

M5 Junction 10 Improvements Scheme

**Schedule in Response to Examining
Authority's Questions 6.0.8 and 6.2.1**

TR010063 - APP 9.55

Rule 8 (1) (a)

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M5 Junction 10 Improvements Scheme Development Consent Order 202[x]

Schedule in Response to Examining Authority's Questions 6.0.8 and 6.2.1

Rule Number:	Rule 8 (1) (b)
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1. Schedule 1 Applicant's position regarding Advice Note 15

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<p>1.1 1. Explanatory Memorandum</p> <p>1.1 The Explanatory Memorandum is an aid to the Examining Authority (ExA), to Interested Parties and to the Secretary of State as decision-maker to help understand what is proposed in the draft Development Consent Order (DCO), why particular provisions have been included and from where the wording has been derived. The Explanatory Memorandum explains why draft DCO provisions have been tailored to meet the specific needs of a particular Nationally Significant Infrastructure Project (NSIP) (and may be required to address novel issues). It should also explain why the provisions are required, having regard to the scope and breadth of powers contained in the Planning Act 2008 (PA2008).</p> <p>1.2 A thorough justification should be provided in the Explanatory Memorandum for every Article and Requirement, explaining why the inclusion of the power is appropriate in the specific case. The extent of justification should be proportionate to the degree of novelty and/or controversy in relation to the inclusion of that particular power.</p> <p>1.3 There is no longer a requirement to submit a tracked changed version of the draft DCO which compares the wording against The Infrastructure Planning (Model Provisions) (England and Wales) Order 2009.</p> <p>1.4 A well-developed Explanatory Memorandum can potentially reduce the number of examination questions an ExA may need to ask about the draft provisions comprising the draft DCO. For each provision, the ExA is likely to want to be satisfied about certain matters, such as:</p> <p>The source of the provision (whether it be a previous made DCO or Transport and Works Act Order, or a novel provision).</p> <p>The section/ Schedule of the PA2008 under which it is made.</p> <p>Why it is relevant to the Proposed Development.</p>	<p>The Applicant has provided an Explanatory Memorandum (EM) (APP-032).</p> <p>The Applicant has provided a thorough justification of every article and requirement taking a proportionate approach to the extent of any justification. Taking into account this proportionate approach, the Applicant has provided details regarding the relevance of articles to the proposed development and why they are important to its delivery. Through the use of footnotes, the Applicant has provided evidence of where wording has been derived from other DCOs. Those references are not intended to be comprehensive and the EM does not refer to every single precedent which accords with the draft DCO (dDCO). The Applicant considers that its approach is justified; if the EM simply referred to one project DCO, it would be open to criticism for overreliance on that project but on the other hand if it stated every precedent for a provision, it would be unwieldy, undermining its fundamental purpose to provide an explanation of the provisions for the public. The Applicant has referenced highways DCOs. This is considered relevant and proportionate to ensure consistency across transport DCOs. This aligns with rationale received from the Secretary of State in his decision letter for the M25 Junction 28 where a number of changes were made due to the need to "maintain consistency with highways DCOs". The references used demonstrate that the articles have broad precedent.</p>

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<p>Why the Applicant considers it to be important/ essential to the delivery of the Proposed Development.</p>	
<p>1.5 If a draft DCO includes wording derived from other made DCOs, this should be explained in the Explanatory Memorandum. The Explanatory Memorandum should explain why that particular wording is relevant to the proposed draft DCO, for example detailing what is factually similar for both the relevant consented NSIP and the Proposed Development. It is not sufficient for an Explanatory Memorandum to simply state that a particular provision has found favour with the Secretary of State previously; the ExA and Secretary of State will need to understand why it is appropriate for the scheme applied for. Any divergence in wording from the consented DCO drafting should also be explained. Note, though, that policy can change and develop.</p>	
<p>1.6 Where applicants are seeking to include specific wording or apply a particular approach from a different statutory regime in a draft DCO, the reasons for doing so and the relevance of this to the application should also be made clear in the Explanatory Memorandum. For example, where an applicant has used wording from an Order made under the Transport and Works Act 1992, the particular Order in question should be clearly identified and the reason for including this wording in the draft DCO explained. Applicants will again need to consider whether such a provision is within the powers of the PA2008 and include comments on this point in the Explanatory Memorandum.</p>	
<p>2.1 2. Statutory Instrument template</p> <p>2.1 A DCO must be made in the form of a validated Statutory Instrument (SI) if, as is usually the case, it includes 'legislative provisions' that for example apply, amend or exclude other statutory provisions (see section 117(4) and section 120(5) of the PA2008). SIs need to conform to a template which is publicly available on the UK Legislation Publishing website (National Archives). The template contains essential formatting for SIs.</p> <p>2.2 Applicants will need to obtain access to the online SI template and associated validation system which assesses whether the drafting in an instrument agrees with the rules for drafting within the template. The Planning Inspectorate's Case Manager will fill in the relevant application form on behalf of the Applicant and submit it to the National Archives. Please contact the Planning Inspectorate in case of any difficulty obtaining access to the template.</p>	<p>The Applicant has provided a draft DCO in the form of a validated SI.</p>

