained at ISH 1, the drafting of Requirement 3 reflects the early stage in the development of the project and the limited nature of engagement with and input from contractors to date. The Applicant is concerned to ensure that the drafting of the Requirement does not have the effect of constraining unduly the Applicant's ability to implement the project in the most appropriate way.

The Applicant notes that a number of authorities have requested that the Requirement should be amended to provide for the approval of a staging plan by the relevant planning authorities. The Applicant disagrees with this proposal. The Applicant is concerned that any provision requiring approval of a staging plan could curtail the Applicant's ability to determine how the authorised development would be implemented most appropriately. Unlike the other plans, schemes and strategies listed in Schedule 2, the staging plan does not itself secure mitigation for the authorised development. Its function is to indicate how the authorised development is to be divided up into stages and provides the link to the other Requirements – which are subject to relevant planning authorities' approval – which provide for the plans, schemes and strategies to be prepared and approved for each stage of the authorised development.

Requirement 5 (code of construction practice)

2.47 The ExA asked the Applicant to explain how it would ensure that the CoCP was secured and enforced, and why a tailpiece was required.

2.48 The CoCP was a certified document and is secured by Requirement 5 of the draft DCO. It therefore had to be complied with by the Applicant. The purpose behind allowing changes to the CoCP to be agreed, with the consent of the relevant planning authority, was to provide a degree of flexibility to enable the Applicant to seek localised changes to the CoCP, where relevant and appropriate in a particular location, as set out in the Applicant's response to Written Question DCO. 1.32.

Post-hearing note: the Applicant has considered the drafting further in response to the ExA's action point following ISH 1 and stands by its proposed drafting of this Requirement. For the reasons set out in response to Written Question DCO. 1.32, the Applicant considers that the drafting of the Requirement provides appropriate checks upon any changes to the approved CoCP, since those changes would necessarily be subject to the prior approval of the relevant planning authority. The Applicant is also concerned that any variations to the certified CoCP which are not expressly authorised by the draft DCO could in principle place the Applicant in breach of the draft DCO, to the extent that the change agreed results in a departure from the details approved in the certified CoCP.

However, in response to the ExA's request, the Applicant can confirm that it has, as advised at ISH 1, amended the draft DCO to include a Requirement for the Applicant to establish and maintain in an electronic form a public register of the Requirements in Schedule 2 of the draft DCO. This is set out at Requirement 20 of the revised draft DCO submitted at Deadline 3 (Document Reference 3.1(4)). This Requirement would, *inter alia*, require the Applicant to track any changes to the certified CoCP which may subsequently be agreed with a relevant planning authority, to ensure that there is appropriate visibility of those changes by members of the public.

Requirement 6 (construction environmental management plan)

2.49 The ExA asked the Applicant to explain how, given the level of detail contained in the outline Construction Environment Management Plan ("**CEMP**") as submitted, the final CEMP for any stage could be considered to be substantially in accordance with its outline predecessor.

2.50 Mr Walker acknowledged that the outline CEMP was only an outline document and did not contain a huge amount of detail as this was reflective of the stage the project had reached. Mr Walker explained that whilst Requirement 6 required the final CEMP for any stage of the authorised development to be substantially in accordance with the outline CEMP, paragraph (2) of Requirement 6 also confirmed that the final version of the CEMP for any stage must, amongst other things, reflect the substantial list of mitigation measures set out in the Register of Environmental Actions and Commitments ("**REAC**") and must also include a suite of management plans and measures to mitigate the impacts of construction of the authorised development.

2.51 In response to the ExA's comment that a number of the LIRs pointed towards a standalone Requirement for the Applicant to provide a community engagement plan (which was currently one of the management plans which formed part of the CEMP), Mr Walker agreed that the Applicant was content to provide for this in the draft DCO.

2.52 In response to a number of local authorities' requests, Mr Walker also agreed that the Applicant was content to commit to providing a lighting plan.

Post-hearing note: the Applicant can confirm that it has, in the revised draft DCO submitted at Deadline 3 (Document Reference 3.1(4)), now included a separate Requirement 15 confirming that no stage of the authorised development must commence until a community engagement plan for that stage, which must be based on the outline community engagement plan, has been submitted to and approved by the relevant planning authority. The Applicant will be providing an outline Community Engagement Plan at Deadline 4.

The Applicant has also modified Requirement 6 to reflect discussion at the environmental issue specific hearings in the week commencing 2 December 2019. The Applicant has confirmed that it will be providing a revised outline CEMP at Deadline 4. This would include the matters previously listed in paragraph (2) of the Requirement, in particular the management plans and measures set out in Requirement 6(2)(d).

Given the further detail that will be included in the outline CEMP, and that any CEMP submitted for approval under Requirement 6 must be based upon the outline CEMP, the Applicant does not consider that it is necessary to specifically list the plans, measures and other matters in the Requirement itself. For the avoidance of doubt, however, the Applicant can confirm that the outline CEMP will include reference to the production of a construction lighting plan, so far as such a plan is relevant to any stage of the authorised development.

The Applicant has made some further minor changes to the wording of Requirement 6 in order to reflect the deletion of paragraph (2) and to improve the clarity of the drafting. Provision has also been made for consultation with the LLFA and / or EA as regards any water mitigation and management measures relevant to a stage of the authorised development.

Requirement 7 (construction traffic)

2.53 The ExA suggested that relevant planning authorities and other bodies such as Network Rail should be included within the ambit of consultation on the construction traffic management plan

("**CTMP**") under Requirement 7. Some of the local authorities went further by suggesting that the local planning authority and relevant highway authority should both be responsible for discharging Requirement 7.

2.54 Mr Walker responded that the Applicant would consider introducing a consultation provision with the relevant local planning authority and other parties, such as Network Rail. In response to the local authorities' suggestion, Mr Walker explained that the Applicant resisted having more than one body sign off any document since, if the two consenting authorities did not agree with each other, this could result in delay to the delivery of the project. Mr Walker also considered that the highway authority was the appropriate body to sign off the CTMP, not the local planning authority. Mr Walker summarised that the Applicant was broadly content to introduce more consultees but remain with one overall discharging body.

2.55 In response to the ExA's question whether a relevant highway authority could be a discharging authority, Mr Walker explained that Requirements in a DCO were not entirely the same as planning conditions for planning permission and that any party was capable of discharging a Requirement under a DCO.

2.56 The ExA also asked the Applicant to confirm whether the CTMP would be a certified document.

2.57 Mr Walker explained that it was not the intention of the Applicant to certify the CTMP because no outline CTMP has been submitted as part of the application. The Applicant's approach had been to collect together all of the commitments and place them in a single document – the REAC - rather than be subject to separate commitments in different outline documents. Mr Walker recognised that there was concern regarding this approach, and that the Applicant would consider separating out the commitments in the REAC and placing them in separate outline documents.

2.58 Mr Walker clarified however that the Applicant did not consider that the submission of outline documents would be necessary as a matter of course, the details of surface and foul water drainage being a good example. In that regard, Mr Walker confirmed that Requirement 9 only related to permanent above ground infrastructure and, since there was so little permanent above ground infrastructure proposed, there was not expected to be a large amount to meaningfully say in any outline submission. Nevertheless, Mr Walker did confirm that the Applicant was willing to produce an outline CTMP.

Post-hearing note: the Applicant has modified Requirement 7 in the revised draft DCO submitted at Deadline 3 (Document Reference 3.1(4)) to include provision for consultation on the CTMP with the local planning authority. The Applicant does not consider that it is necessary for other bodies, such as Network Rail, to be involved in the discharge process under Requirement 7. The Applicant is also concerned to ensure that the process of discharging Requirements does not become unduly complex or lengthy, which may result from numerous bodies, with different and potentially competing interest, being involved in the discharge process. As regards Network Rail, the Applicant considers that the protection of its interests, rights and assets would be appropriately addressed by protective provisions for its benefit, which the Applicant has included in the draft DCO and which are subject to ongoing negotiation.

The Applicant can also confirm that an outline CTMP will be submitted to the examination at Deadline 4. Requirement 7 of the revised draft DCO submitted at

Deadline 3 has therefore been modified to refer to the outline CTMP, in anticipation of that plan being provided.

Requirement 8 (hedgerows and trees)

2.59 The ExA asked the Applicant to explain why a three year aftercare period had been included in Requirement 8(3) as opposed to five years.

2.60 Mr Walker explained that whilst the Applicant did provide evidence that three years was an appropriate aftercare period in response to Written Question DCO.1.35, in light of the concern that this approach appeared to have generated the Applicant was content to increase the aftercare period in Requirement 8(3) to five years.

Post-hearing note: the Applicant has modified Requirement 8(3) in the revised draft DCO submitted at Deadline 3 (Document Reference 3.1(4)) to increase the aftercare period for planting from three years to five years.

2.61 The ExA also suggested that the words "must be replaced with planting material of the same specification as that originally planted" in Requirement 8(3) should be replaced with the words "must be replaced with planting material as approved by the relevant planning authority" in order to ensure that any species of plants which proved to be inappropriate were not simply replaced with the same species.

2.62 Mr Walker noted that the Applicant would also need to consider the wishes of the landowner when replanting as the replanting would in some instances take place on a private landowner's land. As such, Mr Walker explained that the Applicant was seeking to balance those different considerations but was conscious of the concern raised by the ExA. Mr Walker indicated that the Applicant would consider the position and respond accordingly at Deadline 3.

Post-hearing note: the Applicant can confirm that it has now modified Requirement 8(3) to reflect the discussions at ISH 1.

Requirement 11 (archaeology)

2.63 The ExA asked the Applicant when a completed Archaeological Mitigation Strategy (AMS) would be submitted to examination.

2.64 Mr Walker explained that the Applicant remained in discussions with the relevant local authorities and was optimistic that the AMS would be completed and submitted before the end of the examination.

2.65 On a related matter, the ExA asked the Applicant to provide some explanation behind the way in which the definition of "commence" in article 2 of the draft DCO had been drafted.

2.66 Mr Walker explained that as drafted article 2 did not involve anything that was particularly intrusive but did include archaeological surveys and investigations. Mr Walker explained that such surveys and investigations were typical pre-commencement activities, with the main works beginning only once such pre-commencement activities had been undertaken.

Requirement 12 (landscape and ecological management plan)

2.67 The ExA asked the Applicant to confirm whether it could provide an outline Landscape and Ecological Management Plan ("**LEMP**") given the extent of reliance placed by the Applicant upon the mitigation measures contained in the LEMP and, if so, whether this outline LEMP would be a certified document.

2.68 Mr Walker confirmed that the Applicant was willing to provide an outline LEMP but that one would not be ready by Deadline 3. Mr Walker proposed that an outline LEMP would be submitted to the ExA by Deadline 4 and also noted that the drafting of Requirement 12 would need to be modified to reflect that.

Post-hearing note: in anticipation of the outline LEMP being submitted at Deadline 4, the Applicant has modified Requirement 12 so that any LEMP approved pursuant to that Requirement must be based on the outline LEMP.

Requirement 14 (construction hours)

2.69 The ExA asked the Applicant to explain whether the construction hours set out in Requirement 14 were appropriate in light of seasonal constraints and the characteristics of rural areas as opposed to other urban areas where works would be taking place.

2.70 Mr Walker explained that there were a number of locations where no receptors were affected by longer working hours and, as such, the Applicant did not want its construction hours to be restricted across the whole of the project. Mr Walker explained that the Applicant was conscious to minimise impacts on receptors from working hours so, whilst keeping the wider period in Requirement 14, the Applicant was willing to consider shorter periods in certain urban areas. In terms of summer and winter working, Mr Walker explained that the Applicant intended for longer working hours in the summer and shorter hours in the winter.

2.71 Mr Walker explained that amending Requirement 14 to take account of differing working hours in urban and rural areas and the seasonal impact on working hours could make the Requirement itself too complicated. Instead, Mr Walker suggested that the Applicant would consider adding additional commitments in the REAC to address those points. Mr Walker also added that the Applicant was conscious to minimise any impacts on wildlife during specific seasons and was considering the addition of further commitments in the REAC to reflect this.

Post-hearing note: the Applicant can confirm that Requirement 14 has been modified in the revised draft DCO submitted at Deadline 4 (Document Reference 3.1(4)) to reduce the core working hours from 0800 to 1800 on weekdays and Saturdays except in the event of an emergency. The drafting of the Requirement has also been constrained further, by clarifying that the activities in paragraph (3) of Requirement 14 may only *continue* beyond the core working hours in paragraph (1) (i.e. they may not be commenced afresh outside the core working hours) and only then in exceptional circumstances. The list of activities in paragraph (4), which may also be undertaken outside the core working hours, has also been narrowed in scope.

New requirement to prevent existing and new pipelines operating concurrently

2.72 The ExA asked the Applicant to confirm whether the current and proposed pipelines could run concurrently as the draft DCO is currently drafted.

2.73 Mr Walker explained that whilst the draft DCO did not prevent the Applicant from operating both pipelines concurrently, this was not something the Applicant would in fact do and was indeed not practically possible in any event. However, noting the ExA's concerns in this regard, Mr Walker confirmed that the Applicant would consider the insertion of a 'Grampian style' requirement which would explicitly prevent the two pipelines operating at the same time.

Post-hearing note: the Applicant has added a new Requirement 16 to Schedule 2 of the revised draft DCO submitted at Deadline 3 (Document Reference 3.1(4)), which clarifies that the Applicant must ensure that existing fuel pipeline (as defined) is no longer capable of commercial operation once the pipeline works have been commissioned.

