

A303 Sparkford to Ilchester Dualling Scheme TR010036

3.2 Explanatory Memorandum

APFP Regulation 5(2)(c)

Planning Act 2008

Infrastructure Planning (Applications: Prescribed
Forms and Procedure) Regulations 2009

July 2018



Infrastructure Planning

Planning Act 2008

**The Infrastructure Planning
(Applications: Prescribed
Forms and Procedure)
Regulations 2009**

A303 Sparkford to Ilchester Dualling Scheme
Development Consent Order 201[x]

EXPLANATORY MEMORANDUM

Regulation Number:	Regulation 5(2)(c)
Planning Inspectorate Scheme Reference	TR010036
Application Document Reference	3.2
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Version	Date	Status of Version
Rev 0	July 2018	Application Issue

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1 SUMMARY

This memorandum explains the purpose and effect of each article of, and Schedules 1 and 2 to, the draft A303 Sparkford to Ilchester Dualling Development Consent Order (the "**Order**"), as required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009¹.

2 PURPOSE OF THE ORDER

2.1 The draft Order is a development consent order authorising the construction and operation of the A303 Sparkford to Ilchester Dualling scheme (the "**Scheme**").

2.2 In summary the Scheme consists of a new dual carriageway between the Podimore Bypass and the Sparkford Bypass in Somerset, including the removal of at-grade junctions and accesses and the construction of new free-flowing merging and diverging slip roads. A new grade-separated junction will be provided in the vicinity of the Hazlegrove Roundabout and all all-movements junction in the vicinity of Downhead Lane.

2.3 A detailed description of the Scheme is included in Chapter 2 of the Environmental Statement.

Nationally Significant Infrastructure Project

2.4 The Scheme is a nationally significant infrastructure project ("**NSIP**") within sections 14(1)(h) and 22(1)(a) of the Planning Act 2008 (the "**2008 Act**"). Under section 22 an NSIP must fall within one of the three categories specified, which are expressly stated to be alternatives. This Scheme is the "construction" of a highway within the meaning of section 22(1)(a).

2.5 The Scheme satisfies section 22(2) in that the highway will (when constructed) be wholly in England; the undertaker as strategic highways company will be the highway authority for the highway; and the area of development is greater than the relevant limit set out in subsection (4), which in this case is 12.5 hectares and speed limits will be in excess of 50mph.

2.6 As the Scheme is an NSIP, development consent must be obtained from the Secretary of State to authorise it, and an application for a development consent order must be made to the Secretary of State, care of the Planning Inspectorate ("**PINS**"), under section 37 of the 2008 Act.

2.7 Schedule 1 (authorised development) to the Order contains a list of numbered works comprising the Scheme.

¹ S.I. 2009/2264

Associated development

- 2.8 The Order specifically authorises development which is associated with the NSIP. The Secretary of State may, under the provisions of section 115 of the 2008 Act, grant consent for development that is associated with the NSIP (“**associated development**”).
- 2.9 Guidance on associated development has been issued by the Secretary of State². In this guidance associated development is described as being “*typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project*” (paragraph 6) and “*requires a direct relationship between associated development and the principal development. Associated development should therefore either support the construction or operation of the principal development, or help address its impacts. Associated development should not be an aim in itself but should be subordinate to the principal development*” (paragraph 5).
- 2.10 The Order includes consent for development which would constitute associated development. These are Works 39, 40 and 99 which comprise the provision of ecological mitigation outwith the main site, and Work 59 which is an accommodation work to upgrade an access to ensure it can be safely used by large vehicles.

3 ANCILLARY MATTERS

- 3.1 The Order also contains several ancillary matters, i.e. provisions not consisting of development.
- 3.2 The Order seeks to apply and modify statutory provisions relating to the compulsory acquisition of land. It is for this reason that under section 117 and 120(5) of the 2008 Act the Order must be made by way of Statutory Instrument. The Order is therefore in that form.
- 3.3 Other ancillary matters include the temporary and permanent stopping up of lengths of existing highway and private means of access in the vicinity of the Scheme, the classification of highways, the imposition of traffic regulation measures (including the application of speed limits), the creation of new private means of access, and the application and disapplication of legislation.
- 3.4 There is no special category land affected by the proposed order and provisions relating to this have therefore not been included.

² ‘Guidance on associated development applications for major infrastructure projects’ (Department for Communities and Local Government) (April 2013)

4 THE DRAFT ORDER

- 4.1 The purpose and effect of the provisions of the draft Order are now explained in sequence. Whilst the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (S.I. 2009/2265) has been repealed, the Order is based on the model provisions as well as other development consent orders that have been made to date.

Part 1 – Preliminary

Article 1 - Citation and commencement

- 4.2 Article 1 sets out the name of the Order and the date on which it comes into force.
- 4.3 This article did not appear in the model provisions. However, it is a standard article that is included in all development consent orders.

Article 2 - Interpretation

- 4.4 Article 2(1) defines terms used in the Order. It is a standard article and was included in the model provisions as article 1.

- 4.5 Definitions to note include:

- (a) "Commence" which makes clear that a number of works that would constitute a 'material operation' under the Town and Country Planning Act 1990 do not mean that the authorised development has been 'commenced'. This enables the undertaker to undertake certain preparatory works prior to the submission of relevant details for approval under the requirements, which the undertaker considers proportionate. The works that are excluded from the definition of commencement are either de minimis or have minimal potential for adverse impacts. They may in some cases need to be carried out in order to comply with the pre-commencement requirements (for example, to inform assessments and proposals required to be submitted for approval). The undertaker should be permitted to carry out low impact preparatory works following the grant of the DCO, while it is working to discharge the pre-commencement requirements, thereby helping to minimise the construction timetable. The definition of commence used generally follows that in the Silvertown Tunnel Development Consent Order³.
- (b) "Maintain" which includes inspect, repair, adjust, alter, remove, replace and reconstruct.
- (c) "Order land" which includes the words 'or used permanently or temporarily' as some of the land may only be used temporarily, rather than acquired.

³The Silvertown Tunnel Order 2018

- (d) “Order limits” which means the red line boundary for the Scheme as shown on the works plans and the land plans.
- 4.6 Article 2(2) expands the definition of rights over land. This was included in the model provisions as article 1(2).
- 4.7 Article 2(3) defines measurements as approximate. The purpose of this is to ensure that if, upon construction of the works it transpires that the distances are marginally different to those listed in the Order, there is no issue over whether the Order permits the works. Thus this provision allows for a small tolerance, although all works will take place within the limits of deviation. It is now common practice to include such provision in development consent orders and the model provisions included similar wording in article 1(3).
- 4.8 Article 2(4) provides that areas given in the Book of Reference are approximate, since these are not covered by article 2(3). This is intended to clarify the position of the areas in the Book of Reference, and the purpose and effect is the same as set out in the previous paragraph.
- 4.9 Articles 2(5) and (6) confirm that references to lettered or numbered points and numbered works are to points lettered or numbered on the relevant plans and works numbered in Schedule 1, as appropriate.