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2.3 The SI template may be updated periodically. Applicants should contact the Planning Inspectorate's Case Manager to ensure they are using the latest template.	
2.4 All copies of the draft DCO submitted to the Planning Inspectorate (including the Applicant's final draft DCO submitted towards the end of the Examination) must have been cleared through the validation process and be accompanied by a copy of the Validation Success email which evidences that the draft DCO is error free and on the correct version of SI template. Should draft DCOs be submitted with errors or without a successful validation email, applicants will be asked to resolve the errors and resubmit with a Validation Success email.	
<p>.2 3. Drafting conventions</p> <p>3.1 As mentioned above, it is common for applicants to seek out and adopt drafting conventions from previously made DCOs. It may also assist applicants to consider the drafting conventions of made DCOs published by the same department as would authorise their DCO, which may help to identify that department's drafting preferences. However, applicants should note that policy does change and develop.</p>	The Applicant notes this paragraph but does not recognise an instruction regarding the drafting of a DCO.
3.2 Where Deemed Marine Licences or other deemed consents or licences are included within a draft DCO, they must also follow the statutory drafting conventions for SIs. However, note that they are also self-contained licences and need to not be dependent on definitions in the body of the draft DCO.	The dDCO submitted does not contain other licences.
3.3 Guidance is publicly available from the National Archives website and should be followed by applicants. In particular applicants should:	
provide footnotes in relation to statutory provisions referred to in the SI to provide the user of the SI with information about relevant amendments or extensions to, or applications of, enactments mentioned in the instrument;	The Applicant confirms that this has been done and shall ensure a final review of the dDCO as submitted prior to close of the examination is conducted to ensure these footnotes are up to date.
use gender-neutral drafting (for example avoiding the use of 'he' or 'she' to refer to the Secretary of State or other persons, unless referring to a particular living individual);	The Applicant confirms that the use of "he" or "she" does not feature in the dDCO.

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provide an adequate preamble with recitation of powers;	The Applicant has included a preamble equivalent to that included in previous highways DCOs.
avoid use of the words 'shall' or 'will' (because of ambiguity over whether they are an imperative or a statement of future intention);	The Applicant has not included the term "shall". The Applicant has included the term "will" but considers that the interpretation of the word in each case is clear as to its meaning. The Applicant notes that the Advice Note 15 does not introduce a prohibition on the term but expresses its preference for the term to be avoided.
avoid the word 'may' (to avoid ambiguity over whether it is permissive or stating that it is uncertain whether something is to occur);	The Applicant has used the term "may" throughout the dDCO, whilst the Applicant notes that Advice Note 15 does not introduce a prohibition on the term but expresses its preference for the term to be avoided. The Applicant would also note that its drafting is aligned with that of other highways DCOs and therefore with a view of ensuring consistency of approach does not consider that the term "may" results in issues of interpretation.
avoid archaisms (for example 'therewith', 'aforesaid');	The Applicant has avoided archaisms.
not use obliques in operative text (because of ambiguity whether they signify 'and' or 'or');	The Applicant has used an oblique when referring to "Stanboro Lane / Piffs Elm Lane". This is due to the road holding two known names and therefore the Applicant is expressing neither the term "and" or "or."
spell out 'metres', 'millimetres' etc throughout (and not use 'm', 'mm' etc); and	The Applicant can confirm it has followed this approach.
if a paragraph is included in the Interpretation Article saying that distances, directions, lengths, areas etc are approximate, make sure that in the rest of the order the word 'approximately' in conjunction with any of these dimensions does not appear.	The Applicant notes that the use of the word "approximate" has been used in conjunction with the referenced article and has updated the dDCO accordingly to align with this Advice Note 15.
3.4 Before an application is made to the Planning Inspectorate, the draft DCO should be thoroughly checked to remove typographical errors and to ensure consistency across the whole document. These checks should also be undertaken during the Examination, whenever changes are made that affect the draft DCO.	The Applicant confirms that the dDCO continues to be reviewed.