Agenda Item 4: Schedule 11 of the draft DCO – Documents to be certified

2.74 In light of time constraints, the ExA confirmed that the agenda item would be dealt with by way of further written questions.

Agenda Item 5: consents, licenses and other agreements

2.75 The ExA asked the Applicant to provide an update on any other consents not already discussed during the hearing and to indicate when these consents were expected be obtained.

2.76 Mr Walker explained that there was no significant update to provide following the Applicant's response to Written Question GQ.1.11 provided at Deadline 2.

2.77 Mr Walker did note that the Applicant did not expect to receive a bat licence from Natural England by the end of the examination period. Mr Walker explained that that was because Natural England will only provide a letter of no impediment which listed the specific trees which were home to bats which were affected by the works and that information was not currently known by the Applicant. However, Mr Walker explained that Natural England had indicated that it accepted the Applicant's approach to this issue as detailed in Natural England's written submissions.

2.78 The ExA asked the Applicant whether it intended to enter into any section 106 agreements and, if so, the status of discussions and an indication of when they might be submitted to the examination.

2.79 Mr Walker explained that the Applicant was not currently proposing to enter into any section 106 agreements as the Applicant considered the residual environmental impacts to be quite limited and, as such, these impacts were being dealt with through the DCO directly rather than by payments to local authorities to deal with them outside the DCO.

2.80 The ExA asked the Applicant whether its proposed Environmental Investment Programme was going to take the form of side agreements between the Applicant and the relevant third parties and, if so, whether this would be submitted to examination. The ExA also asked whether, in the event that side agreements were not to be submitted to examination, any weight could be given to them in the ExA's consideration of the Application.

2.81 Mr Walker explained that it was the Applicant's case that, whether or not the Applicant submitted such documents to the ExA, the ExA should not afford any weight to them as it did not properly relate to mitigation for the project. Mr Walker noted that, in a recent Supreme

Court case[1] (in the context of an ordinary planning permission for a windfarm), additional payments under the guise of community benefit were ruled out as a material consideration. Mr Walker explained that the Applicant was very conscious that only mitigation (or, if it came to it, any payments in section 106 agreements) which was properly to offset the effects of the project were matters which the ExA could consider as important and relevant under section 104 PA2008, but anything over and above that was between the Applicant and the parties who would benefit from it.

[1] *Wright v Resilient Energy Severndale Ltd and Forest of Dean District Council* [2019] UKSC 53.

Appendix 1 to the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO held on Wednesday 27 November 2019.

Document	Ref	Provision (A=Article, R=requirement, S=Schedule)	Summary of issue raised	Applicant's Response
Surrey LIR REP1-023	6.2	A02 (interpretation)	The definition of 'maintain' is too broad.	The Applicant considers that the definition is appropriate. The list of verbs is based on that used in other pipeline DCOs (see, for example, the Thorpe Marsh Gas Pipeline Order 2016) and ensures that the Applicant can safely and efficiently operate the pipeline throughout its lifetime. The definition is also limited by the proviso that any maintenance activities must not give rise to any materially new or materially different effects to those reported in the ES.
Surrey LIR REP1-023	6.3	A05 (maintenance of drainage works)	Who maintains drainage works when the applicant is in temporary possession of land?	The article ensures that there is no change in responsibility for maintaining drainage works (i.e. the Applicant does not assume responsibility for those drainage works by virtue of being in temporary possession of land under A29).
Surrey LIR REP1-023	6.4	A06 (limits of deviation)	Why is divert included in here as well as in the definition of 'maintain'?	'Divert' is included in the definition of 'maintain' as an activity that could be carried out as part of the maintenance of the authorised development; in A06 it could be done without being associated with maintenance.
Surrey LIR REP1-023	6.5		Are the powers in A06(1)(c)(ii), (d)(i) and (ii) limited by not giving rise to any new or materially different environmental effects to those assessed in the ES?	The Applicant has assessed to the levels set out in these articles so the condition limiting activities to those which do not give rise to materially new or materially different environmental effect is not required here, as it is in A06(2), where the effects would not have been assessed.
Hampshire LIR REP1-013	7.5	A09 (alteration of layout of streets)	Use the Hampshire Permit Scheme	The Applicant is in discussion with both Surrey and Hampshire County Councils regarding the application of the Permit Schemes to the construction and maintenance of the authorised development. Some draft wording for the DCO has been shared with the Councils following ISH 1 and the Applicant envisages
Surrey LIR REP1-023	6.6		Use the South East Permit Scheme	

				that a form of wording will be added to the draft DCO at Deadline 4.
Surrey LIR REP1-023	6.10 – 6.11		Who decides 'reasonable satisfaction' in 9(3)?	All tests of reasonableness are subject to the arbitration provisions in article 47 to the extent that a dispute arises. The standard under A09(3) is an objective one, i.e. what would a reasonable street authority consider to be an appropriate standard of restoration.
Hampshire WQ REP2-066 Rushmoor WQ REP2-080	DCO.1.11		Powers too broad and could result in changes to the road network with only presumed consent.	The power is well precedented and is subject to the consent of the street authority. The Applicant has also amended the deemed consent period in A09(5) from 28 to 42 days in the revised draft DCO submitted at Deadline 3 (**Document Reference 3.1(4)**).
Highways England WQ REP2-068	DCO.1.11	A09 (alteration of layout of streets) and A10 (street works)	Powers unnecessarily wide for a development of this type and are unsuitable in the context of the strategic road network.	Wide powers are sought to ensure that the Applicant is able to undertake the full range of works within streets which may be required to carry out the authorised development (large sections of the replacement will be constructed in streets). Save for those streets set out in S3 and S4 (none of which relate to the strategic road network), all works would be subject to the approval of the relevant highway authority. The Applicant is also negotiating protective provisions for the protection of HE, which include measures for the management of any interface between the project and the strategic road network.
Rushmoor WQ REP2-080	DCO.1.11		Traffic management plan and traffic impact study should be undertaken for each road closure or diversion.	R7 quires a Construction Traffic Management Plan ("**CTMP**") to be prepared and approved by the relevant highway authority for each stage of the authorised development. R7 has also been amended in the revised draft DCO submitted at Deadline 3 (**Document Reference 3.1(4)**) to include provision for consultation with the relevant planning authority in relation to any CTMP submitted for approval.

Surrey WQ REP2-090	DCO.1.11		Any temporary measures under article 9 and any measures listed under article 10 should be ultimately governed by adherence to the South East Permit Scheme.	See comments under A09 above.
Surrey LIR REP1-023	6.13	A11 (application of the 1991 Act)	Use the South East Permit Scheme instead of NRSWA	See comments under A09 above.
Surrey LIR REP1-023	6.14		Should ref to paragraph (2) in 11(5) be to paragraph (4)?	Yes, that correction was been made to the version of the draft DCO submitted at Deadline 2 (**Application Document 3.1(3)**).
Surrey WQ REP2-090	DCO.1.12		The provisions of the 1991 Act listed in para 11 (3) should not be disapplied.	These provisions are inappropriate in the context of this NSIP. The rationale for their disapplication is set out in the Applicant's response to Written Question DCO. 1.12.
Surrey WQ REP2-090	DCO.1.12		We are unclear why the applicant wishes the works in question to be treated as 'Major Highway Works'.	This is to ensure that the cost sharing provisions which apply to major highway works under NRSWA would apply to works of that description which are carried out under the powers conferred by this DCO. The Applicant understands that these provisions continue to operate in parallel with the South East Permit Scheme, so remain relevant.
Hampshire LIR REP1-013	8.2	A12 (temporary stopping up of streets and public rights of way)	Highway authority should approve works to public rights of way	The purpose of the DCO is to avoid duplication of consents. The Applicant has sought powers to temporarily stop up, divert and alter the public rights of way listed in S5 of the DCO, without the need for further consent from the street authority. To the extent that a public right of way needs to be temporarily stopped up, diverted or altered but is not listed in S5, then the consent of the street authority would be required under A12(5).
Hampshire LIR REP1-013	8.3		Temporary Closure Orders will be needed	A12 provides the power to temporarily stop up public rights of way. No further Closure Orders would be required, which is the reason for including them in the DCO.
Surrey LIR REP1-023	6.15		Temporary access restrictions should be kept to a minimum	The Applicant may only impose restrictions 'for the purposes of the development' and for a reasonable

				time. Restrictions would therefore be kept to a minimum. For the majority of the streets and public rights of way listed in Schedule 5, the Applicant only expects restrictions to be in place for a very short period in any case.
Surrey LIR REP1-023	6.16		Will arbitration at A47 apply to A12(1)?	Yes to the extent that there is a dispute about the duration of activities undertaken pursuant to A12(1) being reasonable. As above, the Applicant would seek to keep any restrictions to a minimum.
Surrey LIR REP1-023	6.17		Would Part 1 of 1961 Act apply to A12(5)?	The Applicant assumes that the reference is to A12(7). Part 1 of the 1961 Act would not apply automatically to A12 which is why the process has been imported here, as is common in previous made DCOs.
Surrey LIR REP1-023	6.18		Why does A12(6) depart from A11 of the GMP?	The draft DCO is generally based on more recent made DCOs rather than the 2009 model provisions. This is an example of a provision which is in more recent DCOs but not the model provisions, in response to practice of implementing DCOs. In the Applicant's view, it is also reasonable that any temporary alternative route to be provided should be of a similar standard to that which is stopped up, rather than a higher standard.
Surrey LIR REP1-023	6.19	A13 (access to private streets)	Would Part 1 of 1961 Act apply to A13(3)?	See above in relation to A12(7). It would not apply automatically, which is why the process has been imported here.
Surrey WQ REP2-090	DCO.1.13		Whilst private streets are not the responsibility of SCC as the Highway Authority, we would suggest that reference should be added to restrict access through such streets to a designated timeframe in some way as suggested here by the ExA.	The Applicant addressed this concern in the revised draft DCO submitted at Deadline 2 (**Application Document 3.1(3)**). This provision is now time limited to the period during which temporary possession of land may be taken under A29 and A30 of the draft DCO.
Hampshire WQ REP2-066	DCO.1.15	A14 (access to works)	Where a means of access is required onto a 'trunk' or	The Applicant is seeking the power under this DCO to form and layout the temporary and permanent

			'classified' road, the County Council would want to agree details of the proposed means of access prior to consent being granted with a commitment on the applicant to return the highway to its previous condition if the access was temporary.	means of access referred to in S1. The Applicant does not agree that this article should be subject to the additional consent of the street authority under this article, though would note that this is without prejudice to ongoing discussion in relation to the South East and Hampshire County Permit Schemes. In addition, where the Applicant seeks to form and layout means of access which are not listed in S1, the consent of the street authority would be required under A14(5). As regards reinstatement of land used temporarily for constructing a temporary means of access, the Applicant considers that the duty to reinstate land is addressed in appropriate terms by A29 and A30 of the draft DCO (**Document Reference 3.1(4)**).
Runnymede WQ REP2-079 Rushmoor WQ REP2-080 Spelthorne WQ REP2-088 Surrey WQ REP2-090 Surrey Heath WQ REP2-091 Winchester WQ REP2-097	DCO.1.15		A14 should be deleted or subject to approval provisions which will allow consideration of the effects of any additional site accesses.	A14 has been updated in the revised version of the draft DCO submitted at Deadline 2 (**Application Document 3.1(3)**). This article now ensures that any additional accesses required are subject to the prior consent of the street authority.
SDNPA WQ REP2-086	DCO.1.15		Approval should be sought in advance from the relevant Local Planning Authority.	The Applicant considers that the local highway authority is the appropriate body to approve such matters and this is the approach taken in numerous previous DCOs.
Surrey LIR REP1-023	6.20		A14(2) is missing	This was rectified by the Applicant in the revised draft DCO submitted at Deadline 2 (**Application Document 3.1(3)**).
Surrey WQ REP2-090	DCO.1.15		This article should be conditional upon form, layout and details first being agreed and permitted through the SCC Street Works permit process.	See comments at A09 above.
Surrey LIR REP1-023	6.21	A15 (traffic regulation)	Comments to follow.	Noted.

Surrey LIR REP1-023	6.22	A16 (agreements with street authorities)	Need further information on agreement mechanism	An agreement could be concluded in any way that the parties consider suitable.
Eastleigh WQ REP2-064 Hampshire WQ REP2-066 Rushmoor WQ REP2-080	DCO.1.16	A17 (discharge of water)	More emphasis needs to be given to the LLFA and any works in relation to ordinary watercourses require consent from them. Consent requirement under s. 23 of the Land Drainage Act 1991 should be added alongside reference to the Environmental Permitting Regulations 2017 in A17(6).	The Applicant does not consider that this is necessary. It is proposed instead that protective provisions would be included for the protection of the LLFAs setting out the terms upon which any works to ordinary watercourses would be carried out. These protective provisions are subject to ongoing discussion with Hampshire and Surrey County Councils.
Eastleigh WQ REP2-064 Hampshire WQ REP2-066 Rushmoor WQ REP2-080 SDNPA WQ REP2-086 Winchester WQ REP2-097	DCO.1.16		A17 should provide appropriate caveats to ensure that water is not contaminated and adequately reflects current situation such that flows and volumes are not increased in watercourses and public sewers.	In the Applicant's view, these matters are sufficiently clear. A17(6) confirms that the undertaker must take such steps as are reasonably practicable to secure that any water discharged into a watercourse or public sewer or drain is as free as may be practicable from gravel, soil or other solid substance, oil or other matter in suspension. The application also contains a number of commitments in relation to the water environment (G11, G12, G117, G121), all of which are contained in the Code of Construction Practice and secured by R05 of the draft DCO. Finally, R09(3) also confirms that no discharge may take place under A17 until details of the location and rate of discharge have been submitted for prior approval.

