

**Deadline 5 Response- Written Submission submitted by National Highways Limited**

**Planning Inspectorate Reference Number: EN070007**

**Application by Liverpool Bay CCS Limited for an Order Granting Development Consent for the HyNet Carbon Dioxide Pipeline Project**

## **1 Introduction**

1.1 This further written submission is National Highways Limited's formal written Deadline 5 submission in respect of the application by Liverpool Bay CCS Limited for an order granting development consent for the HyNet Carbon Dioxide Pipeline (DCO) in respect of Liverpool Bay CCS Ltd's ("Applicant") application for a Development Consent Order ("Order") which seeks powers to enable the installation of a new build carbon dioxide ("CO<sub>2</sub>") pipeline from the Ince AGI in Cheshire to Talacre Beach in North Wales to transport CO<sub>2</sub> produced and captured by future hydrogen producing facilities and existing industrial premises in North West England and North Wales for offshore storage ("Scheme"). National Highways respectfully asks the ExA to consider National Highways' further submissions in respect of the Deadline 3 responses together with Counsel's Opinion in respect of the Examining Authority's question regarding the depth of the highway and the 1991 Act.

1.2 The Applicant seeks development consent for the authorised development described in Schedule 1 of the DCO (Authorised Development). National Highways submitted a section 56 representation on 12th January 2023 and has since provided both written and oral submissions to the examination.

1.3 National Highways has been asked by the ExA to agree a Statement of Common Ground with the Applicant (SoCG). The current position on the SoCG is being submitted by the Applicant at Deadline 5.

1.4 National Highways has already set out its key objections to the Scheme and does not wish to reiterate those at this stage. This Written Submission expands on the representation submitted at previous deadlines, answers the Examining Authority's questions posed insofar as is possible and responds to points submitted by the Applicant at Deadline 3.

## **2 Examining Authority's Question to National Highways:**

2.1 The Examining Authority has asked National Highways the following question:

**Question to Strategic Road Network (SRN) - 'highway right' and 'subsoil property rights' National Highways Ltd (NH)/ Welsh Government/ North and Mid Wales Traffic Regulation Authority (NMWTRA)**

**• Your attention is drawn to [REP3-033] and Table 2.2, reference 2.2.2. Do NH agree with the premise that at a point in depth NH would cease to be the Highway Authority for the SRN and the subsurface would revert back to the owner, whether that be NH or another 'Affected Person'? Bearing in mind caselaw and in regard to Plots 5-06, 5-09 and 7-05, as shown on the Land Plans [REP2-014], at what depth do NH consider the highway rights (being the road surface, air**

**space and subsoil required for the operation, maintenance and repair of the highway) on each of those plots to cease and sub-soil property rights resume? Please justify your answer**

**• Responses from the IPs listed to the Applicants reply set out in the above-mentioned table, and reference, especially in regard to depth of a ‘highway right’ and at what point subsoil property rights would occur, are sought.**

2.2 National Highways has sought Counsel’s Opinion on this matter which is annexed and should be read alongside this submission. In particular, attention is drawn to paragraphs 14 -18 of Counsel’s Opinion.

2.3 National Highways wants to make clear that the depth of the highway is not defined and as demonstrated in recent case law as set out below, can vary from highway to highway. Counsel’s Opinion sets out at paragraph 15 that:

*“...in considering the depth of a highway for which NH is the highway authority, that crucially depends upon the context in which the issue is being raised. Lord Briggs pointed out in Southwark LBC v Transport for London, which was concerned with the construction of a property transfer order between two highway authorities: “There is in my view no single meaning of highway at common law. The word is sometimes used as a reference to its physical elements. Sometimes it is used as a label for the incorporeal rights of the public in relation to the locus in quo. Sometimes, as here, it is used as the label for a species of real property. When used within a statutory formula, as here, the word necessarily takes its meaning from the context in which it is used.”*

2.4 There is therefore no single definition of the depth of a highway and will it be determined by facts. The fact that the depth of the proposed pipeline is not known is of concern to National Highways because it cannot ascertain whether the pipeline will be of sufficient depth not to interrupt with the safety and integrity of the SRN. The commitments to mitigating the risk on the SRN which are to be found in National Highways’ form of protective provisions and could be dealt with by way of agreement as opposed to compulsory acquisition are therefore vital, but to date the Applicant has not agreed the form of protective provisions required by National Highways and National Highways’ submissions below detail the concerns regarding attempts to acquire land and rights via alternative means to compulsory acquisition.