Article 3 – Disapplication of legislative provisions

- 4.10 This article provides (in reliance on section 120(5)(a) of the 2008 Act) for the disapplication in relation to the authorised development of certain requirements which would otherwise apply under general legislation. Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude a statutory provisions which relates to any matter for which provision may be made in the order.
- 4.11 Article 3 provides for the disapplication of various consents which would otherwise be required from the Environment Agency, internal drainage boards or lead local flood defence authorities under the Environmental Permitting (England and Wales) Regulations 2016, the Water Resources Act 1991 or the Land Drainage Act 1991. These are the requirements:
 - (a) for an environmental permit for the carrying on of flood risk or water discharge activities;
 - (b) for a licence to abstract water;
 - (c) imposed by byelaws made or deemed to have been made under the Water Resources Act 1991;

- (d) prohibiting the placing of obstructions in waterways which are not main rivers under the Land Drainage Act 1991;
- (e) for Secretary of State consent to vary an award which affects the drainage of land; and
- (f) of byelaws made under the Land Drainage Act 1991 regulating the use and obstruction of watercourses.

These are consents for activities which are a necessary part of the Scheme.

- 4.12 As these provisions (other than section 32 of the Land Drainage Act 199 and byelaws made under section 66 of the Land Drainage Act 1991) are prescribed under section 150 of the 2008 Act⁴, the consent of the Environment Agency and the relevant drainage authorities to the inclusion of these provisions in the Order will be needed and these consents are being sought. The relevant protective provisions are being discussed with the relevant regulators.
- 4.13 Paragraph (3) provides that should the provisions of the Neighborhood Planning Act 2017 which relate to the process of compulsory acquisition, come into force they will not apply to the exercise of such powers under this Order.
- 4.14 The undertaker has produced a Consents and Agreements Position Statement as part of this application. This sets out in greater detail the undertaker's proposed approach to obtaining the other consents required for the Scheme.

Article 4 – Maintenance of drainage works

- 4.15 The purpose of article 4 is to make it clear that any realignment of drainage works or other works to them that are carried out as part of the Scheme do not affect the existing allocation of responsibility for maintenance of those drainage works, unless otherwise agreed in writing between the undertaker and the responsible party. Responsibility for maintenance of drainage works may sit with the Environment Agency, an internal drainage board, a lead local flood authority or a landowner.
- 4.16 This article was not included in the model provisions. However, it appears in existing development consent orders⁵ and is considered to be a sensible inclusion to clarify who has responsibility for the maintenance of drainage works.

Part 2 - Principal Powers

Article 5 - Development consent etc. granted by the Order

⁴ See regulation 5 of and Part 1 of Schedule 2 to the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015.

⁵ See article 4 of The M20 Junction 10a Development Consent Order 2017 and article 4 of The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016.

- 4.17 Article 5 provides the principal power to construct and operate the authorised development within the Order limits. Schedule 1 describes the authorised development.
- 4.18 Development consent is subject to the provisions of the Order, including the requirements listed in Schedule 2. This is based on article 2 of the model provisions.
- 4.19 Article 5(2) was not included in the model provisions, but has been included in previous orders⁶. It provides that any enactment applying to land within or adjacent to the Order limits has effect subject to the provisions of the Order. As the Order amends and disapplies various enactments that apply to and affect the authorised development, or would otherwise do so, this ensures that the legislative position is consistent.

Article 6 – Maintenance of authorised development

- 4.20 This article sets out the scope within which the undertaker may maintain the development. The definition of "maintain" is contained in article 2(1). Article 6 was included in the model provisions as article 3.
- 4.21 Powers of maintenance are subject to the other provisions of the Order and any agreements made under the Order.

Article 7 – Planning permission

- 4.22 This article permits certain development authorised by a planning permission granted under the Town and Country Planning Act that is within the Order limits to be carried out pursuant to the terms of the planning permission without breaching the Order. This is not a model provision, but ensures that the undertaker does not breach section 161 of the 2008 Act in carrying out certain development pursuant to a grant of planning permission, provided that development is not of itself an NSIP or part of one, or required to complete or enable the use or operation of any part of the authorised development.

Article 8 – Limits of deviation

- 4.23 Article 8 confirms that in carrying out the authorised development the undertaker may:
- (a) deviate laterally from the lines or situations shown on the works plans, provided that such deviation is within the limits of deviation for that work;
 - (b) deviate vertically to a maximum of 1 metre upwards or 5 metres downwards in respect of Works 81, 85 and 92; and
 - (c) otherwise deviate vertically from the levels of the authorised development shown on the engineering drawings and sections to a maximum of 1 metre upwards or downwards.

⁶ See article 5(2) of The M20 Junction 10a Development Consent Order 2017 and article 5(2) of The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016

- 4.24 Greater vertical limits of deviation are sought for Works 81, 85 and 92 on the basis that greater flexibility is required for those works to allow the detailed design to consider a smaller junction arrangement. This follows consultation with Somerset County Council which has led the undertaker to consider a design proposal which could reduce the size of the junction but which requires the underpass to be deeper than is currently shown in the indicative levels. In order to retain the ability to consider this within the detailed design of the final engineering solution for the junction, increased limits of downward deviation are sought in this location. Should the ground investigation works show it to be feasible, the deeper junction would be more compact which would reduce the necessary land take. This has been assessed in the Environmental Statement and the greater limits of deviation are therefore considered to be appropriate in this case.
- 4.25 The maximum limits of deviation do not apply where the undertaker is able to demonstrate to the Secretary of State's satisfaction, following consultation with the relevant planning authority and the local highway authority, that a deviation in excess of these limits would not give rise to any materially new or worse environmental effects compared to those reported in the Environmental Statement..
- 4.26 This wording was not included in the model provisions, but has become common wording in development consent orders⁷. The ability to deviate within the prescribed limits of deviation is important to ensure that, if the precise 'as built' alignments or elevations are slightly different to those indicatively shown on the application plans, no question arises as to whether or not the works are permitted by the Order. The detailed design of the scheme will take place following the grant of the Order (see Requirement 12) and the limits of deviation therefore ensure that the undertaker and its contractor have sufficient flexibility to design and construct the authorised development post consent.
- 4.27 The limits of deviation shown on the application plans have been taken into account in the preparation of the Environmental Statement and the potential impacts of a deviation within the permitted limits have therefore been assessed. The undertaker is only permitted to exceed the limits specified in this article if they can demonstrate to the Secretary of State's satisfaction that no materially new or worse adverse environmental effects would arise.

Article 9 - Benefit of Order

- 4.28 Article 9 overrides section 156(1) of the 2008 Act (as permitted by section 156(2)) to give the benefit of the Order to the undertaker rather than anyone with an interest in the land. It would be impracticable for a variety of landowners to implement parts of the

⁷ Recent examples include The Silvertown Tunnel Order 2018 (art. 5), The M20 Junction 10a Order 2017 (art. 8); The M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016 (art. 6); and The A14 Cambridge to Huntingdon Improvement Scheme Order 2016 (art. 7).

Order in an uncoordinated manner, which might be the case if section 156(1) were to apply.

- 4.29 The purpose of paragraph (2) is to clarify the exceptions where the Order will self-evidently benefit others, e.g. rights for statutory undertakers to undertake works to their own apparatus.
- 4.30 Paragraph (1) is based on article 4 of the model provisions. Paragraph (2) was not included in the model provisions but has been included in a number of previous orders⁸.

Article 10 - Consent to transfer benefit of Order

- 4.31 This article allows the benefit of the Order to be transferred or leased to others by the undertaker. The exercise of any transferred benefits or rights is subject to the same restrictions, liabilities and obligations as would apply under the Order if those benefits or rights were exercised by the undertaker. The consent of the Secretary of State is required for a transfer or grant, except where it is made to a specified company in respect of a particular work.
- 4.32 This article is based on article 5 of the model provisions. It differs in that it allows a transfer or grant to a specified company to take place without the Secretary of State's consent, on the basis that it is appropriate for those companies to be able to carry out those works.

