



Department for Transport

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Thomas Selby
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Dear Mr Selby

PLANNING ACT 2008

APPLICATION FOR A NON-MATERIAL CHANGE TO THE M20 J10a DEVELOPMENT CONSENT ORDER 2017

1. I am directed by the Secretary of State for Transport (“the Secretary of State”) to advise you that consideration has been given to the application made by Highways England (“the Applicant”) on 10 June 2019 for the proposed M20 Junction 10a Development Consent (Amendment) Order (“the Amendment Order”) to make a non-material change (“the Application”) to the M20 Junction 10a Development Consent Order 2017 (“the 2017 Order”) under section 153 of, and paragraph 2 of Schedule 6 to, the Planning Act 2008 (“the 2008 Act”). This letter is the notification of the Secretary of State’s decision in accordance with regulation 8 of the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations (“the 2011 Regulations”).
2. The original application for development consent under the 2008 Act was submitted to the Planning Inspectorate by the Applicant on 19 July 2016. Development consent was granted on 1 December 2017, via the 2017 Order, for the creation of a new interchange Junction 10a on the M20 motorway in Kent, east of the existing Junction 10 in Ashford. The M20 Junction 10a scheme involves creating a new interchange on the M20 east of Junction 10 that will incorporate a new two-lane dual carriageway link road to the existing A2070 Southern Orbital Road (Bad Munstereifel Road) (“the Development”).
3. The Applicant is seeking consent for a non-material change to the 2017 Order which would increase the working hours specified in requirement 3(2)(e) of Schedule 2 to the 2017 Order.

4. The current working hours are:
- 07:00 to 18:00 (Mondays to Fridays); and
 - 07:00 to 13:00 (Saturdays).

No works are currently permitted to be undertaken outside of these hours, with the exception of limited works as specified in sub-paragraphs (i) to (vii) of requirement 3(2)(e).

5. The new working hours would be:
- 07:00 to 19:00 (Mondays to Fridays);
 - 07:00 to 18:00 (Saturdays); and
 - 08:00 to 17:00 (Sundays and Bank Holidays) – for earthworks only.

The existing exceptions to the working hours as set out in sub-paragraphs (i) to (vii) of requirement 3(2)(e) will continue unaffected.

Summary of the Secretary of State's decision

6. For the reasons set out in the following paragraphs, the Secretary of State is satisfied that the proposed changes are non-material and has decided under paragraph 2(1) of Schedule 6 to the 2008 Act to approve the Application and make the change via the Amendment Order.

Purposes of the Amendment Order

7. The Applicant has stated that the increased working hours would allow a more efficient use of resources within the given programme to meet key project delivery dates. The Secretary of State notes that earthwork activities have been limited during winter working conditions and that the Applicant considers the increased working hours would help to maximise the level of earthworks that can be carried out in the drier conditions. The Applicant has also set out that the proposed change has the potential to reduce the short-term pressures on the local area and reduce the ongoing pressure experienced on the road system.

Consultation

8. On 26 March 2019, the Secretary of State consented to allow the Applicant, in accordance with regulation 7(3) of the 2011 Regulations, to only consult those consultees identified by the Applicant in their application dated 18 March 2019. The Secretary of State also required any new parties with nearby land interests to be consulted. The Secretary of State is therefore content that the Applicant has consulted the necessary parties in line with regulation 7 of the 2011 Regulations.
9. The Application was made publicly available on the Planning Inspectorate's website on 10 June 2019 for the purposes of Schedule 6 to the Planning Act 2008 and Part 1 of the 2011 Regulations.