2.5 Typically, the depth of the highway of a motorway would be much greater than for example the depth required on a smaller local highway. Similarly, the depth of the highway would depend on the ground conditions of the particular highway in question. Some highway will require much greater depth than others due to ground conditions. National Highways has not carried out surveys to identify the exact depth of the highway at the locations which comprise the plots which cross the SRN and therefore is not in a position to give further detail on the depth of the highways in question. What is fundamental is that the protective provisions as proposed by National Highways are secured on the face of the Development Consent Order to ensure that the proposed works comply with for example CD622 which deals with managing geotechnical risk

within the Design Manual for Roads and Bridges (DMRB) and that any acquisition of interests are in a way which protects the integrity and safety of the SRN.

2.6 National Highways draws particular attention to paragraph 18 of Counsel's opinion which states that:

*“It follows that the depth of a highway in any particular case is fundamentally dependent upon the context in which the word “highway” is being used and the purpose in which the issue is raised. However, in terms of the application of the NRSWA, it has no particular relevance. Instead, irrespective of the depth at which apparatus is laid under a highway, and whether it is within the zone of ordinary use or within the subsoil below, the works involved in placing such apparatus under the highway amount to “street works” within the meaning of s.48(3) of NRSWA and are therefore subject to the control and regulation of the provisions of NRSWA by the street authority at the time those works are carried out. That is also the position irrespective of whether the works involve breaking open the surface of the highway, as that is not a pre-condition to the works being “street works” within the meaning of s.48(3).”*

2.7 The Applicant confirmed at Deadline 3 that all works in the vicinity of National Highways assets will be undertaken in accordance with the DRMB Standard CD622, as agreed in the draft SoCG with National Highways. This commitment must also be secured by way of protective provisions as a minimum. The Applicant stated in its Deadline 3 response that “even where works will be below the highway, the Applicant agrees that NH has an interest in how they will be carried out and has agreed to provide such technical detail for their approval as is required to satisfy National Highways that there is no danger to the highway.” In order for this to be secured however National Highways' form of protective provisions must be included within the DCO.

2.8 The point above is even more fundamental given the wide wording included within Schedule 1 of the Draft DCO (please see National Highways' Deadline 4 submission in this respect but attention is drawn in particular to the following wording within the Draft DCO which says: “...and in connection with Work Nos. 1 to 57N, and to the extent that they do not otherwise form part of any such work, development comprising such other works as may be necessary or expedient for the purposes of or in connection with the relevant part of the authorised development and which fall within the scope of the work assessed by the environmental statement...” ) which provides extremely wide powers for highway and street works, which would include the SRN. Where the Applicant seeks a power to carry out unknown works on National Highways' network then it is relevant and proportionate for the protective provisions to provide sufficient protection in the form proposed by National Highways.

### **3 New Roads and Street Works Act 1991 (the “1991 Act”/ “NRSWA”)**

3.1 National Highways has sought Counsel's opinion on this matter which is annexed to this response. In particular, attention is drawn to paragraphs 2 - 13 of Counsel's Opinion.

3.2 Counsel's Opinion makes clear that the Applicant's argument put forward at Deadline 3 (paragraph 2.2.4 of its response to National Highways' previous submission) that the proposed pipeline works do not constitute street works is not correct. Please see in particular paragraph 7 of Counsel's Opinion which states that:

*"It therefore follows, for example, that works involving trenchless technology which would not involve the actual breaking up of the surface of a highway in order to place infrastructure under the highway would still amount to "street works" within the meaning of s.48(3) and would be governed by and regulated by NRSWA."*

3.3 Attention is drawn to paragraph 12 of Counsel's Opinion which states that:

*"...if a statutory right to place infrastructure in, on, above or below a highway is conferred by a DCO, the subsequent execution of that right, namely the carrying out of the requisite physical "street works", remains subject to the regulatory provisions of NRSWA to be applied by the street authority. It is therefore important that such is reflected in the terms of the DCO and all requisite street works are recorded as such."*

National Highways is concerned that no works 'under' the SRN are currently listed as street works within the DCO. This is at odds with the Book of Reference which clearly includes plots within the SRN. National Highways contends therefore that either the draft Development Consent Order is updated to include those works proposed under the SRN (and if that is the case National Highways requires that none of the provisions are disapplied as set out in the Deadline 4 response) or that the Applicant will need to secure a 1991 Act licence before any works are commenced. These works would require a licence whether or not the works are within the subsurface as made clear in Counsel's Opinion. Should the Applicant do neither then National Highways reserves its right in respect of offences committed in relation to the 1991 Act.