Rushmoor WQ REP2-080	DCO.1.16		The LLFA should be consulted on surface water elements for major applications and although this falls outside of the usual planning format, the same principles should apply.	A surface and foul water drainage plan for any stage of the authorised development which contains permanent works must be submitted to and approved by the LLFA (where appropriate) under R9(1). The surface and foul water drainage plan must be based upon the outline surface and foul water drainage plan, which the Applicant will be providing at Deadline 4.
Surrey LIR REP1-023	6.23		Should A17(8)(a) refer to Homes England?	Yes, that correction was made to the version of the draft DCO submitted at Deadline 2 (**Application Document 3.1(3)**).
Surrey WQ REP2-090	DCO.1.16		Surrey has provided recommended draft protective provisions and draft requirements including this issue and is awaiting a response from the applicant.	These protective provisions are subject to ongoing discussion.
Thames Water WR REP2-112	P1		The deemed consent provision should be removed and the article should explicitly not override the Water Industry Act 1991	This is a standard provision, has been consistently approved in previous DCOs and is appropriate since it does not seek to disapply the requirement at first instance for the consent of the relevant body. The Applicant notes that the issue has not been raised by other bodies who also have water / sewerage assets along the length of the replacement pipeline route.
Surrey LIR REP1-023	6.24	A19 (authority to survey and investigate land)	Should contain restoration obligations	The Applicant is content to agree to this and has modified A19 in the revised draft DCO submitted at Deadline 3 (**Application Document 3.1(4)**) to include an obligation to remove apparatus and restore land upon completion of any surveys and investigations under that article.
Surrey LIR REP1-023	6.25		A19(1) seems too broad in applying to 'any land affected'	The power is only to survey and investigate land and is common in DCOs – indeed it is in the same terms in the model provisions. This means that, to the extent that there is a claim that there has been an impact from construction works, the Applicant has the ability to investigate such a claim and is not restricted in

				terms of access by the extent of the Order limits, which in a number of locations are very narrow.
Surrey LIR REP1-023	6.26		How does s125 PA09 apply (as in A19(8))?	The provision is applying s125 to the temporary possession of land in the same way that it already applies to land subject to compulsory acquisition.
MoD WR REP2-070	13.1	A29 (temporary use of land for carrying out the authorised development)	14 days is too short and should be three months	14 days is the standard period for temporary possession until the provisions of Part 2 of the Neighbourhood Planning Act 2017 come into force. This period has been consistently approved in previous DCOs.
MoJ WR REP2-062	6.1			
Rushmoor WR REP2-081	1.2.2			
Spelthorne WR REP2-063	11.1			
Surrey LIR REP1-023	6.29		A29(1)(c) should be subject to Highway Authority approval	These would be under A14, to the extent that they are not already included in S1.
Thames Water WR REP2-112	P1		A29(4) should be amended in the case of Thames Water	The Applicant does not consider that this is necessary, since the protective provisions offered by the Applicant already make provision for reasonable conditions to be imposed by a statutory undertaker where works are near to, or may affect, the apparatus of that undertaker.
MoD WR REP2-070	13.2	A30 (temporary use of land for maintaining the authorised development)	28 days is too short and should be three months	30 days is the standard period under this article and has been consistently approved in previous DCOs. 3 months would restrict the Applicant's ability to take access to land in an expeditious manner to undertake important maintenance works.
MoJ WR REP2-062	6.1			
Rushmoor WR REP2-081	1.2.2			
Spelthorne WR REP2-063	11.2			
Surrey LIR REP1-023	6.30		A30(1) maintenance period should be clarified	The maintenance period is defined in A30(12), as five years from the date on which the relevant part of the authorised development is brought into operational use.
Surrey LIR REP1-023	6.31		A30(1)(a) - maintain is too broadly defined	See comments on the definition of 'maintain' in relation to A2 above. The maintenance period in A30 only lasts for 5 years beginning with the date on which the relevant part of the authorised development is brought into operational use.
Surrey LIR REP1-023	6.32		A30(1)(b) - means of access should be subject to HA approval	See answer to A29(1)(c) above.

Surrey LIR REP1-023	6.33	A32 (special category land)	Why is the discharge in A32(1) needed?	The discharge is needed, and is limited, to ensure that the project can be constructed on special category land without impediment.
Surrey LIR REP1-023	6.35	A33 (Statutory undertakers)	What does 'any necessary track or roadway' mean in A33(e)?	It refers to any means of access that crosses statutory undertakers' apparatus that is needed to construct the authorised development. The Applicant considers that this common sense meaning should apply.
Thames Water WR REP2-112	P2		A33 powers should not apply to Thames Water	The Applicant is negotiating protective provisions that will address the exercise of these powers in relation to the land and apparatus of Thames Water.
Surrey LIR REP1-023	6.36	A35 (disapplication and modification of legislative provisions)	A35(c) is not agreed; each disapplication should be fully justified	The Applicant hopes to agree protective provisions with Surrey County Council, as the LLFA, so that works to ordinary watercourses can be regulated through the DCO as opposed to the s.23 Land Drainage Act 1991 process. Surrey's consent would also be required to disapply that provision in any event under s. 150 of the Planning Act 2008.
Surrey LIR REP1-023	6.37	A36 (removal of human remains)	Why is the limit set at 100 years?	Please see the Applicant's response to Written Question DCO. 1.25 at Deadline 2 (**Application Document 8.6.05**).
North Surrey Green Party WR REP2-077	P5	A41 (felling or lopping)	The powers to fell and lop trees are too wide	The Applicant has had regard to concerns raised and has now modified article 41 in the revised draft DCO submitted at Deadline 3 (**Document Reference 3.1(4)**) so that the power to fell and lop trees only applies those trees and shrubs which are within or overhanging land within the Order limits or to the roots of trees or shrubs which extend into the Order land. The additional limits of this power in paragraphs (1)(a) and (b) and (2) continue to apply.
SDNPA WR REP2-085	3.45			
Surrey LIR REP1-023	6.38		'Near any part' needs to be defined	As directly above, these words have been removed and the power restricted to trees which are within or overhanging land within the Order limits or to the roots of trees or shrubs which extend into the Order land.

Surrey LIR REP1-023	6.39		Would Part 1 of 1961 Act apply to A41(5)?	It would not apply automatically which is why the process has been imported here.
Surrey LIR REP1-023	6.40		Consent should be required for any hedgerow not in schedule	The Applicant does not agree. The rationale for distinguishing between important and other hedgerows was set out in the Applicant's response to written question DCO. 1.28 at Deadline 2 (**Application Document 8.6.05**). The approach taken is precedented – see for example article 37 of the Thorpe Marsh Gas Pipeline Order 2016.
Rushmoor LIR REP1-015	8.8.10	A42 (trees subject to Tree Preservation Orders)	All TPO root zones should be protected.	Commitment G65 confirms that *"where notable, TPO, Ancient Woodland and veteran trees would be retained within or immediately adjacent to the Order limits, the trees and their root protection areas would be protected where they extend within the Order limits and are at risk. This would be by means of fencing or other measures."* Commitment G65 is currently located in the Register of Environmental Actions and Commitments (see Appendix C of the Code of Construction Practice (**Application Document 6.4(2)**). However this commitment will be moved to the outline Construction Environment Management Plan ("**CEMP**") and / or the outline Landscape and Ecological Mitigation Plan ("**LEMP**"), which are secured by R06 and R12 of the draft DCO (**Document Reference 3.1(4)**). An updated outline CEMP and an outline LEMP will be provided at Deadline 4.
Surrey LIR REP1-023	6.39		Would Part 1 of 1961 Act apply to A42(4)?	It would not apply automatically which is why the process has been imported here.
SDNPA WR REP2-085	3.62	S01 (authorised development)	Work 4F at St Stephen's Castle Down should be removed	Work No. 4F was removed from the draft DCO submitted at Deadline 2 (**Application Document 3.1(3)**).
Rushmoor WQ REP2-080 Spelthorne WQ REP2-088	DCO.1.30	R03 (stages of the authorised development	It is unclear whether the written scheme for all stages will be sent for the approval of each local	R03 allows for both scenarios (i.e. single or multiple stages as appropriate to the plan, strategy or scheme in question). Each local authority will receive the

Surrey Heath WQ REP2-091			authority. If not, as would appear to be the only practicable option, it is unclear how the authority would control the "stages".	written scheme for each stage where any part of it includes land in that authority's area.
Rushmoor WQ REP2-080 Spelthorne WQ REP2-088 Surrey Heath WQ REP2-091	DCO.1.30		There is no provision for approval of the stages, which relates to a broader concern about the potential duration of the works.	The Applicant does not agree that R03 should be subject to the prior approval of the relevant planning authorities. The Applicant is concerned that any requirement in these terms would curtail its ability to implement the project in the most appropriate way. However, the Applicant is aware of planning authorities' concerns regarding the duration of works and will continue to work with them in this regard. In addition, the updated code of construction practice to be provided at Deadline 4 will provide further details regarding construction in the hotspot areas of concern.
Surrey LIR REP1-023	6.42			
Eastleigh WQ REP2-064 Hampshire WQ REP2-066 Runnymede WQ REP2-079 Rushmoor WQ REP2-080 SDNPA WQ REP2-086 Spelthorne WQ REP2-088 Surrey Heath WQ REP2-091 Winchester WQ REP2-097	DCO.1.30		Lack of clarity about how this requirement would operate in practice. Eastleigh advocate definitions for "stage" and "written scheme".	As set out in response to written question DCO.1.30 the project will not necessarily have reached the identification of project stages until after the examination as it is linked to contractor specifications and appointments. The Applicant intends to identify such stages prior to the commencement of the works and as such has put forward this Requirement to secure that commitment.
Runnymede LIR REP1-017	3.58	R05 (code of construction practice)	Effect on Abbey Road playing pitches should be annex to CoCP	The effects of construction have been assessed and are set out in the Environmental Statement and the Planning Statement. The methodologies applicable to sports pitches and play areas will be set out in the revised code of construction practice to be submitted at Deadline 4.
Spelthorne LIR REP1-021	8.12		Effect on Woodthorpe Road play area should be annex to CoCP	See directly above.
Spelthorne WQ REP2-088 Surrey Heath WQ REP2-091	PC.1.8		R05 should be amended to require its submission and approval by the Relevant Planning Authority prior	R05 allows for variations to the Code of Construction Practice to be agreed with the relevant planning authority. The Applicant considers that this approach

			to the commencement of construction works. This would enable input from contractors, who have yet to be appointed.	strikes an appropriate balance between offering certainty at DCO stage that important mitigation would be delivered by the Applicant, on the one hand, and providing flexibility for the Code of Construction Practice to respond to localised constraints which may emerge at a later stage in the delivery of the project, on the other.
Eastleigh WQ REP2-064	DCO.1.33	R06 (construction environmental management plan)	Outline CEMP should contain further details	The Applicant has confirmed that it will be providing an updated outline CEMP at Deadline 4 in the examination timetable. This would include the matters previously listed in paragraph (2) of R05, in particular the outline for the management plans and measures set out in R06(2)(d). The Applicant would also note that a number of the items listed at paragraph 2.45 of Eastleigh's written representation are not matters that would be addressed by the CEMP under R06 in any event. For example, matters relating to construction traffic would be considered and set out as part of the construction traffic management plan pursuant to R07.
Eastleigh WQ REP2-064 Hampshire WQ REP2-066 Runnymede WQ REP2-079 Rushmoor WQ REP2-080 SDNPA WQ REP2-086 Spelthorne WQ REP2-088 Surrey Heath WQ REP2-091	DCO.1.34		Community Engagement Plan should form a separate Requirement rather than being part of the CEMP.	The Applicant has made this change in the revised draft DCO submitted at Deadline 4 (**Document Reference 3.1(4)**). This is now R15 of the draft DCO. An outline community engagement plan will be provided at Deadline 4.
Hampshire WQ REP2-066 Runnymede WQ REP2-079 Rushmoor WQ REP2-080 SDNPA WQ REP2-086 Spelthorne WQ REP2-088	DCO.1.33		It is suggested that the Applicant should provide considerably more detail in the outline CEMP, particularly the annexes, which would serve to provide a more	The Applicant has confirmed that it will be providing an updated outline CEMP at Deadline 4.