Part 3 – Streets

Article 11 – Street works

- 4.33 Article 11 allows the undertaker to interfere with and execute works in or under the streets within the Order limits for the purposes of the authorised development. The authority given by this article is a statutory right for the purposes of sections 48(3) and 51(1) of the New Roads and Street Works Act 1991. Certain provisions of the 1991 Act apply to works carried out under this article, subject to the provisions of article 12 (application of the 1991 Act).

- 4.34 Article 11 is based on article 8 of the model provisions and article 11 of the M4 order.

Article 12 – Application of the 1991 Act

- 4.35 Article 12 provides for the application of the New Roads and Street Works Act 1991. Although not included in the model provisions, there is precedent for these provisions in previous orders⁹.

⁸ Article 9(2) of the M20 Order, article 7(2) of the M4 Order and 8(2) of A14 order

⁹ See for example articles 11, 9 and 10 of the M20, M4 and A14 orders respectively.

- 4.36 Paragraphs (1) and (2) provide that certain works carried out under the authority of the Order are to be "major highway works" for the purposes of the 1991 Act. The effect of this is to clarify that the cost-sharing provisions relevant to the diversion of utility apparatus (which would apply to such works under the 1991 Act if carried out by the highway authority) will apply in respect of the works authorised by the Order, irrespective of who carries them out.
- 4.37 Paragraph (3) provides that certain provisions of the 1991 Act listed in that paragraph will not apply. The disapplication of these provisions (which are designed primarily to regulate the carrying out of street works by utility companies in respect of their apparatus) is appropriate given the scale of works proposed under the Order, the specific authorisation given for those works by the Order and the specific provisions in the Order which regulate the carrying out of the Order works.
- 4.38 Paragraphs (4) to (6) apply certain provisions of the 1991 Act (listed in paragraph (5)) to streets which are to be temporarily stopped up, altered or diverted under the Order. This is for two reasons: first, it prevents any confusion as to whether works in respect of a temporarily affected street are 'street works' for the purposes of the 1991 Act; and secondly, it simplifies the implementation of the works by providing for a single process in respect of streets which are stopped up and those which are not.
- 4.39 Paragraph (7)(a) provides that nothing in article 13 affects the operation of section 87 of the 1991 Act, which allows a local highway authority to declare that a street in its area is likely to become a maintainable highway and consequently that Part 3 of the 1991 Act applies to that street. The undertaker will not be under the duties that apply to a street authority under the 1991 Act by virtue of being responsible for the maintenance of a street under article 13.
- 4.40 Paragraph (7)(b) clarifies that the provisions relating to responsibility for maintenance of streets in article 13 do not affect the application of Part 3 of the 1991 Act to maintenance works which are street works for the purposes of the 1991 Act. 'Street works' is defined in section 48(3) of the 1991 Act as including works for the maintenance of apparatus (but excluding works for road purposes) that are executed in pursuance of a statutory right or a street works licence.

Article 13 - Construction and maintenance of new, altered or diverted streets and other structures

- 4.41 The purpose and effect of article 13 is as follows:
- (a) Under the Highways Act 1980 and the Appointment of a Strategic Highways Company Order 2015 the undertaker is the highway authority for, and therefore is responsible for maintaining, trunk roads, including those to be provided as

part of the Scheme. For any other highways and streets, this article determines the body that will be liable for maintenance. Liability for maintenance would transfer to the local highway authority or to the street authority as appropriate on completion of the works. Paragraphs (1) to (4) allow the undertaker to make contrary agreements with the local highway authority concerned.

- (b) Paragraphs (1) to (3) are subject to paragraphs (5) and (6), which make specific maintenance provisions in relation to bridges.
- (c) The effect of paragraphs (7) and (8) is that in any action for damages against the undertaker alleging failure to maintain a street, the undertaker will have the defence that it had taken such care as was reasonably required in the circumstances to secure that the street was not dangerous for traffic. This ensures that the provision in section 58 of the Highways Act 1980 applies to the undertaker not only in respect of the trunk roads for which it is the highway authority but also other roads and is consistent with the approach taken in previous development consent orders.

4.42 Article 13 was not included in the model provisions, but has been included in all Highways England orders made to date¹⁰.

Article 14 - Classification of roads etc.

- 4.43 The designation of highways, the specification of the classes of traffic authorised to use a highway and speed limits are ancillary matters which may be included in a development consent order¹¹. These and other related matters are addressed by this article. These matters are integral to the implementation of the Scheme and it is therefore appropriate to include them in the Order as ancillary matters.
- 4.44 Article 14(1) provides for the roads described in Part 1 of Schedule 3 to become trunk roads from the date that they are complete and open to traffic.
- 4.45 Paragraph (2) provides for the trunk roads described in Part 2 of Schedule 3 to cease to be trunk roads on such day as the undertaker may determine. In practice this will be a date that has been agreed with or notified to the local highway authority.
- 4.46 Paragraph (3) provides for the roads described in Parts 3 and 4 of Schedule 3 to become classified roads from the date that they are complete and open to traffic.
- 4.47 Paragraph (4) provides for the roads described in Part 5 of Schedule 3 to become unclassified roads from the date that they are complete and open to traffic.

¹⁰ See for example articles 12(6) and (7), 12(5) and (6) and 11(9) and (10) of the M20, M4 and A14 orders respectively.

¹¹ Planning Act 2008 section 120(5) and Schedule 5, paragraphs 19 and 20.

- 4.48 Paragraph (5) imposes speed limits on certain sections of the Scheme as described in Part 6 of Schedule 3.
- 4.49 Paragraph (6) confirms that the public rights of way described in Part 11 of Schedule 3 will be provided and open for use from the date on which the authorised development is open to traffic unless otherwise agreed with the relevant planning authority.
- 4.50 Paragraph (7) provides that the orders specified in Part 10 of Schedule 3 are to be varied or revoked as specified in that Part on such day as the undertaker may determine. Again, in practice the relevant date(s) will be agreed with or notified to the local highway authority.
- 4.51 The purpose of paragraph (8) is to confirm that the matters covered in paragraphs (1) to (6) could be varied or revoked in the future without the need to apply under the 2008 Act for an amendment to the Order, including through the making of a Traffic Regulation Order.
- 4.52 Article 14 was not included in the model provisions, but has been included in all Highways England orders made to date except the M4 Smart Motorway Order 2016.

Article 15 - Temporary stopping up and restriction of use of streets

- 4.53 This article allows for the temporary stopping up, alteration, diversion or restriction of streets for the purposes of the Scheme, whilst ensuring that essential pedestrian access to and from premises along that street is maintained if necessary (paragraph (3)).
- 4.54 Paragraph (2) confers a power on the undertaker where a street has been temporarily stopped up under this article to use it as a temporary working site.
- 4.55 Under paragraph (4) the consent of the street authority is required where the undertaker is not the street authority. The street authority may attach reasonable conditions to any consent, but must not unreasonably withhold or delay consent.
- 4.56 Paragraph (5) provides a right to compensation for any person suffering loss due to the suspension of a private right of way under this article.
- 4.57 Paragraph (6) states that a street authority which fails to notify the undertaker of its decision in respect of an application for consent within 28 days of the application being made is deemed to have given its consent. This time limit is considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by the undertaker in a timely fashion. As a nationally significant infrastructure project the scheme should not be at risk of being held up due to a failure

to respond to an application for consent. This provision has been included in previous Highways England orders¹².