Consideration of the materiality of the proposed change

10. So far as decisions on whether a proposed change is material or non-material, guidance has been produced by the then Department for Communities and Local Government, entitled the “Planning Act 2008: Guidance on Changes to Development Consent Orders” (December 2015) (“the Guidance”). Given the range of infrastructure projects that are consented through the 2008 Act, and the variety of changes that could possibly be proposed for a single project, the Guidance cannot, and does not attempt to, prescribe whether any particular type of change would be material or non-material. However, it sets out that there may be certain characteristics that indicate whether a change to a consent is more likely to be treated as a material change, namely:
 - a) whether an update would be required to the Environmental Statement (from the time the original DCO was made) to take account of likely significant effects on the environment;
 - b) whether there would be a need for a Habitats Regulations Assessment (“HRA”), or a need for a new or additional licence in respect of European Protected Species (“EPS”);
 - c) whether the proposed change would entail compulsory acquisition of any land that was not authorised through the original DCO; or
 - d) whether the proposed change would have a potential impact on local people and business.
11. Although the above characteristics indicate that a change to a consent is more likely to be treated as a material change, these only form a starting point for assessing the materiality of a change. Each case must depend on thorough consideration of its own circumstances.
12. The Secretary of State began his consideration of the materiality of the variation proposed by the Application by considering the four matters referred to in paragraph 10:
 - a) The Applicant supplied an Application Statement which detailed the nature of the proposed change and its implications. The Application Statement provided further environmental information which concludes that increasing the working hours will not have any new significant effects or materially different effects from those already assessed in the original Environmental Statement for the 2017 Order. In response to consultation, four local residents and one local business raised concerns about the impact on air quality from exhaust fumes as well as increased dust and noise that could stem from the longer working hours. The Secretary of State has considered these concerns below (under ‘Requirement to update Environmental Statement’) and in light of the analysis supplied by the Applicant the Secretary of State has concluded that an update to the Environmental Statement is not required.

- b) Based on the assessment in the Applicant's Application Statement, the Secretary of State is satisfied that the proposed change will have no new impacts on habitats and protected species and the proposed change will not result in a need for a HRA or any new or additional licences for EPS. The Secretary of State further notes that no concerns have been raised in relation to this conclusion by Natural England or any other consultee who did not provide any comments that could be attributed to a need for a HRA or need for new or additional licences for EPS. The Secretary of State has therefore concluded that, given the nature and impact of the change proposed and the lack of objection from Natural England, there is not likely to be a significant effect greater than those originally identified. Therefore, the Secretary of State is satisfied that a HRA is not required, and is also satisfied that the proposed change does not bring about the need for new or additional licenses in respect of EPS as the amendments proposed are not anticipated to give rise to any new or different effects from an ecological perspective.
- c) The Secretary of State is satisfied that the proposed change does not entail any new compulsory acquisition of land.
- d) The Secretary of State notes that the Applicant's assessment in the Application Statement is that the proposed change to working hours will have a minimal impact on local people and businesses. The assessment in the Application Statement is that there will be low or no change in the impact on visual amenity or the natural or historic environment. It also states that there will also be a minimal impact on traffic flows in the project vicinity, however, this is not expected to create a significant impact in respect of levels of driver stress. Consultation responses from local residents and business raised concerns about the impact on the Pilgrims hospice, footpaths and bridleways and concern about works taking place on Sundays and bank holidays. Objectors are of the view that such increases will have a disruptive effect on both business and daily life, and will hinder their ability to enjoy their evenings and weekends. The Secretary of State's consideration of these concerns is detailed below under 'Impact on residents and business' and he is satisfied that the impact of the proposed change on local people and business is not such that would render the change material.

Requirement to update Environmental Statement

13. The Secretary of State has considered whether the Application would give rise to any new significant effects or materially different effects when compared to the effects set out in the Environmental Statement for the Development authorised by the 2017 Order. The Secretary of State is satisfied that the Application Statement and Consultation and Publicity Statement provided by the Applicant is sufficient to allow him to decide the Application. The Secretary of State has noted that the Applicant has given particular consideration to impacts relating to air quality and dust (section 3 of the Application Statement), and noise and vibration (section 4 of the Application Statement).

Air quality

14. The Secretary of State has considered the concerns raised in response to consultation as to the impact on air quality of an increase in exhaust fumes caused by longer working hours. He notes the information provided by the Applicant regarding the impacts of the proposed change in working hours on air quality which highlights that there will be small temporary changes in the short term arising from the increase in plant activity and construction related journeys. The Secretary of State has noted that impacts on the overall emissions from plant and machinery would result in a temporary short-term increase in the concentrations of emissions. The Secretary of State has also noted the project has been using, and will continue to use, technology and alternative solutions to reduce harmful emissions in the short term. He also notes that the Applicant has advised that the proposed change could help tackle the long-term air quality issues in alleviating unnecessary emissions by:
- minimising idling times from queuing by contributing less to traffic during peak rush hour at the end of shifts; and
 - minimising unnecessary future journeys of employees by utilising a full day or working and the already mobilised plant and machinery (ie. the additional 5 hours Saturday working will allow a full shift to be achieved to undertake works otherwise deferred).
15. The Secretary of State is accordingly satisfied that proposed change will not contribute any additional impacts on air quality in addition to those originally assessed in relation to the construction stage in the Environmental Statement. He is further satisfied that reasonable steps are being taken to address any short-term impact on air quality that could result from the increased hours.