Surrey Heath WQ REP2-091			appropriate framework for the preparation of the detailed CEMP.	
Runnymede LIR REP1-017 Spelthorne LIR REP1-021 Surrey Heath LIR REP1-024	2.13 4.13 2.16		Tree Survey and Protection Strategy should be provided in R06 and during examination	These matters would form part of the arboricultural management plan secured by R06, an outline of which will be included in the outline CEMP to be submitted at Deadline 4.
Runnymede LIR REP1-017	3.15		Construction Lighting Strategy should be added to CEMP ingredients	The Applicant can confirm that an outline construction lighting plan will be added to the updated outline CEMP to be submitted at Deadline 4.
Runnymede WQ REP2-079 Rushmoor WQ REP2-080 WQ	BIO.1.43 DCO.1.33		Propose further Requirements for the management of works in open spaces.	The Applicant does not agree that there is a need for a requirement dealing with the management of works in open space. Further details on how construction would be managed will be provided as part of the updated code of construction practice to be submitted at Deadline 4.
Rushmoor LIR REP1-015	8.18.1		CEMP should prevent pollution of River Blackwater and its SINC	Details relating to water mitigation and management measures would form part of the CEMP to be approved for each stage, which is secured by R06 of the draft DCO. An outline of these water mitigation and measures will form part of the updated outline CEMP to be submitted at Deadline 4. Any CEMP submitted for approval under R06 would need to be based upon the outline CEMP.
SDNPA WQ REP2-086	DCO.1.33		The SDNPA requests that the CEMP includes details of a lighting management plan in respect of the protection of Dark Night Skies.	The Applicant can confirm that an outline construction lighting plan will be added to the updated outline CEMP to be submitted at Deadline 4.
Spelthorne LIR REP1-021	8.18		Construction Lighting Strategy should be added to CEMP ingredients	The Applicant can confirm that an outline construction lighting plan will be added to the updated outline CEMP to be submitted at Deadline 4.
Network Rail WR REP2-075	3.9	R07 (construction traffic management plan)	NR should be consulted upon and approve CTMP	The Applicant is concerned to ensure that the sign-off process in respect of the CTMP does not become unduly complex or protracted and considers that the highway authority would have appropriate regard to the impact of proposals on other stakeholders in approving any CTMP pursuant to R07. In the case of

				Network Rail, the Applicant also considers that the protection of its interests, rights and assets would be appropriately addressed by protective provisions for its benefit, which the Applicant has included in the draft DCO and which are subject to ongoing negotiation.
Hampshire WQ REP2-066	TT.1.16		The DCO should include provisions for highway condition surveys prior to work in any particular area commencing and a requirement to put right any damage that occurs to the satisfaction of the Local Highway Authority.	There is already a duty to reinstate streets under s. 70 of the New Roads and Street Works Act 1990. That provision is not disapplied by the draft DCO and the Applicant understands that it continues to operate alongside the Hampshire County Permit Scheme, which would apply (subject to modifications and ongoing discussion with the County Councils) to the construction and maintenance of the authorised development. The Hampshire County Permit Scheme also includes provisions enabling the Council to impose conditions upon the grant of any permit. The Applicant does not therefore consider that further provision to this effect is required in the draft DCO.
Hampshire WQ REP2-066 Highways England WQ REP2-068 Runnymede WQ REP2-079 Rushmoor WQ REP2-080 Spelthorne WQ REP2-088 Surrey WQ REP2-090 Surrey Heath WQ REP2-091	TT.1.2		An outline CTMP should be provided.	The Applicant has confirmed that it will be providing an outline CTMP at Deadline 4.
Runnymede LIR REP1-017 Spelthorne LIR REP1-021 Surrey Heath LIR REP1-024	2.34 4.34 2.37		Detailed list of items to be included in CTMP	The Applicant has confirmed that it will be providing an outline CTMP at Deadline 4. Details relating to specific streets would, however, only be included in the CTMP formally submitted for approval under R07. That plan would need to be approved by the local highway authority in
Rushmoor LIR REP1-015	8.10.2		CTMP should refer to Nash Close and Cove Road	
Rushmoor LIR REP1-015	8.14.2		CTMP should refer to Ship Lane	
Spelthorne LIR REP1-021	7.21		Effect on Fordbridge Park should be annex to CTMP	

				consultation with the relevant planning authority (**Document Reference 3.1(4)**).
Hampshire WQ REP2-066	DCO.1.35	R08 (hedgerows and trees)	Suggest that the final sentence of R08(3) is modified to allow for planting material of different specification to be planted as a replacement in circumstances where the original specification of tree/hedgerow may no longer be considered to be suitable.	The Applicant has modified R8(3) to reflect this comment in the revised draft DCO submitted at Deadline 3 (**Document Reference 3.1(4)**).
Hampshire WQ REP2-066 Runnymede WQ REP2-079 Rushmoor WQ REP2-080 SDNPA WQ REP2-086 Spelthorne WQ REP2-088 Surrey Heath WQ REP2-091 Winchester WQ REP2-097	DCO.1.35		Three year period for the management and replacement of hedgerows is unjustifiably short. It is generally accepted good practice that a five-year period is more appropriate in ensuring that the trees/hedgerows are sufficiently established. Eastleigh requesting 10 years for replacement tree planting.	The Applicant has modified R8(3) in the revised draft DCO submitted at Deadline 3 (**Document Reference 3.1(4)**) to increase the aftercare period for planting from 3 to 5 years, in response to comments made by Interested Parties at Deadline 2.
Rushmoor WQ REP2-080	LV.1.19		A requirement for the planting scheme to be agreed with the relevant Local Authority would be appropriate to ensure that it is in accordance with local green infrastructure, bio-diversity and other plans.	The written plan of reinstatement of hedgerows and trees required by R08(1)(b) must form part of the Landscape and Ecological Management Plan to be approved by the relevant planning authority for each stage of the authorised development. The primary duty, however, is to reinstate land to the satisfaction of the landowner concerned, and so there are limits upon the scope of the Applicant's ability to comply with additional duties to reinstate in this regard.
SDNPA LIR REP1-020	5.15		The Applicant must provide the SDNPA with information on trees and hedgerows being removed.	Information regarding trees and hedgerows to be removed would be included in the arboricultural management plan to be approved as part of the CEMP pursuant to R06 and / or as part of the LEMP pursuant to R12. An outline of the arboricultural management plan will be included in the updated

				outline CEMP to be provided at Deadline 4 and an outline LEMP will also be provided at Deadline 4.
Eastleigh WQ REP2-064	DCO.1.16	R09 (surface and foul water drainage)	R9(1) should be extended to require details of temporary surface water drainage to be submitted as part of the details to be approved to ensure that run-off is controlled in terms of flow and pollution prevention.	Temporary water mitigation and management measures relating to the construction phase would be included in and approved by the planning authority (following consultation with the EA and LLFA as appropriate) as part of the CEMP pursuant to R06. An outline of these water mitigation and measures will form part of the updated outline CEMP to be submitted at Deadline 4. Any CEMP submitted for approval under R06 would need to be based upon the outline CEMP.
Rushmoor WQ REP2-080	FR.1.2		R09 should specifically reference the LLFA as well as the EA and refer to requirements for an appropriate submission as detailed on HCC's website.	R09 has been modified to refer to the LLFA in paragraphs (1) and (3).
Surrey LIR REP1-023	6.43		Proposed re-draft for surface and foul water drainage requirement	The Applicant does not consider that the wording proposed by Surrey County Council is appropriate. Amongst other things, it would provide for approval of a scheme by the Secretary of State in circumstances where appeals relating to decisions under the Requirements are made to the Secretary of State in accordance with Part 2 of Schedule 2. The Applicant also considers that a number of the items included in the proposed re-draft relate to the protection of ordinary watercourses, which is being addressed through protective provisions for the protection of Hampshire and Surrey County Councils as the LLFAs.
SDNPA WR REP2-085 Hampshire WQ REP2-066 SDNPA WQ REP2-086 Spelthorne WQ REP2-088 Surrey WQ REP2-090	3.69.3 BIO.1.2	R12 (landscape environmental management plan)	Outline LEMP should be prepared and submitted to examination.	The Applicant has confirmed that it will provide an outline LEMP at Deadline 4.

Surrey Heath WQ REP2-091				
Spelthorne LIR REP1-021	7.29		Fordbridge Park should form an annex to LEMP, covering tree protection, reinstatement and aftercare.	These details would be included in the LEMP but the Applicant does not consider that an annex will be required.
Hampshire WQ REP2-066	PC.1.8	R14 (construction hours)	In areas likely to cause impacts on residents, the standard working hours should be amended to 08:00 to 16:00 Mondays to Friday, and 08:00 to 12:00 on Saturdays, with suitable provision provided for through an amended requirement 13 (3) to allow for other events that either are not likely to cause noise or disturbance or could not otherwise reasonably have been expected. The exception to this may be street works, as in some locations it will be necessary to expedite the works to minimise disruption and therefore longer working hours or overnight working may be appropriate.	The Applicant considers that these proposed working hours are extremely restrictive and would in fact increase disruption to local communities since it would inevitably take longer to construct the authorised development. The Applicant has sought to achieve a balance between being able to complete works in a given location quickly, whilst noting that there are particular sensitivities along the length of the replacement pipeline route. The Applicant has also proposed some modifications to R14 in the revised draft DCO submitted at Deadline 3 (**Document Reference 3.1(4)**), to reduce the core working hours from 0800 to 1800 on weekdays and Saturdays except in the event of an emergency. The drafting of R14 has also been constrained further, by clarifying that the activities in R14(3) may only continue beyond the core working hours in R14(1) (i.e. they may not be commenced afresh outside the core working hours) and only then in exceptional circumstances. The list of activities in R14(4), which may also be undertaken outside the core working hours, has also been narrowed in scope.
Runnymede WQ REP2-078	PC.1.8		There should be an embargo on the delivery of materials during peak/school travel times at both ends of the day. This would not stop vehicles getting into the area and parking up safely (in a layby) to wait for the exclusion period to end.	The Applicant does not consider that these are matters which are appropriate for inclusion in R14. Details relating to construction traffic would be included in and approved through the construction traffic management plan ("**CTMP**") under R07. The Applicant has modified R7 in the revised draft DCO submitted at Deadline 3 (**Document Reference 3.1(4)**) to include provision for consultation with the

				relevant planning authority on any CTMP submitted for approval under R07.
Runnymede WQ REP2-079 Spelthorne WQ REP2-088 Surrey Heath WQ REP2-091	PC.1.8		R14 should be amended to require the approval by the Relevant Planning Authority of construction working hours for defined sections of the pipeline, failing which restricted to 08:00 to 18:00 Mondays to Fridays and 08:00 to 13:00 on Saturdays with no working on Sundays and Bank Holidays, unless otherwise agreed in writing by the Relevant Planning Authority.	The Applicant has modified the core working hours under R14(1) to between 0800 and 1800 on weekdays and Saturdays except in the event of an emergency, in response to concerns raised by Interested Parties. No provision is made for Sunday or Bank Holiday working, except in relation to the activities specified in R14(3) and (4).
Rushmoor WQ REP2-080	PC.1.8		Hours of work should be specified in the outline CEMP and should be restricted so that no activity can commence on site before 0800 on any day.	Hours of work are already set out in R14 and in section 1.6 of the code of construction practice (**Application Document 6.4(2)**). The Applicant seeks the ability to undertake start-up and shut-down activities up to one hour either side of the core working hours (i.e. from 0700 in the morning). These would be low noise generating activities and would not involve the operation of plant and machinery.
Rushmoor WQ REP2-080	PC.1.8		The reference to "start-up and shut-down activities" is not defined. Concern generally about these activities (as well as oversize deliveries) taking place before 0700hrs).	Start up and shut down activities are any activity that does not involve the operation of plant and machinery. The Applicant has also reduced the core working hours to 0800 and 1800, which means that any start-up and shut-down activities may now only take place between the hours of 0700 and 0800 in the morning and 1800 and 1900 in the evening.
SDNPA LIR REP1-020	5.31		Construction hours should be 0800 to 1300 on Saturdays	The construction hours specified in R14 reflect the Applicant's desire to complete the Works in an efficient and expeditious manner, which means that affected communities and environments affected can return to normal as quickly as possible. Whilst the
SDNPA WQ REP2-086	PC.1.8			

				core working hours have therefore been limited to 1800 in the evening, the Applicant does not propose to limit Saturday working as suggested.
Surrey LIR REP1-023	6.44		What can be done outside working hours? What are 'core hours'?	'Core' simply refers to the working hours in requirement 14(1). Outside those hours the activities in requirement 14(3) and (4) can be undertaken.
Surrey LIR REP1-023	6.45	R16 (amendments to approved details)	How does 28-day deemed consent sit with statutory period for determination?	There is no statutory period for determination of approval of a requirement.
Surrey LIR REP1-023	6.46	R17 (anticipatory steps towards compliance with any requirement)	What steps are contemplated by this provision?	This provision simply ensures that any preparatory steps that are taken before the DCO is granted may be counted towards satisfying the requirements in Part 1 of Schedule 2.
Eastleigh WQ REP2-064 SDNPA WQ REP2-086	DCO. 1.38	R18 (applications made under requirements)	Period for reaching a decision should be increased from 28 days to 56 days. 56 day period should also be reflected in R21(2)(b) (fees).	The Applicant has amended the period from 28 days to 42 days in the revised version of the draft DCO submitted at Deadline 3 (**Document Reference 3.1(4)**), to reflect concerns raised by interested parties. This period is also in line with the recommendation in PINS' Advice Note 15.
SDNPA LIR REP1-020	5.61		LPAs should have 56 not 28 days to determine requirement applications	See directly above.
Surrey Heath WQ REP2-091	DCO. 1.38		The Council requests that the ExA consider a prior notification process to address potential timing issues when considering conditions submissions pursuant to the proposed requirements set out in the DCO.	The Applicant has increased the period for determination under R18, in part to address this concern. R19 also provides for pre-application consultation in relation to applications involving multiple discharging authorities. The Applicant is also concerned that a separate prior notification process would add substantially to the length of the discharge process.
Surrey LIR REP1-023	6.48		Deemed consent is not always explicit.	If it is not explicitly provided for in the DCO, then there is no deeming of consent. In any event, R18(2) is clear in confirming that deemed consent applies where the relevant authority has failed to determine

				an application at the end of the period specified in R18(1).
Thames Water WR REP2-112	P2		There should be no deemed consent.	This is a common provision in DCOs; the period has also been extended from 28 to 42 days.
Hampshire WQ REP2-066	DCO. 1.38	R19 (applications involving multiple authorities)	Clarity is sought in relation to the scope of this provision. Is this referring to an informal 'pre-application' prior to an application under R18?	Yes. This provision enables the Applicant to consult multiple authorities on the proposed content of a plan, scheme and strategy before alighting upon the final version to be formally submitted for approval under the Requirements. The process is not mandatory.
Hampshire WQ REP2-066	DCO.1.38		The basis of the 20 day period is also unclear. Whilst it is acknowledged that the applicant will have potential cross-boundary issues which it needs to address, local planning authorities will also need to liaise with each other to provide for a consistent approach. As such a minimum 28 day period is suggested.	The Applicant believes that 20 days is adequate; particularly as the period for discharge under R18(1) has now been extended to 42 days.
Runnymede WQ REP2-079 Rushmoor WQ REP2-080 Spelthorne WQ REP2-088 Surrey Heath WQ REP2-091	DCO.1.38		Modified drafting proposed for R19.	The Applicant has deleted the words "without limiting the scope of paragraph 18 above" as requested. The Applicant has not replaced the word "may" with "shall" as suggested. The Applicant does not consider that the process in R19 should be a mandatory one, in circumstances where there is no particular need to invite comments from all authorities in advance of an application under R18 being made.
Surrey LIR REP1-023	6.49		Has 20-day deadline been agreed to?	The Applicant considers it to be a reasonable period, for the reasons set out above.
Eastleigh WQ REP2-064 Hampshire WQ REP2-066 Rushmoor WQ REP2-080 Surrey Heath WQ REP2-091	DCO.1.37	R20 (further information)	2 business day period for requesting further information following receipt of an application for consent is unjustifiably short, should be 5/14/15 days.	The period for requesting further information under R20(2) was extended to 5 business days in the revised draft DCO submitted at Deadline 2 (**Application Document 3.1(3)**).