Article 16 - Permanent stopping up and restriction of use of streets and private means of access

- 4.58 This article allows the streets and private means of access identified in Schedule 4 to be stopped up (i.e. the legal right of way along them to be extinguished). Since the definition of a 'street' in section 48 of the New Roads and Street Works Act 1991 includes highways and footways such ways can be stopped up under this Article as well as vehicular accesses.
- 4.59 Paragraph (2) relates to the highways and private means of access to be stopped up as specified in Parts 2 and 4 of Schedule 4, for which a substitute is to be provided. It requires the substitute to be completed and open for use, or a temporary alternative route to be available, before the highway or private means of access in question is stopped up.
- 4.60 For the highways and private means of access to be stopped up as specified in Parts 1 and 3 of Schedule 4, no substitute highway or private means of access is to be provided. Such a highway or private means of access may not be stopped up unless the condition referred to in paragraph (3) and set out in paragraph (4) is met.
- 4.61 Paragraph (6) provides a right to compensation for any person suffering loss due to the suspension or extinguishment of a private right of way under this article.
- 4.62 Since the definition of a 'street' in section 48 of the New Roads and Street Works Act 1991 includes highways and footways, the stopping up and diversion of footpaths and footways are dealt with by article 16 and Schedule 4 as well and there is no need for a separate provision.
- 4.63 This article was included in the model provisions as article 9.

Article 17 - Access to works

- 4.64 This article allows works accesses to be created within the Order limits. This article departs from the model provisions (article 12) to provide the undertaker with a general power to provide means of access, the intention being to provide similar powers to those available under the Highways Act 1980¹³.

Article 18 – Clearways, prohibitions and restrictions

¹² See for example article 14(6) of the M20 order and article 14(6) of the A14 order.

¹³ See section 129 (further provisions with respect to new means of access).

- 4.65 This article is necessary to ensure safe and proper operation of the authorised development, and to ensure that the Scheme delivers its intended benefits. It is therefore appropriate to include it in the Order as an ancillary matter under section 120(3) of the 2008 Act.
- 4.66 Paragraph (1) prohibits waiting on any part of a road specified as a clearway in Part 7 of Schedule 3 except on the direction of, or with the permission of, a uniformed constable or traffic officer.
- 4.67 Paragraph (2) prohibits use of roads in Part 8 of Schedule 3 which are unsuitable for general use by heavy vehicles by vehicles over the specified weight limit of 7.5 tonnes.
- 4.68 Paragraph (3) imposes a waiting limit on the laybys to be created by the scheme and listed in Part 9 of Schedule 3 of two hours. This is included to address concerns that the laybys, which are designed as driver rest areas, would be inappropriately used. This provision provides a limit to the time for which the layby can be used to ensure that its purpose as a driver rest area is maintained and that inappropriate use can be prevented or addressed.
- 4.69 Paragraphs (4) and (5) set out a list of circumstances in which it would be lawful for a vehicle to contravene the restrictions and prohibitions set out in paragraphs (1), (2) and (3).
- 4.70 Paragraph 5 imposes a prohibition on waiting on any part of the highway to be constructed for the purposes of selling or dispensing goods from a vehicle. This provision is intended to prevent unauthorised trading on the highway, particularly in the laybys which are not designed to accommodate such a use.
- 4.71 Paragraph (6) confirms that the provisions of this article can be varied or revoked in the future without the need to apply under the 2008 Act for an amendment to the Order.
- 4.72 This article was not included in the model provisions but has been included in all Highways England orders made to date except the M4 Smart Motorway Order 2016.

Article 19 – Traffic regulation

- 4.73 The purpose of this article is to provide the undertaker with powers to make traffic regulation orders in relation to roads for which it is not the highway authority, so that it can implement traffic management measures (e.g. restrictions on the use of roads) necessary to construct the authorised development.
- 4.74 Article 46 would, at any time up to 12 months after the opening of the authorised development for public use, allow the undertaker, in so far as it is necessary or

expedient for the purposes of the construction, maintenance or operation of the authorised development, to:

- (a) revoke, amend or suspend in whole or in part any order made or having effect under the Road Traffic Regulation Act 1984;
- (b) permit, prohibit or restrict the stopping, waiting, loading or unloading of vehicles on any road;
- (c) authorise the use as a parking place of any road;
- (d) make provision as to the direction or priority of vehicular traffic; and
- (e) permit or prohibit vehicular access to any road.

4.75 Under paragraph (3) any restriction etc. made before the end of the 12 month period may continue to have effect after that period has expired.

4.76 Implementation of any of the measures is subject to the consent of the traffic authority in whose area the roads are situated. Requirement is made in paragraphs (4) and (5) for the chief officer of police and the relevant traffic authority to be consulted and notified in advance. The notification period varies depending on what is being proposed.

4.77 Any restrictions etc. may be suspended, varied or revoked by the undertaker within a period of 24 months from the opening of the authorised development (paragraph (7)).

4.78 This article was not included in the model provisions but has been included in all previous Highways England orders¹⁴. It is anticipated that this article will be used *inter alia* to allow the undertaker to amend the speed limits on small sections of the public highways adjacent to and connecting to the Order Land for which the County Council is the Highway Authority and traffic authority. These amendments are required to align the existing speed limits with those to be imposed on the altered stretches of highway within the Scheme to which they connect. The County Council has requested that the speed limits on the adjacent highways be altered to align with the limits to be imposed under the scheme on the relevant stretches of highway which will be maintained by the Council.

Part 4 – Supplemental powers

Article 20 - Discharge of water

4.79 This article sets out the circumstances in which the undertaker is entitled to discharge water into a watercourse, public sewer or drain, and its purpose is to establish statutory authority for doing so.

¹⁴ See for example article 47 of the M20 order, article 43 of the M4 order and article 45 of the A14 order.

- 4.80 The effect of paragraph (3) is that this can only be done with the consent of the owner. Consent can be given subject to reasonable terms and conditions, but cannot be unreasonably withheld.
- 4.81 Paragraph (5) requires the undertaker to take reasonably practicable steps to ensure that any water that is discharged is as free as may be practicable from gravel, soil or other solid substance, oil or matter in suspension.
- 4.82 Paragraph (7) states that a person who fails to notify the undertaker of their decision in respect of an application for consent/approval within 28 days of the application being made is deemed to have granted consent/approval. This time limit is considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by the undertaker in a timely fashion. As a nationally significant infrastructure project the scheme should not be at risk of being held up due to a failure to respond to an application for consent/approval. This provision has been included in previous Highways England orders¹⁵.

Article 21 - Protective work to buildings

- 4.83 The purpose of this article is to allow the undertaker to undertake protective works to buildings affected by the authorised development. It was included in the model provisions as article 15.

Article 22 - Authority to survey and investigate the land

- 4.84 This article gives the undertaker the power to enter land for the purpose of surveying and investigating. It provides that the undertaker must give 14 days' notice before exercising the powers of entry. Compensation is payable for any loss or damage caused. Paragraphs (1) to (5) were included in the model provisions as article 16. Paragraph (6), which provides for deemed consent in cases where there is no response to an application for consent under this article, was not included in the model provisions but has been included in previous orders¹⁶.

Part 5 - Powers of Acquisition

Article 23 - Compulsory acquisition of land

- 4.85 This article authorises the acquisition of land by compulsory purchase. It grants the power to acquire the land that is required for the Scheme. This is subject to articles 26 (compulsory acquisition of rights) and 33 (temporary use of land for carrying out the authorised development), which are explained below.
- 4.86 Article 23 is based on article 18 of the model provisions.

