



Proposed Hinckley National Rail Freight Interchange

Section 51 Advice

Draft Development Consent Order

22 March 2019

These queries relate solely to matters raised by the draft Development Consent Order (DCO) submitted for comment, and not the merits of the proposal. They are limited by the time available for consideration and raised without prejudice to the acceptance or otherwise of the eventual application. They are provided to assist the preparation of the next iteration.

The Applicant should ensure that when the DCO is finalised all internal references and legal footnotes are checked and that the drafting follows best practice in Advice Notes ('AN') 13 and 15 and any guidance on statutory instrument drafting.

The Applicant should ensure that any typos and formatting issues are corrected, including the use of square brackets.

The draft DCO was submitted for comment without an accompanying Explanatory Memorandum.

Draft DCO Comments:

Q No.	Article	Extract from Document	Question/Comment
1	2	Definition of Authorised Development includes "any works carried out under the requirements"	Is this redundant?
2	4	The second part of Article 4 allows the local authority to consent changes to the scheme authorised by the Secretary of State	This seems to duplicate the function of the non-material change process. Advice note 15 should be read in regard to the final paragraph of this provision, in regard to tailpieces.

			For example during the Northampton Gateway Strategic Rail Freight Interchange examination the Examining Authority has stated (within its 'commentary on the Draft Development Consent Order'): <i>'The issue arises in relation to submissions pursuant to requirements where the requirement specifies something "unless the relevant planning authority [RPA] otherwise approves" and where there are schemes and details to be submitted to the RPA for approval or variations to details specified in the application are made'.</i>
	6	<p>Maintenance of authorised development'</p> <p>(3) Paragraph (1) does not extend to any maintenance works which would give rise to any significant adverse effects on the environment not identified at the time this Order was made or in any updated environmental information supplied under the 2017 EIA Regulations.</p>	<p>Is there a reason as to why 6(3) is worded differently to the final paragraph in Article 4?</p> <p>The drafting here is confusing as it implies that the DCO may be granted even though there are significant adverse effects on the environment and implies that it is ok for there to be significant adverse effects providing they are identified.</p> <p>In any event the order should not authorise works that have not been assessed and the maintenance definition should be limited to works assessed in the Environmental Statement (ES).</p>
	7(4)	<p>Paragraph (1) does not apply to the works for which consent is granted by this Order for the express benefit of owners and occupiers of land, statutory undertakers, operators of the electronic communications code network and other persons affected by the authorised development.</p>	<p>Is this also supposed to be subject to paragraphs (2) and (3)? It is unlikely to be acceptable for compulsory acquisition (CA) powers to be granted to anyone but the undertaker and transfer only permitted with Secretary of State consent or to a body who the Secretary of State can be satisfied has sufficient standing and funding to pay CA compensation costs. If this is the Applicant's intention, they should ensure that the drafting achieves this.</p>

			The Applicant should explain why this provision is necessary and give examples of where it would come into effect.
3	17	Article 17 allows the undertaker to regulate traffic by giving notice to the highways authority	This is a deemed consent provision that extends outside the order limits, and is unlikely to be acceptable to Highways England, for example.
	21	'Discharge of Water'	Has this Article been agreed with the Environment Agency?
	33	Application of Part 1 of the Compulsory Purchase Act 1965	<p>The Applicant should ensure that drafting reflects the amendments made by the Housing and Planning Act 2016. For examples of current drafting see the Silvertown Tunnel DCO and the Secretary of State's Decision Letter</p> <p>The Applicant should also consider whether they require a schedule modifying CA legislation to apply to the creation of new rights, usually entitled the modification of compensation and compulsory purchase enactments for the creation of new rights and imposition of new restrictions.</p>
	47	Removal of Hedgerows and protected trees	<p>Where it is known that specific hedgerows need to be removed they should be listed in a Schedule in accordance with the Planning Inspectorate's Advice Note 15 Drafting Development Consent Orders paragraph 22.1 and Good Practice Point 6.</p> <p>Trees protected by TPO's should also be dealt with in a schedule and referred to in this article.</p>

	49(2)	When any details, plans or other matters have been agreed or approved by the relevant planning authority under a requirement or the relevant highway authority under a requirement or Parts 2 and 3 of Schedule [11] then they may subsequently be amended by agreement with the relevant planning authority or relevant highway authority as the case may be provided that no amendments to those details, plans or other matters may be approved where such amendments would permit development which would give rise to any significant adverse effects on the environment not identified at the time this Order was made or in any updated environmental information supplied under the 2017 EIA Regulations	<p>This drafting is confusing. It implies that the DCO will give rise to significant adverse environmental effects and that these are permissible providing they are identified, presumably this is not what the Applicant means?</p> <p>Perhaps this should read:</p> <p><i>"Amendments may be permitted provided that they do not give rise to any materially new or materially different environmental effects from those assessed in the environmental statement."</i></p> <p>This would reflect drafting in recently granted DCO's</p>
	49(3)	(3) Where a consent, agreement or approval is required or requested by the undertaker under a requirement then the procedure set out in Part 2 of Schedule [2] (procedure for approvals etc. under requirements) for obtaining such consent, agreement or approval, and appealing against the refusal or failure to approve or refuse such consent, agreement or approval, shall apply.	<p>The Applicant should follow the template for discharge of requirements in Appendix 1 of Advice Note 15 or explain any differences</p> <p>https://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/2014/10/advice_note_15_version_1.pdf</p>
	50(1)	Disapplication and modification of legislative provisions	<p>The removal of consent requirements listed in Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015/462 requires the relevant authorities consent to be authorised in the DCO. The Applicant should ensure they obtain this prior to submission.</p>