SDNPA LIR REP1-020	5.61		LPAs should have five not two business days to seek further information	See directly above.
Surrey LIR REP1-023	6.50		Time limits will need to be agreed to	The Applicant is considering comments as it receives them and has made changes to the draft DCO in light of those comments.
SDNPA LIR REP1-020	5.61	R21 (fees)	Requirement approval fee should be non-refundable	The fee is non-refundable in line with PINS' Advice Note 15.
SDNPA WQ REP2-086	DCO.1.38			
Surrey Heath WQ REP2-091	DCO. 1.38		The Council would also request that the ExA considers an appropriate fee be payable for such a prior notification process due to the resource implications for all relevant Planning Authorities.	The Applicant does not consider that it is necessary to provide for a formal prior notification process under Part 2 of Schedule 2, for the reasons explained at R18 above.
Surrey LIR REP1-023	6.51		Need further discussion with relevant authorities	The Applicant is considering and responding to any alternative wording as it is received.
SDNPA LIR REP1-020	5.61	R22 (appeals)	The Applicant should only be able to appeal an unnecessary information request after expiry of time limit	The Applicant does not agree, as it would unnecessarily delay the appeal process. The right of appeal in these circumstances is in line with PINS' Advice Note 15.
SDNPA WQ REP2-086	DCO.1.38		Undertaker should only have ability to appeal after prescribed time limit has been reached. See R22(1)(b) and (c).	See directly above.
Surrey LIR REP1-023	6.51		Need further discussion with relevant authorities	The Applicant is considering and responding to any alternative wording as it is received.
Runnymede LIR REP1-017	2.14	Rnew	Local Tree Protection Plan should be approved before any work	These local matters would form part of the arboricultural management plan secured by R06, an outline of which will be included in the outline CEMP to be submitted at Deadline 4.
Rushmoor LIR REP1-015 Rushmoor WR REP2-081	8.6.7 4.1.1	Rnew	Requirement to control construction in SANGs	The updated Code of Construction Practice to be submitted at Deadline 4 will include a commitment limiting the duration of construction works within Southwood Country Park SANG to 2 years. The

				Applicant does not consider that a wider Requirement controlling construction works in SANGs is necessary.
Rushmoor LIR REP1-015	8.7.2	Rnew	Requirement to augur bore under all important hedgerows	See the response to written question ALT.1.6 at Deadline 2.
Rushmoor LIR REP1-015	8.11.1	Rnew	Exact location of West Heath Road construction compound (Work 4AD) to be negotiated	The Applicant considers that the limits shown on sheet 34 for Work 4AD are appropriate and impose sufficient restrictions upon the Applicant's ability to determine the final location of this compound.
Rushmoor LIR REP1-015	8.12.8	Rnew	Ecological compensation package at Queen Elizabeth Park	The Applicant is continuing to discuss these issues with Rushmoor Borough Council.
Rushmoor LIR REP1-015	8.13.3	Rnew	Amenity compensation package at Queen Elizabeth Park	The Applicant is continuing to discuss these issues with Rushmoor Borough Council.
Rushmoor WR REP2-081	4.5.1	Rnew	Requirement for compensation of effects at Southwood Playing Fields and Cove Cricket Club	The Applicant submitted a proposal to the Council in respect of compensation for construction impacts at Southwood Playing Fields and Cover Cricket Club as part of the Environmental Investment Programme, on 10 September 2019. A response to that proposal is still awaited.
Rushmoor WR REP2-081	5.4.2	Rnew	Requirement for mitigation of effects at Nash Close and Cove Road	Detailed information relating to construction traffic would be addressed through the construction traffic management plan under R07.
Rushmoor WR REP2-081	6.1.3	Rnew	Requirement to fund the Cove Brook Greenways Enhancement Project should be added to the DCO.	The Applicant does not consider that such a Requirement is either suitable or related to the impacts of the project. The Applicant has offered to undertake additional work in this area as part of its Environmental Investment Programme and proposals were sent to Rushmoor in September 2019. A response is still awaited.
Network Rail WR REP2-075	3.15	Rnew	NR approval of maintenance plan, wording to follow	This wording is awaited from Network Rail.
SDNPA LIR REP1-020	5.12	Rnew	Location of marker posts to be approved by SDNPA	This is not appropriate as there are particular safety rules for marker post style and locations under the relevant British Standards.

SDNPA LIR REP1-020	5.60	Rnew	Existing above-ground infrastructure should be removed when existing pipeline ceases	This would be managed as part of the decommissioning of the replacement pipeline, which is not part of this application. However, the Applicant can confirm that it expects to remove the pipeline marker posts which are located at intervals along the length of the route of the existing pipeline.
Spelthorne LIR REP1-021	4.14	Rnew	Local Tree Protection Plan should be approved before any work	These matters would form part of the arboricultural management plan secured by R06, an outline of which will be included in the outline CEMP to be submitted at Deadline 4.
Surrey Heath WR REP2-092 Runnymede WQ REP2-079	13	Rnew	Alternative SANG to be provided	The Applicant does not consider that any evidence has been provided regarding impacts on St Cathrines Road SANG which would require alternative SANG to be provided.
Surrey Heath WR REP2-092	13	Rnew	Scheme for management of works in open space to be provided	The Applicant does not agree that there is a need for a requirement dealing with the management of works in open space. Further details on how construction would be managed will be provided as part of the updated code of construction practice to be submitted at Deadline 4.
Surrey Heath LIR REP1-024	2.17	Rnew	Local Tree Protection Plan should be approved before any work	These matters would form part of the arboricultural management plan secured by R06, an outline of which will be included in the outline CEMP to be submitted at Deadline 4.
QEP Users WQ REP2-131	QE.1.1	S01 (authorised development	It has been confirmed that the play area will be removed for the (unknown) duration of the project, but the DCO does not confirm the temporary replacement because currently no suitable alternative location has been identified.	The Applicant is in discussions with Rushmoor Borough Council regarding the identification of a suitable temporary alternative site. The position is as set out in Commitment OP05 of the CoCP, which is secured by R05 of the draft DCO.
Spelthorne LIR REP1-021	6.32	S08 (trees subject to Tree Preservation Orders)	TPO076 is outside order limits, is it correctly included?	TPO076 may encroach into land within the Order limits although its stem is located outside the Order limits.

Highways England WQ REP2-068	CA.1.3	S09 (protective provisions)	Provided proposed protective provisions.	The Applicant has provided a response and now awaits Highways England's comments.
Surrey LIR REP1-023	6.41 and 6.52	S09 (protective provisions)	Need response to draft protective provisions as drainage authority	The Applicant is responding to protective provision proposals as they are received; agreed protective provisions will either be reflected in Schedule 9 or be the subject of a separate agreement between the parties.
Highways England WQ REP2-068	DCO. 1.40	S11 (certified documents)	Highways England considers that an Outline Construction Traffic Management Plan is necessary and that the Applicant should provide a draft as quickly as possible.	The Applicant has agreed to provide an outline CTMP at Deadline 4.
SDNPA WQ REP2-086	DCO. 1.40	S11 (certified documents)	LEMP should be added to list of certified documents.	The LEMP is not a document which is presented to examination, thus there is nothing to be certified; the Applicant considers that the outline LEMP would be certified, however.

The Planning Inspectorate

Application by Esso Petroleum Company, Limited for an Order granting Development Consent for the Southampton to London Pipeline Project

Hearing Action Points arising from the Issue Specific Hearing on the draft Development Consent Order held at the Holiday Inn Farnborough on Wednesday 27 November 2019

Action	Description	Action by	When	Where this action has been addressed
1	Article 6 not covered by procedure to discharge. Additional drafting may be required.	Applicant	Deadline 3	See post-hearing note at paragraph 2.20 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.
2	The Applicant to review whether Schedule 10 of the draft Development Consent Order (dDCO) should list all hedges	Applicant	Deadline 3	See post-hearing note at paragraph 2.26 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.
3	The Applicant to confirm in writing that the hedgerow corridor would be reinstated following completion of the instillation – ie that a 6.3m gap in hedges would not need to be retained *Comment from Examining Authority (ExA): Could be contained within either an amended Register of Environmental Actions and Commitments (REAC) or the outline Landscape and Ecological Management Plan*	Applicant	Deadline 3	The confirmation that hedgerows would be reinstated following installation is contained in commitment G93, which states: 'Hedgerows, fences and walls would be reinstated to a similar style and quality to those that were removed, with landowner agreement.' This commitment is contained in the Code of Construction Practice (REP2-010) which is secured under Requirement 5 of the draft DCO (**Document Reference 3.1 (4)**).

Appendix 2 to the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO held on Wednesday 27 November 2019 (the Applicant's responses to the ExA's action points)

Action	Description	Action by	When	Where this action has been addressed
4	Articles 9/10 – time period for consent to be amended to 42 days and to review whether the wording needs to be amended to include 'the street authority in consultation with the relevant planning authority'	Applicant	Deadline 3	See post-hearing note at paragraph 2.31 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.
5	The Applicant to hold further meetings with representatives from Surrey and Hampshire County Councils Highway Authorities to discuss the potential amendment of Article 11 to include the County Council's permitting schemes but with potential exclusions (such as the 6-month moratorium on roadworks) and to look at the Framework agreement used in the Thames Tideway DCO	Applicant/Surrey County Council and Hampshire County Council	Deadline 3	See post-hearing note at paragraph 2.35 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.
6	The Applicant to review whether Article 12 needs to be reworded to reflect whether streets would have traffic light operation or diversions agreed with the relevant Highways Authority	Applicant	Deadline 3	See post-hearing note at paragraph 2.42 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.

Appendix 2 to the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO held on Wednesday 27 November 2019 (the Applicant's responses to the ExA's action points)

Action	Description	Action by	When	Where this action has been addressed
7	The Applicant to review and consider extending the time limit in Article 14(3) and inserting 'in consultation with the Local Planning Authority'. The Applicant also to review whether the A14(3) is needed and could be removed.	Applicant	Deadline 3	See post-hearing note at paragraph 2.40 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.
8	The Applicant to retitle the table in Schedule 5, Part 2 to remove the reference to stopping up and to review the contents of the table to confirm if any of the streets listed would be stopped up; whether they would be diverted or subject to traffic light controls	Applicant	Deadline 3	See post-hearing note at paragraph 2.42 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.
9	Requirement 3 – the Applicant to review 'stages' of the authorised development	Applicant	Deadline 3	See paragraph 2.46 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.
10	Requirement 5 – the Applicant to consider the structure a content of the Code of Construction Practice and provide a revised document.	Applicant	Deadline 3	The action noted by the Applicant was to consider the structure of this Requirement and consider whether drafting changes may be required. In this regard, see paragraph 2.48 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.

Appendix 2 to the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO held on Wednesday 27 November 2019 (the Applicant's responses to the ExA's action points)

Action	Description	Action by	When	Where this action has been addressed
11	Applicant to amend dDCO to include a requirement to create an on-line register of discharge of requirements.	Applicant	Deadline 3	See post-hearing note at paragraph 2.48 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.
12	Requirement 6 (2)(d) to be amended to include a lighting strategy	Applicant	Deadline 3	See post-hearing note at paragraph 2.52 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.
13	Requirement 6 (2)(d) to be amended to remove the Community Engagement Plan and this to be made in to a standalone requirement	Applicant	Deadline 3	See post-hearing note at paragraph 2.52 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.
14	Local Authorities to review Requirement 6(2) for any omissions	Local Authorities	Deadline 3	Not applicable.
15	Requirement 7 – Applicant to review whether the Construction Traffic Management Plan who should be the discharging authority and who they would need to consult with eg the 'relevant highways authority in consultation with the relevant local planning authority' or the 'relevant planning authority in consultation with the relevant highways authority'	Applicant	Deadline 3	See post-hearing note at paragraph 2.58 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.