¹⁵ See for example article 18(7) of the M20 order and article 17(8) of the A14 order.

¹⁶ See for example article 20(6) of the M20 order, article 19(6) of the M4 order and article 19(6) of the A14 order.

Article 24 - Compulsory acquisition of land – incorporation of the mineral code

- 4.87 This article incorporates Parts 2 and 3 of Schedule 2 to the Acquisition of Land Act 1981, exempting existing rights in minerals from the scope of compulsory acquisition unless they are expressly named and conveyed. It also makes provision for a situation where the owner of mines or minerals wishes to work such mines or minerals.
- 4.88 Article 24 was included in the model provisions as article 19.

Article 25 - Time limit for exercise of authority to acquire land compulsorily

- 4.89 This article gives the undertaker five years to issue notices to treat or to execute a general vesting declaration to acquire the land that may be compulsorily acquired under the Order. These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should the Order be made.
- 4.90 The article also sets a five year time limit on the power to take temporary possession of land under article 33, although it does not prevent the undertaker from remaining in possession of land after that time if it took possession within the five year limit.
- 4.91 This article was included in the model provisions as article 20.

Article 26 - Compulsory acquisition of rights

- 4.92 This article allows for rights over land to be acquired as well as the land itself, and also for new rights to be created over land. This includes the power to impose restrictive covenants.
- 4.93 It provides for such rights as may be required to be acquired by the undertaker over land which it is authorised to acquire under article 23. The public benefit of this is that it would allow the undertaker, if possible, to reduce the area of outright acquisition and rely on rights instead.
- 4.94 Paragraph (2) provides that for the land described in Schedule 5, the undertaker's powers of compulsory acquisition are limited to the acquisition of such rights, and the imposition of such restrictive covenants, as may be required for the purposes set out in that Schedule.
- 4.95 The power to impose restrictive covenants will allow for the possibility of reducing the area of outright acquisition and thus enable a more proportionate exercise of compulsory powers. It is therefore in the public interest and has precedent in other highway development consent orders.
- 4.96 Paragraph (3) provides that the power to impose restrictive covenants under paragraph (1) is exercisable only in respect of the plots specified in column (1) of Schedule 5.

- 4.97 Paragraph (4) provides that where the undertaker only needs to acquire rights over land it is not obliged to acquire any greater interest in that land.
- 4.98 Paragraph (5) applies Schedule 6, which imposes modifications to the compulsory purchase and compensation provisions under general legislation. They do not affect the entitlement to compensation, but generally ensure that the compensation code applies to the additional categories of acquisition covered by the Order and the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories (done to allow lesser land interests to be acquired).
- 4.99 For the purpose of section 126(2) of the 2008 Act, the relevant compensation provisions are modified only to the extent necessary to ensure that they apply properly to the acquisition/creation of rights and the imposition of restrictive covenants, and not to affect the amount of compensation to which landowners would be entitled.
- 4.100 Article 26 is based on article 21 of the model provisions and previous Highways England orders¹⁷.

Article 27 – Public rights of way

- 4.101 Article 27(1) provides for the public rights of way specified in Parts 1 and 2 of Schedule 4 and shown on the Rights of Way and Access Plans to be extinguished. The rights of way are extinguished following the expiry of a site notice which must be erected at each end of the way to be extinguished no less than 28 days prior to the extinguishment.
- 4.102 Article 27 is based on article 10 of the model provisions and previous Highways England orders¹⁸

Article 28 - Private rights over land

- 4.103 This article provides for the extinguishment of private rights over land that is subject to compulsory acquisition under the Order. In so far as the undertaker acquires land or creates new rights over land under the Order, where the continuance of private rights over that land would be inconsistent with the exercise of the right being acquired or created then the private rights in question will be extinguished.
- 4.104 Paragraph (3) provides that rights over Order land that is already owned by Highways England are extinguished on commencement of any activity authorised by the Order which interferes with or breaches those rights.

¹⁷ See for example article 24 of the M20 order and article 22 of the M4 order.

¹⁸ See for example article 25 of the M20 order and article 24 of the A14 order.

- 4.105 Paragraph (4) provides that all private rights over land which the undertaker takes temporary possession of under the Order will be suspended and unenforceable for as long as the undertaker remains in lawful possession of the land.
- 4.106 Paragraphs (5) to (8) make provision for compensation and for circumstances where rights are preserved. Article 28(5) provides that any right holders who suffers loss caused by the extinguishment or suspension of rights will be entitled to compensation
- 4.107 Paragraph (9) sets out a list of matters deemed to be private rights.
- 4.108 Paragraph (10) provides that the owners and occupiers of the land to be accessed over new private means of access which require taking access along the tracks to be formed on the Order Land are granted private rights to use these tracks. This provides certainty to the owners and occupiers of the affected landholdings as to how their access will be secured.
- 4.109 Other than paragraph (10) which has been drafted for this scheme, article 28 is based on article 22 of the model provisions and previous Highways England orders¹⁹.

Article 29 – Modification of Part 1 of the 1965 Act

- 4.110 The purpose of this article is to ensure consistency between the terms of the Order and the Compulsory Purchase Act 1965, as applied by section 125 of the 2008 Act. It has been included in the most recent Highways England order at the time of writing²⁰.

Article 30 – Application of the 1981 Act

- 4.111 This article applies (with minor modifications to ensure consistency between the terms of the Order and the Act) the provisions of the Compulsory Purchase (Vesting Declarations) Act 1981 to compulsory acquisition under the Order so that Highways England has the option to acquire land via the vesting declarations procedure.
- 4.112 Vesting declarations are one of two ways of acquiring land that is subject to compulsory purchase (the other being by means of a notice to treat). They allow title in the land to pass to the acquirer more quickly than using the notice to treat method, and also allow several parcels to be acquired at once and therefore more efficiently than under the notice to treat procedure.
- 4.113 Article 30 is based on article 23 of the model provisions and previous Highways England orders²¹.

Article 31 - Acquisition of subsoil or airspace only

¹⁹ See for example article 26 of the M20 order and article 25 of the A14 order.

²⁰ See article 27 of the M20 order.

²¹ See for example article 28 of the M20 order and article 24 of the M4 order.

- 4.114 This article allows the undertaker to acquire, or acquire or create rights in, the subsoil or airspace below or above land, rather than having to acquire the land itself.
- 4.115 The purpose of article 31 is to give the undertaker the flexibility to minimise so far as is possible the extent of interests to be acquired, with consequently less impact on landowners and lower payments of compensation, both of which are in the public interest. Any subsoil or airspace acquired under this provision can only be used for the same purposes for which the undertaker could have acquired all of the land. This provision allows acquisition of the minimum interest needed to deliver the scheme.
- 4.116 This article is based on article 24 of the model provisions, which related to subsoil only, and previous Highways England orders²².

Article 32 - Rights under or over streets

- 4.117 The purpose of this article is to allow the undertaker to appropriate and use land above or below streets within the Order limits, without having to acquire the street or any right or easement in it. The exercise of this power, without acquisition, is prohibited in the circumstances set out in paragraph (3). Compensation is payable for any loss or damage caused to an owner or occupier of land affected by the power of appropriation where no acquisition has taken place.
- 4.118 This article was included in the model provisions as article 27.