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<p>3.1 4. Protective Provisions</p> <p>4.1 Applicants are encouraged to agree Protective Provisions with the protected party(ies) prior to submitting the application for development consent. Where agreement on Protective Provisions has not been reached during the Preapplication stage, applicants should, as a minimum, submit with their application the standard Protective Provisions for all relevant protected parties with any amendments that the Applicant is seeking annotated with full justification included within the Explanatory Memorandum</p> <p>4.2 Where the Applicant is not proposing to include draft Protective Provisions for a Statutory Undertaker that has been identified as such by the Inspectorate (under Regulation 11 of The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017), the Applicant needs to ensure that the Consultation Report explains why Protective Provisions for that Statutory Undertaker are not sought or required. Ideally this information will be provided as a table listing all of the Statutory Undertakers identified by the Inspectorate with either:</p> <p>a link to the proposed draft Protective Provisions; or</p> <p>a brief explanation why the Statutory Undertaker is not affected by the application and/ or why Protective Provisions are not required.</p> <p>4.3 Submitting blank Protective Provisions Schedules is not acceptable and is likely to pose a serious risk to the acceptance of an application under s55 of the PA2008.</p> <p>4.4 It is common for Protective Provisions to be drafted in unison with the protected party(ies) or by them first hand. Applicants should ensure that any Protective Provisions drafted by others appropriately align with the terminology and style of the draft DCO and are suitably drafted for use in an SI. If Protective Provisions for more than one protected party are included in a single Schedule, SI drafting requires the numbering of the paragraphs to follow sequentially throughout the Schedule and not re-start at '1' with each part (as with all textual Schedules in several parts). This approach should be adopted in the draft DCO submitted with the application and in each amended draft submitted during the Examination where Protective Provisions are changed.</p> <p>4.5 If, for good reason, an applicant prefers to provide a separate Schedule for each protected party, the paragraph numbering can re-start at paragraph 1 for each Schedule</p>	<p>The Applicant has included the standard protective provisions with its dDCO. The Applicant considers that the standard protective provisions provide protection for all undertakers but is continuing to negotiate bespoke protective provisions with those undertakers who desire these provisions. The Applicant has included the protective provisions in one schedule with continuous numbering used across the parts of the schedule.</p>

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<p>3.2 5. References</p> <p>5.1 References to Articles in the draft DCO or sections of Acts should include the heading of the provision (or other concise, explanatory wording) on the first occasion that the reference appears in each Article or each paragraph of a Schedule.</p> <p>5.2 Applicants should take care to ensure that the efficacy of any cross-references used in the draft DCO are maintained and checked. These checks are particularly important if and when the draft DCO is revised during the Examination.</p>	<p>The Applicant considers that the dDCO aligns with these paragraphs of Advice Note 15.</p>
<p>6.1 Definitions should be applied consistently throughout the draft DCO and should be in lower case. Applicants should note that:</p> <p>terms defined in the parent legislation (ie the PA2008) or in the Interpretation Act 1978 do not need to be re-defined in the DCO;</p> <p>they should define, either in the relevant Article or paragraph (if only used once) or in a general definitions Article (if used more frequently), all terms not defined in the PA2008 or the Interpretation Act 1978, or where the term uses its ordinary meaning;</p> <p>the use of different definitions for the same term within different parts of the draft DCO should be avoided wherever possible (for example setting out two different meanings of 'apparatus'). If this is unavoidable, then the definition in the Interpretation Article should make clear that it is subject to another definition elsewhere in the draft DCO;</p> <p>generally, a definition for 'The Secretary of State' should not be provided (government departments ask for a general Secretary of State to be assumed to allow for future changes to government machinery);</p> <p>care should be taken to ensure that the definitions provided in draft DCOs do not conflict with any of the definitions provided in s235 of the PA2008 (where there is conflict, applicants should explain and provide justification in the Explanatory Memorandum); and</p> <p>definitions should not be used to try to make substantive provision about what can and cannot be done under a DCO, nor to try to give effect to or introduce Schedules.</p>	<p>The Applicant considers that the dDCO aligns with these paragraphs of Advice Note 15.</p>

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6.2 Where there is more than one relevant planning authority (or other authority), this should be made clear in the definitions	
<p>4 7. Footnotes</p> <p>7.1 There should be clear footnotes provided for all Acts, SIs, European Union or other international legislation, or external documents referenced in a draft DCO, which must conform to the guidance on footnotes in SI practice (for legislation, the footnote should identify relevant amendments to specific provisions). This practice should apply throughout the draft DCO and its Schedules. This includes any draft Deemed Marine Licence because these also form part of an SI and must therefore meet SI standards, as mentioned above.</p>	The Applicant considers that the dDCO aligns with these paragraphs of Advice Note 15 and will ensure that the final dDCO submitted is checked to ensure all footnotes remain up to date.
7.2 Applicants must ensure that all footnotes in their final draft DCO submitted to an Examination are still up to date (ie legislation referred to has not been amended or repealed), and reflect the preferred practice in the relevant decision making department.	
<p>3.5 8. Schedules</p> <p>8.1 Schedules in DCOs must be given effect by an operative Article in the main body of the DCO. This may be by an express provision that the Schedule is to have effect or by clear implication (such as where the Article which grants development consent does so by reference to the Schedule which describes the Authorised Development). The Schedule should also include a shoulder reference to that operative Article, and such references should either be the first Article that mentions the Schedule, or all the Articles that mention the Schedule. A consistent approach should be adopted throughout the DCO.</p>	The Applicant considers that the dDCO aligns with these paragraphs of Advice Note 15 and will ensure that the final dDCO submitted is checked to ensure any changes introduced during examination have not altered this position.
8.2 To assist the reader in navigating the draft DCO, Schedules should be numbered according to the order they are mentioned in the substantive Articles in the draft DCO.	
<p>3.6 9. Paragraphs</p> <p>9.1 Paragraphs in the draft DCO should usually consist of a single sentence and applicants should avoid the use of long sentences.</p>	The Applicant notes this paragraph of Advice Note 15 and has taken this into account, balancing its position of seeking consistency with other highways DCOs.
3.7 10. Numbering	The Applicant considers that the dDCO aligns with these