Appendix 2 to the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO held on Wednesday 27 November 2019 (the Applicant's responses to the ExA's action points)

Action	Description	Action by	When	Where this action has been addressed
16	Requirement 7 – Applicant to review request from Network Rail and Highways England about being consultees on the discharge of this Requirement	Applicant	Deadline 3	See post-hearing note at paragraph 2.58 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.
17	Applicant to review the structure of the REAC and in particular whether it should be structured around areas/local authorities	Applicant	Deadline 3	The Applicant has confirmed that it will be providing a suite of outline documents at Deadline 4, which will replace commitments currently recorded in the REAC. Given that, the Applicant considers that the structure of these outline documents is now of greater relevance than the REAC, references to which have been deleted from the revised draft DCO submitted at Deadline 3 in anticipation of outline documents being submitted. The Applicant will however consider this action in preparing the suite of outline documents to be provided at Deadline 4.
18	Requirement 8(3) time period to be amended to five years and to consider whether 'must be replaced with planting material of the same specification as that originally planted ' should be amended to allow for the use of alternative species	Applicant	Deadline 3	See post-hearing notes at paragraphs 2.60 and 2.62 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.

19	Requirement 12 – outline LEMP to be provided indicated aiming to submit at Deadline 4 (30 January 2020). Local Authorities requested discussions about its scope and early sight of drafts.	Applicant and Local Authorities	As soon as possible and no later than Deadline 4	See post-hearing note at paragraph 2.68 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.
20	Requirement 14 – Applicant to give further thought to construction hours and whether a more flexible/area specific approach to working hours would be appropriate	Applicant	Deadline 3	See post-hearing note at paragraph 2.71 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.
21	Applicant to consider new requirement to ensure that the existing and replacement pipeline could not operate concurrently	Applicant	Deadline 3	See post-hearing note at paragraph 2.73 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.
22	Applicant to review the requests for additional requirements or alternative wording for requirements submitted in the Local Impact Reports and at Deadline 2 and amend the dDCO accordingly or provide a written response as to why the additional requirement or wording has not been included	Applicant	Deadline 3	See table at Appendix 1 of the Applicant's written summary of case following the Issue Specific Hearing on the draft DCO.

Michaelmas Term
[2019] UKSC 53
On appeal from: [2017] EWCA Civ 2102

JUDGMENT

R (on the application of Wright) (Respondent) *v* Resilient Energy Severndale Ltd and Forest of Dean District Council (Appellants)

before

Lady Hale, President
Lord Reed, Deputy President
Lord Lloyd-Jones
Lord Sales
Lord Thomas

JUDGMENT GIVEN ON

20 November 2019

Heard on 22 and 23 July 2019

Appellant (1)
Martin Kingston QC
Jenny Wigley
(Instructed by Burges Salmon LLP (Bristol))

Respondent
Neil Cameron QC
Zack Simons
(Instructed by Harrison Grant)

Appellant (2)
Paul Cairnes QC
James Corbet Burcher
(Instructed by Forest of Dean District Council)

Intervener (Secretary of State for Housing, Communities and Local Government)
Richard Kimblin QC
(Instructed by The Government Legal Department)

Appellants:

(1) Resilient Energy Severndale Ltd
(2) Forest of Dean District Council

LORD SALES: (with whom Lady Hale, Lord Reed, Lord Lloyd-Jones and Lord Thomas agree)

1. This case concerns a challenge by the respondent ("Mr Wright") to the grant of planning permission by the local planning authority (the second appellant: "the Council") for the change of use of land at Severndale Farm, Tidenham, Gloucestershire from agriculture to the erection of a single community scale 500kW wind turbine for the generation of electricity ("the development"). Mr Wright is a local resident. The first appellant ("Resilient Severndale") was the successful applicant for the planning permission.

2. In its application for planning permission, Resilient Severndale proposed that the wind turbine would be erected and run by a community benefit society. The application included a promise that an annual donation would be made to a local community fund, based on 4% of the society's turnover from the operation of the turbine over its projected life of 25 years ("the community fund donation"). In deciding to grant planning permission for the development the Council expressly took into account the community fund donation. The Council imposed a condition ("condition 28") that the development be undertaken by a community benefit society with the community fund donation as part of the scheme.

3. Mr Wright challenged the grant of planning permission on the grounds that the promised community fund donation was not a material planning consideration and the Council had acted unlawfully by taking it into account. Mr Wright succeeded in his challenge before Dove J at first instance. The Court of Appeal dismissed an appeal by Resilient Severndale and the Council. They now appeal to this court.

4. The issue on the appeal is whether the promise to provide a community fund donation qualifies as a "material consideration" for the purposes of section 70(2) of the Town and Country Planning Act 1990 as amended ("the 1990 Act") and section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). These are very familiar provisions in planning law. There is also a subsidiary issue whether the Council was entitled to include condition 28 in the planning permission.

5. Section 70(1) of the 1990 Act provides in relevant part:

> "Where an application is made to a local planning authority for planning permission -

> … they may grant planning permission, either unconditionally or subject to such conditions as they think fit …"

6. Section 70(2) of the 1990 Act provides:

> "In dealing with an application for planning permission or permission in principle the authority shall have regard to -
>
> (a) the provisions of the development plan, so far as material to the application,
>
> (aza) a post-examination draft neighbourhood development plan, so far as material to the application,
>
> (aa) any considerations relating to the use of the Welsh language, so far as material to the application;
>
> (b) any local finance considerations, so far as material to the application, and
>
> (c) any other material considerations."

7. Section 38(6) of the 2004 Act provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

Policy background

8. The land in question is agricultural and is not designated for development in the development plan for the area. The proposed development is not in accordance with the development plan.

9. Paragraph 97 of the National Planning Policy Framework (March 2012) in force at the relevant time ("NPPF") states:

> "To help increase the use and supply of renewable and low carbon energy, local planning authorities should recognise the responsibility on all communities to contribute to energy generation from renewable or low carbon sources. They should:
>
> - Have a positive strategy to promote energy from renewable and low carbon sources;
>
> - Design their policies to maximise renewable and low carbon energy development while ensuring that adverse impacts are addressed satisfactorily, including cumulative landscape and visual impacts;
>
> - Consider identifying suitable areas for renewable and low carbon energy sources, and supporting infrastructure, where this would help secure the development of such sources;
>
> - Support community-led initiatives for renewable and low carbon energy, including developments outside such areas being taken forward through neighbourhood planning …"

10. Planning Policy Guidance has been issued to expand upon the guidance in the NPPF regarding renewable and low carbon energy (reference ID: 5-004-20140306, revision date 6 March 2014 - "the PPG") as follows:

> "*What is the role for community led renewable energy initiatives?*
>
> Community initiatives are likely to play an increasingly important role and should be encouraged as a way of providing positive local benefit from renewable energy development. Further information for communities interested in developing their own initiatives is provided by the Department of Energy and Climate Change. Local planning authorities may wish to

> establish policies which give positive weight to renewable and low carbon energy initiatives which have clear evidence of local community involvement and leadership.
>
> Neighbourhood plans are an opportunity for communities to plan for community led renewable energy developments. Neighbourhood Development Orders and Community Right to Build Orders can be used to grant planning permission for renewable energy development. To support community based initiatives a local planning authority should set out clearly any strategic policies that those producing neighbourhood plans or Orders will need to consider when developing proposals that address renewable energy development. Local planning authorities should also share relevant evidence that may assist those producing a neighbourhood plan or Order, as part of their duty to advise or assist. As part of a neighbourhood plan, communities can also look at developing a community energy plan to underpin the neighbourhood plan."

11. In October 2014, the Department of Energy and Climate Change published a document containing general guidance with the title, "Community Benefits from Onshore Wind Developments: Best Practice Guidance for England" ("the DECC Guidance"). The object of the DECC Guidance was to set out principles of good practice applicable through the preparation and planning phases and on to the operational phase for onshore wind energy developments, with the aim of securing local community acceptance and support for such developments. It was published alongside a document entitled "Best Practice Guidance on Community Engagement".

12. The Ministerial foreword to the DECC Guidance included the following:

> "Communities hosting renewable energy play a vital role in meeting our national need for secure, clean energy and it is absolutely right that they should be recognised and rewarded for their contribution."

13. The Introduction stated:

> "Communities have a unique and exciting opportunity to share in the benefits that their local wind energy resources can bring

through effective partnerships with those developing wind energy projects."

14. Under the heading "What are community benefits?", the Introduction continued as follows:

> "Community benefits can bring tangible rewards to communities which host wind projects, over and above the wider economic, energy security and environmental benefits that arise from those developments. They are an important way of sharing the value that wind energy can bring with the local community.
>
> Community benefits include:
>
> 1. Community benefit funds - voluntary monetary payments from an onshore wind developer to the community, usually provided via an annual cash sum, and
>
> 2. Benefits in-kind - other voluntary benefits which the developer provides to the community, such as in-kind works, direct funding of projects, one-off funding, local energy discount scheme or any other non-necessary site-specific benefits.
>
> In addition to the above, there can also be:
>
> 3. Community investment (Shared ownership) - this is where a community has a financial stake, or investment in a scheme. This can include co-operative schemes and online investment platforms.
>
> 4. Socio-economic community benefits - job creation, skills training, apprenticeships, opportunities for educational visits and raising awareness of climate change.

> 5. Material benefits - derived from actions taken directly related to the development such as improved infrastructure.
>
> This document contains guidance on community benefit funds and benefits in-kind (points 1 and 2). The provision of these community benefits is an entirely voluntary undertaking by wind farm developers. They are not compensation payments.
>
> Material and socio-economic benefits will be considered as part of any planning application for the development and will be determined by local planning authorities. They are not covered by this guidance …"

15. Prior to October 2014, many onshore wind developers already provided voluntary contributions in various forms over the lifetime of their projects. The DECC Guidance stated:

> "The wind industry through RenewableUK has consolidated this voluntary approach by coming together to produce a protocol which commits developers of onshore wind projects above 5MW (megawatts) in England to provide a community benefit package to the value of at least £5,000 per MW of installed capacity per year, index-linked for the operational lifetime of the project.
>
> Community benefits offer a rare opportunity for the local community to access resources, including long-term, reliable and flexible funding to directly enhance their local economy, society and environment …
>
> The best outcomes tend to be achieved when benefits are tailored to the needs of the local community …"

It referred to a number of case studies where community benefit funds have been set up by wind farm developers, eg by RWE Innogy UK in respect of the Farr Wind Farm in Scotland (£3.5m over the lifetime of the wind farm).

16. However, the DECC Guidance makes clear the relationship between the guidance it gives in the context of renewable energy policy, and the planning regime.

Under the heading "Preparation phase guidance: Background to community benefits", it states:

> "This document contains guidance on community benefit funds and benefits-in kind. The provision of these community benefits are entirely voluntary undertakings by wind farm developers and should be related to the needs of the local community.
>
> These community benefits are separate from the planning process and are not relevant to the decision as to whether the planning application for a wind farm should be approved or not - ie they are not 'material' to the planning process. This means they should generally not be taken into account by local planning authorities when deciding the outcome of a planning application for a wind [farm] development.
>
> Currently the only situation in which financial arrangements are considered material to planning is under the Localism Act as amended (2011), which allows a local planning authority to take into account financial benefits where there is a direct connection between the intended use of the funds and the development.
>
> And Planning Practice Guidance [the PPG] states that, 'Local planning authorities may wish to establish policies which give positive weight to renewable and low carbon energy initiatives which have clear evidence of local community involvement and leadership'.
>
> Socio-economic and material benefits from onshore wind developments are types of benefit that can be taken into consideration when a planning application is determined by the local planning authority and are not covered by this Guidance."

This explanation is in accordance with the general object of the DECC Guidance, which is to set out ways in which the support of local communities for wind energy development in their area might be promoted, rather than to provide policy guidance regarding the operation of the planning system. The distinction was emphasised again later in the document, under the heading "Planning phase guidance: Planning and the role of local authorities":

> "Local authorities can play an important role in supporting community benefit negotiations by supporting the development of neighbourhood, community or parish plans and having positive local plan policies.
>
> Community benefits should be considered separately from any actions or contributions required to make a development acceptable in planning terms. …
>
> The primary role of the local planning authority in relation to community benefits is to support the sustainable development of communities within their jurisdiction and to ensure that community benefits negotiations do not unduly influence the determination of the planning application.
>
> There is a strict principle in the English planning system that a planning proposal should be determined based on planning issues, as defined in law. Planning legislation prevents local planning authorities from specifically seeking developer contributions where they are not considered necessary to make the development acceptable in planning terms. Within this context, community benefits are not seen as relevant to deciding whether a development is granted planning permission. …"

17. As will be seen below, I consider that this is an accurate statement of the conventional and well-established rule of planning law, which stems from the interpretation of the relevant planning statutes.

Factual background

18. The Resilience Centre Ltd ("Resilience Centre") was established in 2009 to focus on the provision and use of capital to generate social benefits as well as financial returns. It aims to help build resilience in society in the context of climate change and limited natural resources, with a view to improving local economies.

19. To these ends, the Resilience Centre has developed a model for investment in community energy projects. This involves the Resilience Centre and the landowner obtaining planning permission for a project, in this case the erection of a wind turbine to generate electricity, but with a commitment to open up the project to individual investors from the local community once permission has been

obtained. However, according to the proposal in the present case, there would still be a commercial return for the Resilience Centre and the landowner.