	50(2) – (6)	Disapplication and modification of legislative provisions	The Applicant should explain why these provisions should not apply in the EM.
	50(5)	50(5) (disapplication of CIL)	Has the local authority agreed this provision?
	53	Arbitration	Have the named bodies been consulted on their role?
	Work 6	Electricity generation	Clarification is required as to whether this would be an NSIP in its own right.
	Work 10		These works should be limited to works assessed within the ES, particularly (n) which could encompass a wide range of works and is uncertain. Who decides what is “necessary”?
	Work 19	Further works	These are limited to works which do not give rise to any materially new or different environmental effects from those assessed in the ES but they are very extensive and it is not clear whether they are to apply only to NSIP 2 or to both NSIP’s. The Applicant should ensure this is clear and consider tying them to specific works. The Applicant should also provide sufficient justification for their approach in the EM.

Queries raised by the Applicant, and the Inspectorate’s s51 advice:

1. Query:

The definition of “undertaker” follows that proposed for other rail freight interchanges in that it includes successors in title to the main site. This enables future operators to take the benefit of the powers in the DCO but this general benefit is curtailed by the provisions of Article 7 which requires the Secretary of State’s consent to transfer the benefit of compulsory acquisition powers. In addition, Highways England and Leicestershire County Council have step-in rights to complete works as provided for in the protective provisions. Do PINS have any comments on this approach or issues to be aware of that might have arisen in other examinations?

S51 Advice:

The Applicant will need to explain and justify their approach in the EM. We note that the benefit of the order to unspecified persons with an interest in the land is limited to the “main site” but it is unclear at present which works this will relate to. The Applicant will need to explain what works and powers this will relate to and justify this approach. The Applicant should also consider making it clear that this is subject to article 7 transfer of benefit.

2. Query:

Article 28 currently proposes the standard 5 year period for the exercise of compulsory acquisition powers. There is a possibility that highway modelling may identify mitigation that is only required in later phases, beyond the 5 year period and dependent upon traffic numbers generated. I am aware that a longer period has been permitted in some circumstances (Dogger Bank Teesside A&B for example). PINS comments on extending the period beyond 5 years would be appreciated.

S51 Advice:

Whilst we note that a 7 year commencement period was granted for the proposal identified, it has been rejected for other proposals, for example where it was felt that seven years is too long a period over which affected persons’ affairs might be exposed to uncertainty. Therefore this is an issue which would be investigated at examination and the Applicant should provide justification for its proposed approach (e.g. Dogger Bank Creyke Beck was not granted 7 years). The Applicant may wish to review the report for Dogger Bank Teesside at para 6.3.19 which details the specific reasons why an extension was recommended in that case.

3. Query:

The scheme will require the diversion of the public footpath crossing the existing railway line and the closure of the associated level crossing.

- a. This has been addressed in Article 12(5) by the addition of wording taken from Transport and Works Act Orders relating to level crossing closures promoted by Network Rail (see for example The Network Rail (Closure of Abbots Ripton Level Crossing) Order 2017). Is PINS content for the drafting to be approached in this way as they relate to the diversion of public rights of way, or is there a preference for this to be done in a separate article?

- b. Is PINS aware of any other made DCO that authorises the closure of a level crossing promoted by someone other than Network Rail?

S51 Advice:

Article 17 of the made Tilbury2 DCO closes a level crossing:

'17. Upon the stopping of Footpath 144 (as shown on sheet 2 of the rights of way and access plans) in accordance with article 12, the level crossing which forms part of that footpath is closed and discontinued.'

The Tilbury interpretation article doesn't define "level crossing" – A definition may be helpful, perhaps with reference to work numbers or plans. The definition may benefit from discussion with Network Rail.

4. Query:

The description of the authorised development in Schedule 1 has adopted the approach in the East Midlands Gateway DCO and the draft DCOs for Northampton Gateway and Rail Central of distinguishing between those rail works which interface with the existing rail network and those which form part of the Rail Freight Terminal itself. Does PINS have any comments on this, or is there a preferred approach?

S51 Advice:

Are Network Rail content with the approach? It may make drafting protective provisions easier but might also restrict the scope of the indemnities the provisions contain.

5. Query:

Are there any general drafting points arising from other rail freight DCOs that PINS would like to draw our attention to, or are there any particular points arising from those examinations that it would be particularly helpful to pick up in the explanatory memorandum.

S51 Advice:

The Phasing of the scheme is an issue that often comes up at examination; how far in advance of the rail connected/served elements the warehousing can be occupied. The Applicant is advised to follow the examinations of the Northampton Gateway and Rail Central applications however to note that Advice Note 15 states that where a provision has been replicated from another made DCO, the Explanatory Memorandum must explain why this provision is relevant and appropriate for/to the NSIP(s) being applied for.