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<p>10.1 Numbering within Articles and Schedules should follow the guidance at National Archives. Please see advice above (paragraph 4.4) in relation to the numbering of Protective Provisions where included in draft DCO multi-part Schedules. This practice applies to all textual Schedules in several parts.</p>	<p>paragraphs of Advice Note 15 and will ensure that the final dDCO submitted is checked to ensure any changes introduced during examination have not altered this position.</p>
<p>10.2 Applicants should avoid the use of very long lists where the contents need to be numbered with roman numerals or lettered (for example, sub-divisions of a single numbered Work in Schedule 1, where a recent example extended to '(ttt)'). The SI template is unable to cope well with the formatting of such long numbering/ lettering.</p>	
<p>10.3 In the font mandated by the template for SIs, the character for the numeral 'one' and the lower case equivalent of the letter 'L' are indistinguishable from one another visually. When determining a numbering/ lettering scheme (for example, for individual land plots) which also needs to be referred to in the draft DCO, applicants should use a scheme that does not run the risk of ambiguity between these two characters.</p>	
<p>3.8 11. Certification Articles</p> <p>11.1 In a draft DCO certification Article, applicants should avoid referring to 'any other plans or documents referred to in this Order' since this is insufficiently clear and lacks precision.</p>	<p>The Applicant has not made this reference in Article 44.</p>
<p>1.2 Plans and other documents which are required to be certified such as the Land Plans and Works Plans should be specifically listed in the relevant Article. Applicants should set out the titles and numbers of such documents, either in the certification Article or, if there are a large number of documents, in a separate Schedule or Schedules to the DCO.</p>	<p>The Applicant has listed the documents to be certified at Schedule 10 of the dDCO. This list will be reviewed for the final version the dDCO to ensure that the up to date revisions of documents are used.</p>
<p>11.3 It is common for the Environmental Statement (ES) to be certified, not least because adherence with the assessment findings may be relevant when a discharging authority is considering whether or not to discharge Requirements. However, during the course of an Examination, applicants may also provide 'environmental information' which affects the findings of the ES and which may be relied upon for the purposes of the Examination required by Regulation 21 of The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017. If during the course of an Examination 'environmental information' is provided which affects the findings in the ES then applicants should consider if this</p>	<p>The Applicant will, for submission of its final version of the dDCO, review the material provided during examination to determine whether any "environmental information" needs to be certified.</p>

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<p>information should also form part of the certification of the ES since it may have been relied upon by the decision maker and incorporated into the Requirements as mitigation measures.</p>	
<p>3.9 12. Preambles and explanatory notes</p> <p>12.1 Draft DCOs must include a preamble, briefly setting out details of the submission, examination and determination of the application, citing relevant statutory provisions.</p> <p>12.2 Draft DCOs must also, after the Schedules, include a brief explanatory note, explaining the purpose of the DCO, and what it would permit the Applicant to do if consented. This must also set out where copies of the plans and other documents, to be certified under the DCO, may be inspected and when. The agreement reached with the document host/ venue should be confirmed to the Examination</p>	<p>The Applicant considers that the dDCO aligns with these paragraphs of Advice Note 15 and will ensure that the final dDCO submitted is checked to ensure any changes introduced during examination have not altered this position.</p>
<p>4.1 13. DCO revisions</p> <p>13.1 Changes to the draft DCO may well be put forward by the Applicant and others during the course of the Examination. This may be for several reasons as follows:</p> <p>responding to questions raised by the ExA;</p> <p>responding to representations made by Interested Parties; or</p> <p>responding to agreements reached with other Interested Parties, for example in relation to Protective Provisions or revisions to Requirements.</p> <p>13.2 The Examination Timetable will make provision for revised version(s) of the draft DCO to be submitted by the Applicant. Where this is not expressly required in the timetable, applicants may choose to submit revised drafts at other times during the Examination; for example to meet timetabled deadlines for the submission of Written Representations. It is important that there is a clear audit trail to identify both changes to the draft DCO made during the Examination and the reasons why those changes have been made. This will greatly assist the Secretary of State in understanding how the form of any draft DCO that is recommended by the ExA has come about.</p>	<p>The Applicant provided the Draft Development Consent Order Change Log (REP1-039) which provides justification for the changes being made.</p>
<p>4.2 14. Providing a DCO audit trail</p>	<p>During the examination so far, the Applicant, when updating the dDCO, has provided:</p>