Article 33 - Temporary use of land for carrying out the authorised development

- 4.119 The purpose of this article is to allow the land set out in Schedule 7 to be occupied temporarily while the works are carried out. This is land which is required during construction of the Scheme but which is not required permanently. The authorisation of temporary possession prevents the undertaker having to permanently acquire land which is required to construct the Scheme but which is not needed permanently and therefore assists in minimising the interference with landowners' rights. This Article also allows for the temporary occupation of any of the Land intended for permanent acquisition that has not yet been acquired.
- 4.120 Article 33 also allows for the temporary occupation of any of the land intended for permanent acquisition that has not yet been acquired.
- 4.121 Article 33(4) provides that before giving up possession of any land the undertaker is obliged to remove all temporary works and restore the land to the reasonable satisfaction of the owners of the land. The restoration of the land will not include replacing any buildings which have been demolished

²² See for example article 29 of the M20 order and article 25 of the M4 order.

4.122 The article is based on article 28 of the model provisions, with a number of changes:

- (a) First, the ability to occupy land temporarily that is subject to powers of permanent acquisition but that has not yet been acquired (paragraph (1)(a)(ii)) has been added. This allows the undertaker to occupy land without having to acquire it immediately. There is a consequential amendment to paragraph (3) to cater for the two types of land.
- (b) Secondly, paragraph (1)(d) has been added so that permanent works specified in column (3) of Schedule 7, and any other permanent mitigation works in connection with the authorised development, may be left on land that has been temporarily occupied, rather than having to acquire such land for this purpose. The rationale for this is that it reduces the amount of land that is required to be subject to outright acquisition. The intended scope of 'mitigation works' is any permanent works necessary and appropriate to mitigate the impacts of the Scheme (e.g. landscaping or ecological mitigation works).
- (c) There has been a minor amendment to paragraph (2) to require the notice of intended entry to specify the purpose for which entry is to be taken where land is being entered under paragraph (1)(a)(ii).
- (d) There are amendments to the requirements for restoring the land before returning it to reflect the changes in respect of permanent works, which have been added as paragraph (4)(b). Paragraph (4)(c) is also added in respect of protective works for statutory undertaker apparatus.
- (e) There is a minor amendment to paragraph (5) where 'any power conferred by' has been omitted, since the provisions are of the article, not of the powers.
- (f) Finally, paragraph (11) has been added to ensure clarity about the extent of the land the undertaker may take temporary possession of.

4.123 The amended article reflects the wording of recent Highways England orders²³.

Article 34 - Temporary use of land for maintaining the authorised development

4.124 This article provides that the undertaker may take temporary possession of land within the Order limits, as required for the purpose of maintaining the authorised development, at any time within a period of five years from the date on which that part of the authorised development is first opened for use.

4.125 Paragraph (1)(c) authorises the construction of such temporary works and buildings on the land as may be reasonably necessary for that purpose. Under paragraph (5) all

²³ See for example article 31 of the M20 order and article 28 of the M4 order.

temporary works must be removed before the undertaker gives up possession under this article and the land must be restored to the reasonable satisfaction of the owners.

- 4.126 This power does not apply in relation to houses, gardens or any other buildings for the time being occupied (paragraph (2)).
- 4.127 Paragraph (3) requires at least 28 days' notice of intended entry to be served on the owners and occupiers of the land in question.
- 4.128 Paragraphs (6) to (8) provide for compensation to be paid to owners and occupiers of land of which temporary possession is taken under this article.
- 4.129 This article was included in the model provisions as article 29.

Article 35 - Statutory undertakers

- 4.130 This article allows the undertaker to extinguish rights of statutory undertakers and remove and reposition their apparatus. Reference is made to the Order land so that this power is not restricted to apparatus which has been specifically shown on the Land Plans and described in the Book of Reference. In practice it is impractical to show and describe all such apparatus and so a general power for the extinguishment of rights and the removal or relocation of apparatus belonging to statutory undertakers over or within any of the Order land is required.
- 4.131 As the land over which this power may be exercised is shown on the Land Plans, and the beneficiaries of such rights are described in the Book of Reference, the requirements of Regulations 5(2)(i)(iii) and 7(1)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 are satisfied.
- 4.132 Paragraph (2) restricts the undertaker's power to extinguish rights or remove or reposition apparatus by excluding apparatus in streets. If the streets in question are to be stopped up as part of the authorised development then the provisions of article 35 will apply.
- 4.133 This article is based on article 31 of the model provisions and previous Highways England orders²⁴.

Article 36 - Apparatus and rights of statutory undertakers in stopped up streets

- 4.134 This article governs what happens to statutory undertakers' apparatus (pipes, cables etc.) under streets that are stopped up by the Order. Without the article, the statutory undertaker would not have access to the apparatus, since there would no longer be a right of way along the street.

²⁴ See for example article 33 of the M20 order and article 30 of the M4 order.

- 4.135 Under paragraph (2) the undertaker may require a statutory undertaker to remove and relocate the apparatus (or apparatus provided in substitution) elsewhere. Paragraph (3) requires the undertaker to compensate the statutory undertaker for the reasonable costs it incurs in doing so.
- 4.136 Paragraph (4) provides for a reduction to the amount payable to the statutory undertaker in certain circumstances, including where replacement apparatus is provided that is of a better type, of greater capacity or of greater dimensions and those improvements or increases are not necessary. Paragraph (5) clarifies that the placing of apparatus of a greater length does not count for the purposes of paragraph (4), since it is likely that for most diversions apparatus of greater length will need to be installed. Similarly, joints in apparatus may be necessary and if so that will not lead to a reduction of the amount payable.
- 4.137 Paragraph (6) discounts from the amount payable to the statutory undertaker any financial benefit to the statutory undertaker that arises as a result of having new rather than old (i.e. older than 7.5 years) apparatus due to the deferment of the timetable for renewal of the apparatus.
- 4.138 Paragraph (7) provides that for those parts of the scheme that involve major highway works, major bridge works or major transport works (which are defined in Part 3 of the New Roads and Street Works Act 1991 and do not include the construction of a new highway), the compensation provisions of that Act will apply instead.
- 4.139 Article 36 was included in the model provisions as article 32.

Article 37 - Recovery of costs of new connections

- 4.140 This article provides that if any statutory undertaker's apparatus is removed and this halts a supply from that apparatus to owners or occupiers of premises such that they have to seek a connection to other apparatus, then their reasonable costs in obtaining a new supply can be claimed from the undertaker.
- 4.141 This article was included in the model provisions as article 33.

Part 6 - Operations

Article 38 - Felling or lopping of trees and removal of hedgerows

- 4.142 This article allows any tree or shrub that is near the project to be felled or lopped, or have its roots cut back, if it is considered to obstruct the construction, operation or maintenance of the Scheme or endanger anyone using it. Compensation is payable for any loss or damage caused.

- 4.143 Further, this article also authorises the removal of any hedgerow as defined in the Hedgerow Regulations 1997. The scheme includes the removal of a number of hedgerows. This article is based on article 39 of the model provisions and recent Highways England orders²⁵.

Part 7 - Miscellaneous and General

Article 39 - Application of landlord and tenant law

- 4.144 This article governs the leasing of land by the undertaker to any other person. Essentially it allows the terms of the lease to override any statutory provisions relating to landlord and tenant law.
- 4.145 This article was included in the model provisions as article 35.