3.4 In its Deadline 3 response, the Applicant stated that "...it notes it is required to seek approval for the works from National Highways as highway authority under section 61 of NRSWA and it is not seeking to remove any control of the highway authority or undermine the protection of the street..." However, National Highways cannot find reference to any street works within the SRN in the Draft DCO. On the face of the Draft DCO it therefore seems as though none of the proposed works require a licence pursuant to the 1991 Act which is contrary to Counsel's Opinion.

## **4 Compulsory Acquisition**

4.1 In respect of the compulsory acquisition position, it is National Highways' position that the Applicant has not made out its case for compulsory acquisition which must only be used as a case of last resort. The recent example of London Borough of Barking and Dagenham Council (Vicarage Field and surrounding land) Compulsory Purchase Order which was not confirmed at the end of last year partly because there were "concerns that inadequate negotiations have taken place" shows the fundamental importance of negotiations being required. Having reviewed the Book of Reference and engaged with the Applicant on the Statement of Common Ground, it is

clear that even now, the plots in which the Applicant believes National Highways has an interest seem to change at each submission deadline.

4.2 In particular, despite being over half - way through the examination and having requested heads of terms for plots in which National Highways has an interest, National Highways has only received heads of terms in respect of a few of these plots. The Applicant referred in its Deadline 3 response to “a voluntary agreement” however National Highways draws attention to the fact that it is agreed that there are some 40 interests which National Highways holds in respect of the proposed development and to date the engagement has been limited to those plots which relate directly to the SRN. Given the current status and that National Highways has internal governance procedures which must be followed, it would now seem very difficult to allow sufficient time for National Highways to carry out the procedures needed to get relevant agreements in place in the time left before the close of examination, even if terms were immediately forthcoming.

4.3 National Highways had anticipated that it would be in a position to agree protective provisions in a form which are required by National Highways before the close of the examination. To date, although the Applicant and National Highways are in discussions and further dialogue is anticipated, the provisions sought by National Highways and those accepted by the Applicant are some way apart. As a result, National Highways must expand on the list of plots within the list of those being objected to, primarily because without adequate protections in place to ensure that National Highways can exercise its rights in common with the Applicant, National Highways is concerned that its rights will be extinguished and prevent the exercise of those rights to ensure the safe running and integrity of the SRN.

4.4 Additionally, some of the plots comprise local highway authority network which must be protected in a similar way to that of the SRN and so National Highways’ objection extends to National Highways’ land interests located within the local highway authority network for which there are the same concerns around uncontrolled powers being granted in, on, over or adjacent to the highway network. It is considered unnecessary for the applicant to permanently acquire the freehold of such land.

4.5 Finally, National Highways has been made aware during the examination of some additional plots in which National Highways holds an interest as these have been transferred from the Department for Transport and so the following list also includes those where they are being objected to.

Those plots being objected to are as follows:

2-03 – objection to removal of private right

2-05 - objection to removal of private right

2-09 - objection to loss of local highway authority ‘subsurface’

2-10 - objection to loss of local highway authority ‘subsurface’

4-20 - objection to removal of private right

5-01 - objection to removal of private right



- 5-02 - objection to removal of private right
- 5-05 - object to loss of woodland mitigation land
- 5-06 – object to loss of SRN ‘subsurface’
- 5-09 – object to loss of highway ‘subsurface’ and verges
- 5-10 - objection to removal of private right
- 5-12 - objection to removal of private right
- 5-14 – objection to interference
- 5-15 – objection to interference
- 5-20 – objection to interference
- 5-22 - objection to interference
- 5-23 - objection to interference
- 6-02 - objection to interference
- 6-03 - objection to interference
- 6-04 - objection to interference
- 6-05 - objection to interference
- 6-06 - objection to interference
- 6-07 – objection to interference with SRN
- 7-05 – object to loss of SRN ‘subsurface’
- 9-04 – objection to interference with private right
- 9-07 – objection to loss of local highway authority ‘subsurface’
- 9-09 - objection to loss of local highway authority ‘subsurface’
- 9-10 - objection to loss of local highway authority ‘subsurface’
- 9-12 - objection to loss of local highway authority ‘subsurface’

## **5 Conclusion**

5.1 National Highways is happy to provide further information in respect of this and previous submissions should it assist the ExA.

National Highways – 6 July 2023

Annexure – Ruth Stockley Counsel’s Opinion