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<p>14.1 It is important to maintain a clear audit trail of changes made to the draft DCO. To achieve this, applicants should ensure that each revised draft DCO is accompanied by:</p> <p>a track changed version of the draft DCO highlighting any changes made from the previous version (and identified by a suitable filename) or a version using suitable comparite software which similarly identifies the changes;</p> <p>a track changed draft DCO version highlighting all of the changes made from the version of the draft DCO originally submitted with the application (and identified by a suitable filename) or a version using suitable comparite software which similarly identifies the changes must be submitted at the end of the examination and, depending on the number of versions, at points during the examination; and</p> <p>a supporting explanatory document, such as drafting notes or table of proposed changes. This should explain any amendments in a proportionate and concise way and be appropriately updated during the Examination. This is so that Interested Parties and the ExA are sufficiently aware of the purpose and effect of any proposed revisions to draft DCO provisions.</p>	<ul style="list-style-type: none"> • a clean dDCO; • a tracked dDCO against the most recently submitted version; and • a tracked dDCO against the submission dDCO. <p>The Applicant has also provided the Draft Development Consent Order Change Log (REP1-039) which provides justification for the changes being made.</p>
<p>14.2 A fully updated Explanatory Memorandum must be submitted with the final version of the Applicant's draft DCO submitted towards the end of the Examination. It will therefore be necessary for applicants to keep a detailed and comprehensive audit of changes made to the draft DCO during the course of the Examination to inform the final version of the Explanatory Memorandum. It would therefore seem in the best interests of applicants to update the Explanatory Memorandum in conjunction with each update to the draft DCO during the course of the Examination. If an updated Explanatory Memorandum could be submitted with each update to the draft DCO this would seem to help everyone involved in the examination of the application. The increased clarity provided by regular updates to the Explanatory Memorandum may also reduce the number of questions posed to the Applicant and/ or challenges raised in response to suggested changes</p>	<p>The Applicant notes that there is no requirement to update the EM. The Applicant will look to provide updates where feasible, but otherwise will comply with the requirement to update the EM at the end of examination.</p>
<p>14.2 A fully updated Explanatory Memorandum must be submitted with the final version of the Applicant's draft DCO submitted towards the end of the Examination. It will therefore be necessary for applicants to keep a detailed and comprehensive audit of changes made to the draft DCO during the course of the Examination to inform the final version of the Explanatory Memorandum. It would therefore seem in the best interests of applicants to update the</p>	<p>N/A</p>

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<p>Explanatory Memorandum in conjunction with each update to the draft DCO during the course of the Examination. If an updated Explanatory Memorandum could be submitted with each update to the draft DCO this would seem to help everyone involved in the examination of the application. The increased clarity provided by regular updates to the Explanatory Memorandum may also reduce the number of questions posed to the Applicant and/ or challenges raised in response to suggested changes</p>	
<p>5.1 15. Requirements – general considerations</p> <p>15.1 Section 120 of the PA2008 provides that a DCO may impose Requirements in connection with the development for which consent is granted. Such Requirements may correspond with conditions which could have been imposed on the grant of any permission, consent or authorisation (for example planning permission under the Town and Country Planning Act 1990 (the TCPA1990)) which would have been required for the development if it had been consented through a different regime.</p> <p>15.2 The law and policy relating to planning conditions (in particular, in England, relevant paragraphs of the National Planning Policy Framework and associated Planning Practice Guidance), imposed on planning permissions under the TCPA1990, will generally apply when considering Requirements to be imposed in a DCO in relation to the terrestrial elements of a proposed NSIP. Requirements should therefore be precise, enforceable, necessary, relevant to the development, relevant to planning and reasonable in all other respects.</p>	<p>The Applicant considers that the requirements proposed are precise, enforceable, necessary, and relevant to the development.</p>
<p>5.2 16. Securing mitigation</p> <p>16.1 An application may have significant adverse environmental effects that require mitigation; such effects will be identified in the accompanying ES and/ or relevant environmental information. Any mitigation measures relied upon in the ES must be robustly secured and this will generally be achieved through Requirements in the draft DCO. Mitigation that is identified in the ES as being required must also be clearly capable of being delivered.</p> <p>16.2 Mitigation may include adherence with control measures established through relevant management plans. Requirements can be used to secure the preparation and specification of details for such plans. The plans can be applicable to various stages in the life-cycle of the</p>	<p>The Applicant has secured the mitigation identified in the ES through the Register of Environmental Actions and Commitments (REAC) (REP1-030), and a range of management plans. These are secured via requirement 3 of the dDCO. Where specific requirements are necessary to govern more detailed involvement of other parties, then separate requirements have been proposed by the Applicant.</p>