Article 40 - Operational land for purposes of the 1990 Act

- 4.146 This effect of this article is that the land within the Order limits is to be treated as the operational land of a statutory undertaker for the purposes of the Town and Country Planning Act 1990 and the Town and Country Planning (General Permitted Development) (England) Order 2015/596.
- 4.147 This article was included in the model provisions as article 36.

Article 41 - Defence to proceedings in respect of statutory nuisance

- 4.148 Section 158 of the 2008 Act confers statutory authority for the purposes of a defence in civil or criminal proceedings for nuisance. This article provides a defence to proceedings brought in a magistrates' court under s.82(1) of the Environmental Protection Act 1990 in relation to certain nuisances set out in paragraph 79(1) of that Act.
- 4.149 The defence is available if the nuisance relates to:
- (a) the use of premises by the undertaker for the purposes of or in connection with the construction or maintenance of the authorised development and is attributable to the carrying out of the authorised development in accordance with a notice served, or consent given, under the Control of Pollution Act 1974; or
 - (b) the construction, maintenance or use of the Scheme and cannot reasonably be avoided.

²⁵ See for example article 38 of the M20 order, article 35 of the M4 order and article 36 of the A14 order.

4.150 This article provides a defence to those nuisances which may be of relevance to the authorised development, as set out in the Statutory Nuisances Statement accompanying the application.

4.151 This article is based on article 7 of the model provisions and recent Highways England orders²⁶.

Article 42 – Protective provisions

4.152 This article gives effect to Schedule 8, which contains provisions protecting the interests of third parties. It was not included in the model provisions but is a standard article in development consent orders that include protective provisions.

Article 43 – Certification of plans etc.

4.153 This article provides for various application plans and documents to be certified by the Secretary of State as true copies of those documents following the making of the Order. This was included in the model provisions as article 41.

Article 44 - Service of notices

4.154 This article governs the service of notices required to be given under the Order. In particular it allows service by email with the consent of the recipient (paragraph (1)(c)), and deals with the situation of service on an unknown landowner (paragraph (4)).

4.155 This article was not included in the model provisions but is a sensible addition that has been included in previous orders²⁷.

Article 45 - Arbitration

4.156 This article governs what happens when two parties disagree about any provision of the Order. Unless the Upper Tribunal (Lands Chamber) has jurisdiction the matter is to be settled by arbitration. If the parties cannot agree on who the arbitrator should be then this will be decided by the President of the Institution of Civil Engineers.

4.157 This article was included in the model provisions as article 42.

Article 46 - Appeals relating to the Control of Pollution Act 1974

4.158 This article establishes an appeal process in circumstances where a local authority issues a notice under section 60, or does not grant consent or grants conditional consent under section 61, of the Control of Pollution Act 1974. Its aim is to streamline the appeal process, thereby minimising the potential for unnecessary delay to the scheme.

²⁶ See for example article 42 of the M20 order and article 38 of the M4 order.

²⁷ See for example article 45 of the M20 order, article 41 of the M4 order and article 42 of the A14 order.

- 4.159 This was not included in the model provisions but was included in the A14 order as article 44. It has also been included in other non-highways orders²⁸.

Article 47 – Removal of human remains

- 4.160 There are a number of records of inhumation and cremation burials on Camel Hill, making this a likely location for burials from the prehistoric period onwards. The disturbance of the greenfield land which will be necessary to construct the development may uncover human remains. The Order therefore includes a process for authorising the removal and reinternment of such remain. Without this article consent from the Secretary of State for Justice would be required to remove any remains.
- 4.161 Under paragraph (3) the undertaker is required to publish public notices of the intended removal of the remains. There is then a period of 56 days for any personal representative or relative of the deceased person to give notice to the undertaker that they intend themselves to carry out the removal, which if accepted by the undertaker will be carried out at the undertaker's cost.
- 4.162 Paragraph (14) confirms that section 25 of the Burial Act 1857 (which makes it an offence to remove human remains unless the conditions in that section are complied with) does not apply to a removal carried out in accordance with this article.
- 4.163 This article was included in the model provisions as article 17.

Article 48 – Crown rights

- 4.164 This article prevents the undertaker from acquiring any Crown land, or from otherwise interfering with it, without the written consent of the relevant Crown authority. The Crown's consent may be given unconditionally or subject to terms and conditions.
- 4.165 The proposed Order Land includes two small areas of land within the ownership of the Ministry of Defence which is required for the rerouting of public rights of way. Given the known presence of Crown landholdings in the Order Land, Article 48 (Crown Rights) has been included to ensure that any acquisition of other landholdings, creation or extinguishment of rights cannot create any interference with the rights of the Crown
- 4.166 This article reflects the provisions of section 135 of the 2008 Act. It was not included in the model provisions but was included in the A19/A1058 Coast Road (Junction Improvement) Order as article 37.

5 SCHEDULES

Schedule 1 – Authorised development

²⁸ See paragraph 4 of Schedule 17 to The Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014.

- 5.1 Schedule 1 describes the authorised development, which is described in detail in Chapter 2 of the Environmental Statement.

Schedule 2 - Requirements

- 5.2 The requirements in Schedule 2 are the equivalent of planning conditions. They apply to the carrying out and operation of the authorised development and reflect the processes and procedures usually employed by the undertaker when implementing a scheme such as this.
- 5.3 Approvals will be sought from the Secretary of State for Transport. In practice this would involve certain internal approvals being obtained from independent teams within Highways England before the details are formally submitted by the project team within Highways England to the Secretary of State for Transport for approval.
- 5.4 The undertaker understands that decision-making by the Secretary of State would follow similar internal processes to those employed in taking other quasi-judicial decisions (for example, in deciding whether to make a DCO or a Transport and Works Act Order), meaning a separation within the Department for Transport's Strategic Roads Division of those involved in discharging requirements from those involved in delivery of the Scheme through their relationships with the undertaker.
- 5.5 The requirements provide that the various schemes, details and plans to be approved must, where appropriate, reflect the measures included in the Environmental Statement. The requirements also provide that the approved schemes, details and plans must be implemented as approved, unless further amendments to them are approved. A general provision to this effect is provided at requirement 16.
- 5.6 Requirement 1 contains a number of definitions used in the requirements. This was included in the model provisions as requirement 1.
- 5.7 Requirement 2 specifies the time limit for commencing the authorised development as being five years from the date on which the Order comes into force. This was included in the model provisions as requirement 2.
- 5.8 Requirement 3 requires a construction environmental management plan ("CEMP") to be submitted to and approved by the Secretary of State, following consultation with the relevant planning authority and the local highway authority, prior to commencement of the relevant part of the authorised development. It specifies that the CEMP must be substantially in accordance with the outline CEMP submitted as part of the application. The outline CEMP is included with the application documents and specifies what the full CEMP is to include.