20. Since the Cooperative and Community Benefit Societies Act 2014 came into force on 1 August 2014, the Resilience Centre's legal structure of choice has been to involve a community benefit society registered under that Act. This has tax advantages. By section 2(2)(a)(ii) of that Act, it is a condition of registration of such a society that its business is conducted for the benefit of the community.

21. In the present case, the Resilience Centre says that the development will provide various benefits for the local community. These include the opportunity for individuals in the community to invest in the project by subscribing for shares in the proposed community benefit society, with estimated returns of 7% pa, and the community fund donation. The money donated is to be allocated to community causes by a panel of local people.

22. On 29 January 2015 Resilient Severndale, using the Resilience Centre as its agent, applied to the Council for planning permission for the development, relying amongst other things on these benefits for the local community. The application focused on the benefits of renewable wind energy and the policy emphasis, including in the DECC Guidance, on the engagement of local people in the energy process.

23. An officer's report dated 7 July 2015 advised the Council's Planning Committee ("the Committee") that the community benefit fund was not a material consideration that could be taken into account when considering the planning application, because (i) there were no clear controls and/or enforcement measures that could ensure the benefit was delivered, and in any event, (ii) the fund could be used to finance projects that were unconnected to low carbon energy generation.

24. Resilient Severndale submitted further observations to the Council, which resulted in consideration of the application being deferred. Further submissions were then made, to the effect that the project would commit up to £1.1m in direct community benefits (ie 4% of turnover, together with £600,000 that it was estimated would be earned by the turbine over and above the community benefit society's commitments which, under the terms of the society, would also be dedicated to the community), and referring to a successful appeal to an inspector in relation to Alvington Wind Farm. Further officer reports were then produced. The final report dated 11 August 2015 concluded that the community benefit fund was a material consideration in favour of the development.

25. The same day, 11 August 2015, the Committee resolved to approve the application. It is common ground that its members had included the local community donation fund as a material consideration in favour of the proposals as part and parcel of the basket of socio-economic benefits which were relied upon by Resilient Severndale.

26. On 30 September 2015, the planning application was granted subject to a number of conditions, including condition 28, as follows:

> "The development is to be undertaken via a Community Benefit Society set up for the benefit of the community and registered with the Financial Conduct Authority under the Co-Operative and Community Benefit Societies Act 2014. Details of the Society number to be provided to the local planning authority prior to commencement of construction.
>
> Reason: to ensure the project delivers social, environmental and economic benefits for the communities of Tidenham and the broader Forest of Dean."

27. The fund, once set up, was to be allocated by a panel of local individuals established for that task. The objects of the fund would include any community project. Evidence in the proceedings indicates that a similar fund in relation to a wind turbine at St Briavels had been distributed for (amongst other things) the creation of a village handyman service, the maintenance of publicly accessible defibrillators in the village, the purchase of waterproof clothing to enable young members of the community to participate in scheduled outdoor activities in inclement weather, and to provide a meal at a local public house for the members of a lunch club for older people in the village and club volunteers.

28. Mr Wright challenged the decision to grant planning permission by way of judicial review, on the ground that the community benefit fund donation was not a material consideration for planning purposes. He submitted that it did not serve a planning purpose, it was not related to land use, and it had no real connection to the proposed development. At first instance Dove J accepted those submissions and made an order quashing the permission. He applied what he took to be settled law regarding what constitutes a material consideration for the purposes of the planning statutes derived from a series of authorities, in particular *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 ("*Newbury*"), *Westminster City Council v Great Portland Estates Plc* [1985] AC 661 ("*Westminster*"), *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd*

(1993) 67 P & CR 78 ("*Plymouth*"), *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 ("*Tesco*") and *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20; [2011] 1 AC 437.

29. The Council and Resilient Severndale appealed. Their appeal was dismissed by the Court of Appeal in a judgment by Hickinbottom LJ, with which McFarlane and Davis LJJ agreed. Hickinbottom LJ agreed with the reasons given by Dove J. He relied on the same case law and also on *Elsick Development Co Ltd v Aberdeen City and Shire Strategic Development Planning Authority* [2017] UKSC 66; [2017] PTSR 1413 ("*Aberdeen*"), a decision which post-dated Dove J's judgment but which, in the view of Hickinbottom LJ, confirmed that the judge's approach was correct. Davis LJ gave a short concurring judgment to emphasise that the question was not whether the proffered benefits were desirable, but whether in planning terms they were material and whether they satisfied the criteria of materiality set out in the speech of Viscount Dilhorne in *Newbury* at p 599H ("the *Newbury* criteria"). Davis LJ also expressed agreement with the judgment of Dove J.

30. The Council and Resilient Severndale now appeal to this court. They contend that Dove J and the Court of Appeal erred in their approach to the question of what counts as a material consideration for the purpose of section 70(2) of the 1990 Act and section 38(6) of the 2004 Act and that they should have found that the community benefits to be derived from the development constitute a material consideration which the Committee was entitled to take into account when it decided to grant planning permission for the development. The main burden of presenting the oral argument for the appellants was assumed by Mr Martin Kingston QC, for Resilient Severndale. The Secretary of State for Housing, Communities and Local Government was given permission to intervene orally and in writing. He was represented by Mr Richard Kimblin QC. Mr Kimblin made submissions which were supportive of the arguments for the appellants. He invited the court to "update *Newbury* to a modern and expanded understanding of planning purposes".

Discussion

31. Planning permission is required "for the carrying out of any development of land": section 57(1) of the 1990 Act. So far as is relevant, "development" is defined in section 55(1) to mean "the making of any material change in the use of any buildings or other land". Section 70(2) of the 1990 Act requires a planning authority to have regard to the development plan and certain other matters "so far as material to the application" and to "any other material considerations": that is to say, material to the change of use which is proposed. Similarly, in relation to an application for planning permission, the "material considerations" referred to in section 38(6) of the 2004 Act are considerations material to the change of use which is proposed.

32. In *Newbury* at pp 599-601 Viscount Dilhorne treated the scope of the concept of "material considerations" in section 29(1) of the Town and Country Planning Act 1971 (which corresponds to what is now section 70(2) of the 1990 Act) as the same as the ambit of the power of a local planning authority (in what is now section 70(1)(a) of the 1990 Act) to impose such conditions "as they think fit" on the grant of planning permission. It had been established in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 ("*Pyx Granite*"), *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636 ("*Fawcett Properties*") and *Mixnam's Properties Ltd v Chertsey Urban District Council* [1965] AC 735 ("*Mixnam's Properties*") that the power to impose conditions was not unlimited. Viscount Dilhorne referred to the following statement by Lord Denning in *Pyx Granite* at p 572, approved in *Fawcett Properties* and *Mixnam's Properties*:

> "… the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

Viscount Dilhorne referred to other authority as well and set out the *Newbury* criteria at p 599H as follows:

> "… the conditions imposed must be for a planning purpose and not for any ulterior one, and … they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them …"

33. Lord Edmund-Davies agreed with the speech of Viscount Dilhorne. Lord Fraser of Tullybelton approved the same three-fold test in his speech at pp 607-608, as did Lord Scarman at pp 618-619 and Lord Lane at p 627. The view of the law lords was that a condition attached to the grant of planning permission for the change of use of two hangars to use as warehouses on condition that they were removed at the end of a specified period of time did not fairly or reasonably relate to the permitted development and was therefore void.

34. The equation of the ambit of "material considerations" with the ambit of the power to impose planning conditions is logical, because if a local planning authority has power to impose a particular planning condition as the basis for its grant of permission it would follow that it could treat the imposition of that condition as a material factor in favour of granting permission. The relevance of the *Newbury*

criteria to determine the ambit of "material considerations" in what is now section 70(2) of the 1990 Act and section 38(6) of the 2004 Act is well established and is not in contention on this appeal.

35. The *Westminster* case was concerned with the lawfulness of a policy adopted by the City of Westminster as part of its local plan to promote and preserve certain long established industries in central London and to limit the grant of planning permission for office development to exceptional cases. The House of Lords applied the same test for whether a matter was a material consideration in the preparation of a local plan as in relation to the grant or refusal of planning permission (under provisions of the Town and Country Planning Act 1971 which have been re-enacted in the 1990 Act), and held that the policy was concerned with a genuine planning purpose, namely the continuation of industrial use important to the character and functioning of the city, and hence was lawful.

36. Lord Scarman gave the sole substantive speech, with which the other members of the appellate committee agreed. He referred at p 669 to the statement by Lord Parker CJ in *East Barnet Urban District Council v British Transport Commission* [1962] 2 QB 484, at p 491, that when considering whether there has been a change of use of land "what is really to be considered is the character of the use of the land, not the particular purpose of a particular occupier." Lord Scarman pointed out (p 670) that development plans are concerned with "development", "a term of art in the planning legislation which includes now, and has always included, the making of a material change in the use of land." He held that Lord Parker's dictum applies to the grant or refusal of planning permission, to the imposition of conditions and also to the formulation of planning policies and proposals, and said (p 670):

> "The test, therefore, of what is a material 'consideration' in the preparation of plans or in the control of development … is whether it serves a planning purpose: see [*Newbury*], 599 per Viscount Dilhorne. And a planning purpose is one which relates to the character of the use of land."

37. It has long been recognised that a consequence of this approach of relying on the *Newbury* criteria to identify "material considerations" is that planning permission cannot be bought or sold. In *City of Bradford Metropolitan Councils v Secretary of State for the Environment* (1986) 53 P & CR 55, at 64, Lloyd LJ said that this was "axiomatic". In *Plymouth* this was taken to be a correct statement of the law (at p 83, per Russell LJ; p 84, per Evans LJ; and p 90, per Hoffmann LJ). *Plymouth* was concerned with whether a developer's agreement to provide certain off-site benefits could properly be regarded as fairly and reasonably related to the development for which permission was sought, so as to constitute a material

consideration which the local planning authority was entitled to take into account when granting permission. The *Newbury* criteria were applied in order to answer that question. On the facts, a sufficient connection with the proposed development was found to exist. That was also the case in relation to certain off-site benefits taken into account in *Tesco*: see pp 782-783 per Lord Hoffmann, as he had become. In both cases, there was a sufficiently close nexus between the off-site benefits to be provided and the proposed change in the character of the use of the land involved in the proposed development.

38. However, in *Plymouth* Hoffmann LJ made reference at p 90 to a general principle that planning control should restrict the rights of landowners only so far as may be necessary to prevent harm to community interests and referred to the concept of materiality in that regard, "because there is a public interest in not allowing planning permissions to be sold in exchange for benefits which are not planning considerations or do not relate to the proposed development". This statement was not qualified in *Tesco*. Therefore, a condition or undertaking that a landowner pay money to a fund to provide for general community benefits unrelated to the proposed change in the character of the use of the development land does not have a sufficient connection with the proposed development as to qualify as a "material consideration" in relation to it.

39. A principled approach to identifying material considerations in line with the *Newbury* criteria is important both as a protection for landowners and as a protection for the public interest. It prevents a planning authority from extracting money or other benefits from a landowner as a condition for granting permission to develop its land, when such payment or the provision of such benefits has no sufficient connection with the proposed use of the land. It also prevents a developer from offering to make payments or provide benefits which have no sufficient connection with the proposed use of the land, as a way of buying a planning permission which it would be contrary to the public interest to grant according to the merits of the development itself.

40. In this court in *Aberdeen* these points were emphasised by Lord Hodge (with whom the other members of the court agreed) at paras 43-46. In that case, planning obligations imposed on developers to make contributions to assist with development of infrastructure around Aberdeen were found to be unlawful because they were not related to the use of the land for which the developers sought planning permission. At para 43, Lord Hodge cited with approval a passage from the judgment of Beldam LJ in *Tesco Stores Ltd v Secretary of State for the Environment* (1994) 68 P & CR 219, at 234-235, including the following:

> "Against the background that it is a fundamental principle that planning permission cannot be bought or sold, it does not seem

> unreasonable to interpret [subsection 106(1)(d) of the 1990 Act] so that a planning obligation requiring a sum or sums to be paid to the planning authority should be for a planning purpose or objective which should be in some way connected with or relate to the land in which the person entering into the obligation is interested."

41. At para 44 Lord Hodge continued:

> "A planning obligation, which required as a pre-condition for commencing development that a developer pay a financial contribution for a purpose which did not relate to the burdened land, could be said to restrict the development of the site, but it would also be unlawful. Were such a restriction lawful, a planning authority could use a planning obligation in the context of an application for planning permission to extract from a developer benefits for the community which were wholly unconnected with the proposed development, thereby undermining the obligation on the planning authority to determine the application on its merits. Similarly, a developer could seek to obtain a planning permission by unilaterally undertaking a planning obligation not to develop its site until it had funded extraneous infrastructure or other community facilities unconnected with its development. This could amount to the buying and selling of a planning permission. Section 75, when interpreted in its statutory context, contains an implicit limitation on the purposes of a negative suspensive planning obligation, namely that the restriction must serve a purpose in relation to the development or use of the burdened site. An ulterior purpose, even if it could be categorised as a planning purpose in a broad sense, will not suffice. It is that implicit restriction which makes it both ultra vires and also unreasonable in the *Wednesbury* sense for a planning authority to use planning obligations for such an ulterior purpose."