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<p>Proposed Development but may typically include: a Code of Construction Practice, a Construction Environmental Management Plan and a Site Waste Management Plan.</p>	
<p>16.3 A 'Table of Mitigation' should be provided, usually as part of the ES, setting out precisely how and where mitigation measures relied upon in the ES are secured in the draft DCO.</p>	
<p>5.3 17. Providing flexibility – approving and varying final details</p> <p>17.1 When preparing the draft DCO, applicants should consider carefully the aspects of the Proposed Development that require flexibility, particularly where later stage approval by a relevant discharging authority is required. Any provisions in the draft DCO that allow for flexibility must be thoroughly justified within the Explanatory Memorandum, and assessed within the ES. (The general approach to flexibility can be set out in other application documents and cross-referenced to the Explanatory Memorandum, where appropriate.)</p>	<p>The Applicant notes this paragraph in Advice Note 15 and does not consider that it has made use of a “tailpiece” except where that is justifiable. The wording “unless otherwise approved in writing” is used throughout the dDCO but it is only on a small number of occasions used in a way which might be relevant to paragraph 17.4, Advice Note 15.</p> <p>The first example of this type of “tailpiece” is in requirement 9(2). This is justifiable in this case as, in accordance with paragraph 17.5 of Advice Note 15, the tailpiece is allowing the discharging authority power to approve a change in the exercise, or details that they have approved in the preceding paragraph (1). The Applicant therefore considers the tailpiece in requirement 9 to be in accordance with Advice Note 15. This article has been based on recent highway orders as reported in the EM.</p> <p>Other examples can be found at requirement 11 and 12, both of these examples are also in aligned with paragraph 17.5, Advice Note 15 in that the tailpiece is giving power to the original discharging body to approve a change to the details which they have already approved.</p>
<p>18.1 A DCO should only authorise Environmental Impact Assessment (EIA) development which has been assessed in accordance with the EIA Regulations.</p> <p>18.2 Particular care should also be taken when drafting a power to ‘maintain’ so that it does not authorise development which may result in significant environmental effects not already</p>	<p>The Applicant has ensured that the definition of “maintain” is appropriately drafted.</p>

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<p>assessed. Neither should the power to maintain permit the construction of what is effectively a different project from that consented or its removal (although the removal and replacement of part(s) only of an Authorised Development may in certain circumstances be appropriate). Applicants are encouraged to engage in sufficiently early consultation with the appropriate bodies to seek to agree a definition of maintain and the wording of the corresponding maintenance Article.</p>	
<p>5.5 19. Discharging Requirements</p> <p>19.1 Section 120(2)(b) of the PA2008 allows for Requirements to include the obtaining of approvals from the Secretary of State 'or any other person'. In many cases, the relevant planning authority for the area(s) within which the development is situated, is likely to be the relevant 'person' from which to obtain such approvals. For clarity, such Requirements should generally be drafted to identify the relevant planning authority or authorities by name. This could be made clear in the definitions, for example when defining the 'relevant planning authority'.</p> <p>19.2 Applicants should engage with the discharging authorities and other key stakeholders at the earliest opportunity (at the Pre-application stage) about the Requirements proposed to be included in the draft DCO and to agree the best approach to discharging the Requirements, for example to agree a proportionate timescale for discharge depending on the extent or complexity of detail reserved for subsequent approval.</p>	<p>The Applicant is continuing to engage with the Secretary of State, National Highways, the local highway authority, and relevant planning authorities to determine the most suitable arbiter for discharge of requirements.</p>
<p>5.6 20. Environmental information for subsequent applications</p> <p>20.1 Applicants should note that the procedures under The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (the 2017 EIA Regulations) must be followed for any subsequent application (to a discharging authority) for approval of matters in pursuance of a Requirement before all or part of the development may be started. (Note The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 continue to apply for projects falling under Regulation 37 of the 2017 EIA Regulations.) The 2017 EIA Regulations include transitional provisions which (where relevant) maintain the applicability of The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009. When submitting an application to the discharging authority the Applicant should therefore consider whether the transitional provisions apply. Where transitional provisions do not apply applicants should consider if the 2017 EIA Regulations require them to provide an updated</p>	<p>The Applicant notes these paragraphs of Advice Note 15.</p>