- 5.9 The requirement also specifies the authorised working hours for the scheme, which are to be from 07:00 to 18:00 Monday to Friday and 07:00 to 13:00 on Saturdays, with certain permitted exceptions where there are compelling reasons why works should be carried out outside of those hours.
- 5.10 On completion of the authorised development the CEMP must be converted into the handover environmental management plan ('HEMP'), which sets out the information and measures that are required for the continued operation and maintenance of the authorised development.
- 5.11 Requirement 3 is based on requirement 19 of the model provisions, which referred instead to a code of construction practice. It is also based on recent Highways England orders²⁹.
- 5.12 Requirement 4 provides that where the undertaker is required to consult other organisations under a requirement, it must when applying for the discharge of that requirement include a report setting out the consultation it has undertaken and its response to any comments received as a result of the consultation. Under paragraph (2) a copy of the report must be provided to the consultees in question when the application to discharge the requirement is submitted.
- 5.13 The undertaker is required to ensure that any consultation responses it receives under the requirements are reflected in the details that it submits for approval, but only so far as it is appropriate, reasonable and feasible for it to do so, taking into account such matters as cost and engineering practicality (paragraph (3)). If consultation responses are not incorporated then the undertaker must explain why in its report (paragraph (4)).
- 5.14 Requirement 4 was not included in the model provisions, but has been included in recent Highways England orders³⁰.
- 5.15 Requirement 5 requires the preparation of a landscaping scheme for approval by the Secretary of State prior to commencement of the relevant part of the authorised development. The relevant planning authority and the local highway authority must both be consulted on the scheme, which must be based on the environmental masterplan and the results of the arboricultural walkover survey and tree survey required under sub-paragraph (2).
- 5.16 Requirement 5 is based on requirement 7 of the model provisions and recent Highways England orders³¹.
- 5.17 Requirement 6 provides for the implementation and maintenance of landscaping in accordance with the scheme approved under Requirement 5. Sub-paragraph (3)

²⁹ See for example requirement 3 of the M20 order.

³⁰ See for example requirement 4 of the M20 order and requirement 30 of the M4 order.

³¹ See for example requirement 5 of the M20 order.

provides for the replacement of trees and shrubs which become diseased or damaged within a period of 5 years after planting.

- 5.18 Requirement 6 was included in the model provisions as requirement 8.
- 5.19 Requirement 7 provides that permanent and temporary fencing must be constructed and installed in accordance with the undertaker's *Manual of Contract Documents for Highway Works* unless otherwise agreed in writing with the Secretary of State. It is based on requirements 12 and 13 of the model provisions, amended to reflect that standards are already set out in the *Manual of Contract Documents*. This wording has been included in recent Highways England orders³².
- 5.20 Requirement 8 makes provision for dealing with any contaminated land or groundwater discovered during construction of the works. Prior to commencement of development the undertaker must prepare a contamination risk assessment in respect of controlled waters for approval by the Secretary of State.
- 5.21 Sub-paragraphs (3) to (5) specify additional requirements that will apply if any unexpected contamination is encountered during construction.
- 5.22 The Environment Agency is included as a consultee under this requirement.
- 5.23 This requirement is based on requirement 15 of the model provisions and recent Highways England orders³³.
- 5.24 Requirement 9 sets out requirements for archaeological investigations. A written scheme of archaeological investigation must be prepared and approved by the Secretary of State before any part of the authorised development can commence. Sub-paragraphs (4) to (6) put in place a process for investigating and recording remains that are revealed during construction that were not previously identified. The WSI must be prepared in consultation with the relevant planning authority and local highway authority and agreed with the County Archaeologist.
- 5.25 This requirement is based on requirement 16 of the model provisions and recent Highways England orders³⁴.
- 5.26 Requirement 10 provides that where any previously unidentified protected species are found during construction, construction works near their location are to cease and the undertaker must immediately report it to the Ecological Clerk of Works. The undertaker must then prepare a written protection and mitigation scheme.

³² See for example requirement 7 of the M20 order.

³³ See for example requirement 8 of the M20 order and requirement 12 of the M4 order.

³⁴ See for example requirement 9 of the M20 order and requirement 15 of the M4 order.

- 5.27 Under sub-paragraph (3) the undertaker must implement the written scheme immediately and construction in the area specified in the written scheme must not recommence until any necessary licences are obtained to enable mitigation measures to be implemented.
- 5.28 This requirement is based on requirement 34 of the model provisions and recent Highways England orders³⁵.
- 5.29 Requirement **11** provides that no part of the authorised development may commence until a traffic management plan for the construction of the authorised development has been prepared and approved by the Secretary of State following consultation with the relevant highway authority. This requirement consolidates various requirements of the model provisions (e.g. 22, 33) and is based on recent Highways England orders³⁶.
- 5.30 Requirement **12** provides that the authorised development must be designed in detail and carried out so that it is compatible with the preliminary scheme design shown on the Works Plans and the Engineering Sections and Drawings, unless otherwise agreed in writing by the Secretary of State following consultation with the relevant planning authority and local highway authority, where appropriate. This means that any variations to the Scheme design (which must be within the limits of deviation) are subject to approval.
- 5.31 The Secretary of State must be satisfied that any amendments to the preliminary design would not give rise to any materially new or worse adverse environmental effects compared to those reported in the Environmental Statement.
- 5.32 This requirement is based on requirements 4 to 6 of the model provisions and recent Highways England orders³⁷.
- 5.33 Requirement **13** provides that no part of the authorised development may commence until details of the surface water drainage system are submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authority, the lead local flood authority and the Environment Agency. The details must reflect the mitigation measures in the Environmental Statement and include means of pollution control.
- 5.34 This requirement is based on requirement 14 of the model provisions.
- 5.35 Requirement **14** provides that no part of the authorised development may commence until written details of proposed noise mitigation, including noise barriers and any very low noise surfacing, have been submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authority.

³⁵ See for example requirement 10 of the M20 order and requirement 13 of the M4 order.

³⁶ See for example requirement 11 of the M20 order and requirement 18 of the M4 order.

³⁷ See for example requirement 12 of the M20 order and requirement 3 of the A14 order.

- 5.36 Under sub-paragraph (2) the written details must either reflect the mitigation measures referred to in the Environmental Statement or, where the mitigation proposed is materially different, include evidence that the mitigation proposed would not give rise to any materially new or worse adverse environmental effects compared to those reported in the Environmental Statement.
- 5.37 This requirement is based on requirement 25 of the model provisions and previous Highways England orders³⁸.
- 5.38 Requirement **15** provides that no part of the authorised development may commence until a written scheme of the proposed highway lighting for that part of the authorised development has been submitted to and approved in writing by the Secretary of State following consultation with the relevant planning authority and the local highway authority (where appropriate). In the case of this scheme not every section is intended to be lit and the lighting scheme for some phases will therefore simply be confirmation that no lighting is to be installed.
- 5.39 Under sub-paragraph (2) the standard of the highway lighting to be provided must either reflect the standard of highway lighting referred to in the Environmental Statement or, where the standard of highway lighting proposed is materially different, include evidence that the standard of highway lighting proposed would not give rise to any materially new or worse adverse environmental effects compared to those reported in the Environmental Statement.
- 5.40 The standard of the highway lighting must include the specification, level of provision, light spillage, intensity and brightness of the highway lighting.
- 5.41 This requirement is based on requirements 21 and 27 of the model provisions and previous Highways England orders³⁹.
- 5.42 Requirement **16** confirms that details approved pursuant to the requirements include any amendments that may subsequently be approved by the Secretary of State. This is based on requirement 37 of the model provisions.
- 5.43 Part 2 of Schedule 2 provides a clear procedure for the discharge of requirements by the Secretary of State. It sets out clear time limits for decisions to be made and makes provision for circumstances where the Secretary of State requires further information to be provided in relation to an application for the discharge of a requirement. This also includes an obligation on the undertaker to publish an electronic register of requirements under paragraph 19, which would track where each requirement is in the process.

³⁸ See for example requirement 12 of the A14 order.

³⁹ See for example requirement 14 of the A14 order.

- 5.44 Under paragraph 20 any steps the undertaker takes to comply with the requirements before the Order is made will be treated as effective in complying with the requirements once the Order is made, thereby avoiding the need to repeat such steps.