42. The protection for landowners on the one hand and for the public interest on the other has been held to be established by Parliament through statute, as interpreted by the courts. Parliament has itself in this way underwritten the integrity of the planning system. In *Tesco* Lord Hoffmann pointed out that the question of whether something is a material consideration is a question of law: p 780. Statute cannot be overridden or diluted by general policies laid down by central government (whether in the form of the NPPF or otherwise), nor by policies adopted by local planning authorities. As Lord Hodge said in *Aberdeen* at para 51, "The inclusion of a policy in the development plan, that the planning authority will seek … a planning

obligation from developers [to contribute money for purposes unconnected with the use of the land], would not make relevant what otherwise would be irrelevant."

43. The same point can be made about the policy statements in the DECC Guidance. In any event, as set out above, that document itself explains that the guidance it contains has to be read subject to the established legal position regarding what qualifies as a material consideration for the purposes of the grant of planning permission.

44. In the present case, the community benefits promised by Resilient Severndale did not satisfy the *Newbury* criteria and hence did not qualify as a material consideration within the meaning of that term in section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. Dove J and the Court of Appeal were right so to hold. The benefits were not proposed as a means of pursuing any proper planning purpose, but for the ulterior purpose of providing general benefits to the community. Moreover, they did not fairly and reasonably relate to the development for which permission was sought. Resilient Severndale required planning permission for the carrying out of "development" of the land in question, as that term is defined in section 55(1) of the 1990 Act. The community benefits to be provided by Resilient Severndale did not affect the use of the land. Instead, they were proffered as a general inducement to the Council to grant planning permission and constituted a method of seeking to buy the permission sought, in breach of the principle that planning permission cannot be bought or sold. This is so whether the development scheme is regarded as commercial and profit-making in nature, as Hickinbottom LJ thought it was (para 39), or as a purely community-run scheme to create community benefits.

45. For the appellants, Mr Kingston submitted that the planning statutes had to be regarded as "always speaking" so far as concerns what counts as a "material consideration", and that this meant that the meaning of this concept should be updated in line with changing government policy. I do not agree. The meaning of the term "material consideration" in section 70(2) of the 1990 Act and section 38(6) of the 2004 Act is not in doubt and updating the established meaning of the term is neither required nor appropriate. To say that the meaning of the term changes according to what is said by Ministers in policy statements would undermine the position, as explained above, that what qualifies as a "material consideration" is a question of law on which the courts have already provided authoritative rulings. The interpretation given to that statutory term by the courts provides a clear meaning which is principled and stable over time. I note that Parliament has considered it necessary to amend section 70(2) when it wishes to expand the range of factors which may be treated as material for the purposes of that provision, for instance in relation to the Welsh language: subparagraph (aa).

46. Mr Kingston relied on statements in *Fawcett Properties* which he maintained showed that policies do inform the meaning of the statutory term "material consideration", and suggested that since this authority was referred to and relied upon by the House of Lords in *Newbury* the interpretation of "material consideration" taken from the latter case had to be read as subject to what was said about this in *Fawcett Properties*. However, in my view, nothing said in *Fawcett Properties* supports Mr Kingston's submission.

47. In that case, a local planning authority had granted permission for the building of two cottages on green belt land subject to a condition that their occupation was limited to persons whose employment is or was in agriculture, forestry or an industry related to agriculture, and their dependants. At the time of imposing the condition the local planning authority had issued a draft outline development plan which indicated that its object in relation to the area where the cottages were to be built was to maintain the normal life of an agricultural district. When imposing the condition the authority stated that the reason for doing so was that it "would not be prepared to permit the erection of dwelling-houses on this site unconnected with the use of the adjoining land for agriculture or similar purposes". The appellants later acquired the freehold and brought proceedings to challenge the validity of the condition on various grounds, including that (i) the imposition of a condition according to the personality of the occupier rather than with reference to the user of the premises was outside the power of the local planning authority to impose such conditions as it thought fit and (ii) the condition bore no reasonable relation to the policy in the outline plan or to any other sensible planning policy. Lord Jenkins described the first challenge as the "broad" ultra vires claim and the second as the "narrow" ultra vires claim: pp 683-684. The nature of these challenges was explained clearly by Romer LJ in the Court of Appeal ([1959] Ch 543 at 572-573 and 568-572, respectively), in a judgment approved by the House of Lords on these points. The House of Lords dismissed the challenge and upheld the condition.

48. It is ground (i) which is relevant for present purposes. On that, Romer LJ held that a condition framed with reference to the occupation of the inhabitants of the cottages was sufficiently linked to the user of the land in question as to be permissible: [1959] Ch 543, 572-573; and to similar effect see 558-559 per Lord Evershed MR and 578-579 per Pearce LJ. This reasoning was upheld in the House of Lords: p 659 (Lord Cohen), p 667 (Lord Morton of Henryton), p 675 (Lord Keith of Avonholm), p 679 (Lord Denning) and pp 683-684 (Lord Jenkins). The reasoning in the Court of Appeal and in the House of Lords on this point is fully in line with Viscount Dilhorne's statement of the first two of the *Newbury* criteria. It offers no support for the submission that the statutory concept of a "material consideration" varies according to the content of planning policy documents.

49. Mr Kingston, however, in seeking to advance that submission, sought to rely on passages in the speeches in the House of Lords which were directed not to ground

(i) and the question whether the condition related to the development permitted, in the sense of being sufficiently connected with the proposed change in use of the land, but rather to ground (ii): pp 660-661 (Lord Cohen), 674-675 (Lord Keith), 679 (Lord Denning) and 684-685 (Lord Jenkins). Ground (ii) was concerned with a different question, arising under the third of what were later called the *Newbury* criteria, namely whether the condition was rationally connected, not with the proposed change in use of the land, but with the policy in the outline plan or "any other sensible planning policy" (pp 660-661 per Lord Cohen). The Court of Appeal dismissed this challenge, on the basis that there was a sufficient rational connection between the condition and the policy in the outline plan. All members of the appellate committee of the House of Lords came to the same conclusion. Contrary to the submission of Mr Kingston, their reasoning in that regard does not indicate that the statutory concept of a "material consideration" varies according to the content of planning policy documents.

50. Mr Kingston also sought to gain support for his argument from a series of cases in which policy was relied upon in order to justify the imposition of conditions or, he submitted, to identify material considerations for the purposes of the planning statutes. Again, however, on proper analysis these authorities do not help him.

51. In *R (Copeland) v London Borough of Tower Hamlets* [2010] EWHC 1845 (Admin) a local planning authority had to consider whether to grant planning permission for a fast-food outlet near a school, which was said to conflict with government policy on healthy eating for children. The authority proceeded on the footing that this was not capable of being a material consideration. However, at the hearing the authority's counsel accepted that whether the site was used for a fast-food outlet was a matter which "relates to the use of land and is thus capable of being a planning consideration" (para 25) and the decision was quashed, because the planning committee had not appreciated, as they should have done, that this was a matter capable of being a material consideration to which they could give consideration. The concession made by counsel was clearly correct: whether or not the property was used as a fast-food outlet was very directly a matter concerning its use. The policy did not affect that one way or the other. It was relevant to a different question, whether in policy terms the grant of planning permission would be justified or not.

52. The same analysis applies in relation to the other authorities on which Mr Kingston relied. In each case, a condition was imposed or planning permission was refused on the basis of a consideration which directly related to the use of the land in question and hence which satisfied the second of the *Newbury* criteria. The policy justification for the condition or for treating the consideration as having significant weight was a distinct matter, as in *Fawcett Properties*, and it was in relation to this that reference to policy guidance was significant. Contrary to the submission of Mr

Kingston, the policy guidance did not affect the meaning of the term "material consideration" in the planning statutes.

53. In *R v Hillingdon London Borough Council, Ex p Royco Homes Ltd* [1974] QB 720 the Court of Appeal held in relation to the grant of planning permission for a residential development that the imposition of conditions that the houses built should be occupied by persons on the planning authority's housing waiting list was ultra vires, on the basis that the conditions were a fundamental departure from the rights of ownership and were so unreasonable that no local planning authority, appreciating its duty and properly applying itself to the facts, could have imposed them: the imposition was found to be *Wednesbury* unreasonable (see pp 731-732 per Lord Widgery CJ, referring to *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). The result was that the planning permission was quashed. Mr Kingston rightly points out that later national planning policy guidance contemplated that use of land for the provision of affordable housing would be a desirable policy objective and that conditions in relation to residential developments requiring a proportion of dwellings to be made available for affordable housing are now accepted as lawful and are very common. However, this is because the alteration in national policy has made it clear that a reasonable local planning authority, acting within the parameters of the *Wednesbury* decision, can properly find such a condition to be justified in terms of planning policy. Contrary to Mr Kingston's submission, the change in the legal position has not occurred because the meaning of the statutory term "material consideration" has been altered by reason of the promulgation of new national planning policy. Mr Kingston's submission again confuses two different questions.

54. This point is borne out by the decision of the Court of Appeal in *Mitchell v Secretary of State for the Environment* (1995) 69 P & CR 60, on which Mr Kingston also relied. In that case, a developer applied for planning permission to convert a building from use for multiple occupation by way of bedsitting rooms to a small number of self-contained flats. There was a draft development plan of the local planning authority which set out a policy to resist such changes of use, on grounds of the local need for affordable housing in the authority's area. The authority refused permission for the development, relying on the policy in the draft plan as a material consideration. The developer appealed to the Secretary of State. The Secretary of State dismissed the appeal and refused planning permission, treating the need for affordable housing as a material consideration as the authority had done. The developer challenged the Secretary of State's decision, contending that the policy of the authority was not a material consideration, and was successful at first instance in having the decision quashed. The Court of Appeal allowed the Secretary of State's appeal. Saville LJ (with whom the other members of the court agreed) observed at p 62 that the proposed change from multiple occupation to self-contained flats was a change in the character of the use of the land within the guidance given by Lord Scarman in *Westminster* at p 670 (see above). He held that the need for affordable

housing in a particular area was a relevant policy consideration which justified the Secretary of State in deciding to refuse to grant permission for the development in question. Balcombe LJ gave a short concurring judgment, referring to planning policy guidance regarding the desirability of provision of affordable housing. There was no question in the case as to whether what was in issue sufficiently related to the proposed use of the land itself: clearly, the configuration of the accommodation in the property directly related to the use of the land. The question was whether there was sufficient policy justification for insisting that the use of the land should be consistent with the draft development plan policy to promote affordable housing, and it was held that there was. Balcombe LJ regarded it as material to that question that national planning policy guidance had been issued stating that this should be treated as a material planning consideration.

55. *R (Welcome Break Group Ltd) v Stroud District Council* [2012] EWHC 140 (Admin) concerned the grant of planning permission to develop land as a motorway service area upon condition of the acceptance of obligations by the developer and site owner in an agreement made under section 106 of the 1990 Act which included that a local employment and training policy should be submitted for the approval of the local planning authority and that reasonable endeavours would be used to stock goods and produce from local producers for sale at the site. A challenge to quash the grant of planning permission, including on the ground that the condition and obligations were immaterial to the merits of the proposed development, was dismissed. The judge implicitly found at paras 50 and 53 that there was a sufficient connection between the obligations and the proposed development (that is to say, the proposed use of the land) so that these were matters capable of falling within the statutory concept of "material considerations", and separately held that there was sufficient policy justification for the authority to be entitled to impose the condition as a matter of planning judgment (paras 49-53). It was in relation to this latter issue that he took into account national planning policy guidance and the relevant regional policy dealing with support for the sustainable development of the regional economy. So, again, this authority provides no support for Mr Kingston's submission.

56. The same points apply as regards *Verdin (t/a The Darnhall Estate) v Secretary of State for Communities and Local Government* [2017] EWHC 2079 (Admin). The case concerned a challenge to a decision of the Secretary of State refusing planning permission for residential development. The claimant was successful on a number of grounds, including that the Secretary of State had wrongly rejected, without giving adequate reasons, a proposed condition requiring local firms to be used for the development and a proposed condition requiring local procurement as part of the proposed development. However, there was no issue regarding whether these conditions sufficiently related to the proposed use of the land. It seems to have been common ground that they did. Rather, the grounds of challenge were analysed in relation to the distinct question whether there was a

sufficient policy basis on which these conditions could be said to be material considerations. It was in relation to that question that the judge had regard to national policy in the NPPF and the development plan regarding sustainable economic development: see paras 92-98 and 108-114, respectively. The two conditions were potentially material in terms of policy, and the Secretary of State had not given adequate reasons to explain why he had rejected them.

57. Finally, Mr Kingston relied on *R (Working Title Films Ltd) v Westminster City Council* [2016] EWHC 1855 (Admin). This concerned a challenge to the grant of planning permission for erection of a building for mixed uses, including the provision within it of a community hall in accordance with a planning obligation undertaken by the developer. A ground of challenge relied on was that the local planning authority was wrong to have had regard to the community benefit from provision of the community hall as something which compensated for under-provision of affordable housing in the residential part of the development. The judge rejected the challenge, holding that this was a planning judgment which the authority was entitled to make: para 25. Again, the case provides no support for Mr Kingston's submission. The planning obligation clearly related to the use of the land, and this was not in issue. The discussion related to the policy justification for accepting such a planning obligation.

Conclusion

58. For the reasons given above, I would dismiss this appeal. I would resist Mr Kimblin's invitation on behalf of the Secretary of State that we should "update *Newbury*". In deciding to grant planning permission for the development, the Council relied on matters which do not qualify as "material considerations" for the purposes of section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. That means that the grant of planning permission has rightly been quashed. It is unnecessary to give separate consideration to condition 28. The imposition of that condition cannot make an immaterial consideration into a material consideration within the meaning of the statutory provisions.