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<p>ES or to request a Screening Opinion from the discharging authority responsible for determining the subsequent application (usually the relevant planning authority) together with a Scoping Opinion.</p> <p>20.2 If an applicant intends to provide an updated ES with the subsequent application it must notify the discharging authority and this will trigger the Applicant's publicity requirements. The discharging authority will also need to consider any obligations (for example under Regulation 11(1)(a)) it has to notify prescribed consultation bodies</p>	
<p>5.7 21. Defining 'commencement' – advance works and environmental protection</p> <p>21.1 In some decisions the Secretary of State has removed definitions of 'commence' and/ or 'preliminary works' which could have allowed for a range of site preparation works (such as demolition or de-vegetation) to take place before the relevant planning authority had approved details of measures to protect the environment under the Requirements.</p>	<p>The Applicant has provided justification for its definition of "commence" in its EM. The approach taken by the Applicant is proportionate and can be found in other highways DCOs. The Applicant has clarified its position in relation to a number of those items under the definition of commence during ISH2, a summary of which is provided at REP1-047.</p>
<p>5.8 22. Hedgerows and trees</p> <p>22.1 Applicants may wish to include an Article within the draft DCO to allow the removal of hedgerows (if necessary) for the purposes of carrying out the Authorised Development. The draft DCO can include an Article with powers which remove the obligation on the Undertaker to first secure consent under The Hedgerows Regulations 1997. (In Wales, such a power can only be included with the consent of Natural Resources Wales.) It is recommended that DCO Articles of this kind are made relevant to the specific hedgerows intended for removal. To support the ExA, the Article should include a Schedule and a plan to specifically identify the hedgerows to be removed (whether in whole or in part). This will allow the question of their removal to be examined in detail. Alternatively, the Article within the DCO could be drafted to include powers for general removal of hedgerows (if they cannot be specifically identified) but this must be subject to the later consent of the local authority.</p>	<p>The Applicant notes that Advice Note 15 is guidance and has no statutory status. There is no requirement for the Applicant to follow the suggestions set out in Advice Note 15 if it is considered inappropriate to do so in any given case. The Applicant also notes that the intention of paragraph 22.1 and "good practice point 6" is unclear. Paragraph 22.1 states that it is "recommended" but not "required" that a schedule is used to identify the hedgerows to be removed. Paragraph 22.1 states that the purpose of this Schedule is "to allow the question of their removal to be examined in detail." However, section 22.1 goes on to state that "the Article within the DCO could be drafted to include powers for general removal of hedgerows (if they cannot be specifically identified) but this must be subject to the later consent of the local authority. It is not clear what the legislative basis is for this guidance to, in practice, limit the operation of section 120(5) which provides that a DCO may disapply statutory provisions. The Hedgerow Regulations 1997 are not included in the prescribed consents set out in Schedule 2, of the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015 for England and therefore it does not appear, from the Applicant's</p>

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	<p>position, to be the intention of Parliament that an undertaker “must” ensure that consents for removal are included in the DCO, curtailing its ability to disapply or amend the provisions of the Hedgerow Regulations 1997.</p> <p>The Applicant notes that the schedule in this instance has been specifically requested as it “may assist parties in making submissions” and the Applicant notes that this aligns with Advice Note 15 which states that submission of a schedule and a plan which identifies those hedgerows that are “important hedgerows” would “enable parties such as the relevant planning authority to make submissions on the appropriateness of including such provisions, and the ExA to consider these.</p> <p>It appears that the intention of being provided a “schedule” is to understand the extent of the anticipated use of article 36. However, the Applicant has provided this detail in its Arboricultural Impact Assessment (APP-116, APP-117). Therefore, the Applicant considers that it has provided material within the examination which allows the parties to consider the extent of the removal of hedgerows and trees currently considered as part of preliminary design.</p> <p>As the Applicant undertakes detailed design, it will do this in accordance with requirement 11. Requirement 11 ensures that the authorised development must be carried out in accordance with the preliminary design shown on the works plans, the general arrangement plans, the environmental masterplan and engineering section drawings. Where it is not in accordance with these aforementioned drawings, the Applicant must obtain the consent of the county planning authority, relevant planning authority and strategic highway authority for matters related to their functions. This means that where there are any changes, the Applicant must continue to engage with the planning authorities regarding those changes and therefore as part of that engagement it would be clear whether there are any changes to the Arboricultural Impact Assessment. Lastly, under requirement</p>

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	<p>11, the county planning authority cannot approve any change to the design where the departure would give rise to a materially new or materially different environmental effect. Therefore, to the extent that any design change proposes changes to the removal of hedgerows sufficient to generate a “materially different or materially new” effect the Applicant would be unable to carry out such works.</p> <p>The Applicant has also committed in the REAC at LV1, to avoid damage to existing vegetation and to protect retained vegetation in accordance with the Arboricultural Impact Assessment, with further protections at LV2, and B6.</p> <p>From the above, the Applicant considers therefore, that the generality of the power in article 36 is supported by the information provided for in the Arboricultural Impact Assessment and then the restrictions imposed by Requirement 11.</p> <p>It should also be noted that the Applicant's approach in this regard can be found to be replicated in other highways DCOs such as the A417 Missing Link Development Consent Order 2022, M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022, M25 Junction 28 Development Consent Order 2022, A303 (Amesbury to Berwick Down) Development Consent Order 2023, A66 Northern Trans-Pennine Development Consent Order 2024, it also appears that the Lower Thames Crossing Order, as of yet ungranted, includes similar provisions.</p> <p>Therefore, the Applicant considers that its position is justified and that notwithstanding guidance to the contrary its position has good precedent.</p>

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<p>5.9 23. Extinguishment of private rights over land</p> <p>23.1 Sub-sections 120(3) and (4) of and paragraph 2 of Schedule 5 to the PA2008 allow a DCO to make provision for the extinguishment of rights over land.</p> <p>23.2 An applicant may wish to extinguish private rights over land when it is acquiring land by the use of a Compulsory Acquisition power in the draft DCO or by agreement with the landowner. An applicant may also wish to extinguish private rights over land it already owns or land which is otherwise required for the NSIP.</p> <p>23.3 The Land Plan accompanying the application must identify any land over which it is proposed to exercise powers of Compulsory Acquisition including any land in relation to which it is proposed to extinguish private rights (Regulation 5 of The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009).</p> <p>23.4 Where an applicant is seeking powers in the DCO to acquire land compulsorily, the drafting of the Article containing the powers should make it clear whether or not the Applicant is also seeking a power to clear the title of the land of all private rights. The Applicant should consider whether the Article should be subject to a power under a separate Article which would allow the Applicant to exclude a particular private right from the blanket extinguishment power.</p> <p>23.5 Section 14A(6) of the Transport and Works Act 1992 and section 134(6A) of the PA2008 (both inserted in the respective Acts by SI 2017/16) each provide that a confirmation notice should be sent to the Chief Land Registrar and that it shall be a local land charge. Where land in an order is situated in an area for which the local authority remains the registering authority for local land charges (ie where the changes made by Parts 1 and 3 of Schedule 5 to the Infrastructure Act 2015 have not yet taken effect in that local authority area), the acquiring authority should comply with the steps required by section 5 of the Local Land Charges Act 1975 (prior to it being amended by the Infrastructure Act 2015) to ensure that the charge is registered by the local authority as the registering authority.</p>	<p>The Applicant considers that the drafting of Article 26, and by extension the EM is sufficiently clear as the operation of the dDCO in this regard.</p>
<p>5.10 24. Restrictive Covenants</p> <p>24.1 It may be appropriate to include a power to impose Restrictive Covenants over part of the land which is subject to Compulsory Acquisition or use under the DCO. Before deciding whether or not the power is justified the Secretary of State will need to consider issues such</p>	<p>The Applicant considers that the drafting of Article 24, and by extension the EM, paragraph 4.87, is sufficiently clear as the operation of the dDCO in this regard.</p>

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<p>as proportionality, the risk that the use of land above or below a structure could be sterilised if it has to be acquired outright in the absence of a power to impose Restrictive Covenants or whether there is for example a policy of establishing a continuous protection zone for the infrastructure network which could be secured more efficiently with the benefit of this power (this was the case in the Docklands Light Railway Orders).</p>	
<p>5.11 25. Application, modification or exclusion of statutory provisions</p> <p>25.1 Under section 120(5)(a) of the PA2008 DCOs may apply, modify or exclude an existing statutory provision which relates to any matter for which provision may be made in the DCO.</p> <p>25.2 The power to apply, modify or exclude an existing statutory provision should be set out in an Article in the main body of the draft DCO. Those provisions that are proposed to be applied, modified or excluded by a DCO should be clearly identified, and, if extensive, identified in a Schedule or Schedules.</p>	<p>The Applicant has set out the extent of disapplication at article 3 of the dDCO.</p>
<p>6. DCOs and Deemed Marine Licences</p>	<p>This section relates to DCOs and Deemed Marine Licences (DML). The dDCO does not contain a DML and so a narrative has not been provided against this section.</p>
<p>7. Appendix 1</p> <p>Standard drafting for Article dealing with procedure for discharge of certain approvals.</p> <p>This appendix is provided in conjunction with 'Good practice point 3' in the main body of Advice Note Fifteen. Where an applicant seeks for any amendment(s) to be made to the drafting of the standard wording provided in this appendix, it should be justified in full in the draft Explanatory Memorandum accompanying the draft Development Consent Order.</p>	<p>Part 2 of Schedule 2 of the dDCO sets out the procedure for the discharge of requirements by the county planning authority. The Applicant has deviated from the standard drafting provided in Advice Note 15 in order to adopt a similar procedure to that used in many other highways DCOs. The Applicant considers that its approach is appropriate and that it is beneficial for highways DCOs to adopt a consistent approach for the discharge of requirements. As noted above, this aligns with the Secretary of State's comments in his decision letter for the M25 Junction 28 where a number of changes were made to the draft DCO to "maintain consistency with highways DCOs".</p>

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	<p>There are many examples of highways DCOs that use a similar procedure to the dDCO for the discharge of requirements. Some recent examples include:</p> <ol style="list-style-type: none">1. The A1 in Northumberland: Morpeth to Ellingham Development Consent Order 2024;2. The A38 Derby Junctions Development Consent Order 2023;3. The A417 Missing Link Development Consent Order 2022;4. The A57 Link Roads Development Consent Order 2022;5. The A428 Black Cat to Caxton Gibbet Development Consent Order 2022; and6. The A19 Downhill Lane Junction Development Consent Order 2020. <p>Please see Part 2 of Schedule 2 of each DCO for reference.</p>

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