Dust

16. In relation to concerns about increased levels of dust the Secretary of State notes from the information in the Application Statement that dust levels as a result of an increase in weekday working hours are assessed as being likely to remain the same. The Application Statement does provide that the additional Saturday working hours, and potential earthwork activities on Sundays and Bank Holidays, will produce additional vehicle movements likely to result in a minor increase in dust levels. However, the dust generated in this instance is expected to be at a significant distance from receptors. The Secretary of State notes that construction to date has been carried out in accordance with the Best Practicable Means described in section 79(9) of the Environmental Protection Act 1990 so as to minimise dust emissions. The Secretary of State has noted that the Applicant has used various management strategies to minimise the impact of dust including its practice of fortnightly monitoring. The Secretary of State is satisfied that any increases in dust will not be significant, and as such does not require an update to the Environmental Statement, and that there will continue to be adequate management strategies in place to minimise the impact of dust and that this will not change as a result of this application.

Noise and Vibrations

17. With regard to noise impacts, the Secretary of State is satisfied that the Applicant's supporting application documents for this change establish that the increased level of construction activity will have no more noise impacts than those generated by works already authorised under the 2017 Order to be undertaken outside the working hours

(as per requirement 3(2)(e)(i) to (vii) in Schedule 2). The Secretary of State is satisfied that the Application will not result in a breach of any of the noise limits already set out in the 2017 Order as no new or different construction activities are proposed.

18. The Secretary of State has noted that vibration from construction is ground borne and is largely related to typical earthworks and is satisfied that earthworks on Sundays and Bank Holidays will be at a significant distance from sensitive receptors and that vibrations will not be perceptible or create an impact.

Conclusion

19. The Secretary of State has considered the information provided and the views of consultees in relation to environmental impacts. The Secretary of State agrees with the Applicant's conclusions that there will not be any new or materially different likely significant effects when compared to the effects set out in the Environmental Statement for the development authorised by the 2017 Order and as such considers that there is no requirement to update the Environmental Statement.

Impact on residents and business

Pilgrims Hospice

20. With regard to the impact on Pilgrims hospice, the Secretary of State notes that the Applicant has confirmed that Pilgrims Hospice were consulted prior to the Application being made and that they have made no objection to the Application. The Secretary of State is also satisfied that the Application should not result in any new noise impacts than those originally assessed.

Working on Sundays and Bank Holidays

21. With regard to works on Sundays and Bank Holidays, the Secretary of State is content that this will be limited to earthworks and will not allow for general works to take place during these periods. The Secretary of State is also satisfied that these will take place away from receptors and that existing mitigation measures currently implemented to manage the impacts of the construction works will remain and alleviate the impacts to residents and business of the works during the proposed increased working hours.

Footpaths and Bridleways

22. In relation to concerns about the impact on footpaths and bridleways, the Applicant confirmed in their Consultation and Publicity Statement that the Application will not generate any unacceptable impacts on footpaths and bridleways that were not addressed during the Examination of the 2017 Order. The Secretary of State has no reason to disagree with this.
23. Overall, the Secretary of State is content that the Application will not lead to sufficiently substantial impacts on the environment, habitats/species or local people and businesses to indicate that the proposed change should be considered as being a material change.

Conclusion of the materiality of the proposed change

24. The Secretary of State therefore concludes that none of the specific indicators referred to in the Guidance, or other relevant considerations, suggest that this

proposed change is material in nature. He has also had regard to the effect of the change to consider whether there are any circumstances in this particular case which would lead him to conclude that the proposed change is material but has seen no evidence to that effect.

25. The Secretary of State is therefore satisfied that the change proposed in the Application is not material and should be dealt with under the procedures for non-material changes.

General Considerations

Equality Act 2010

26. The Equality Act 2010 introduced a public sector “general equality duty”. This requires public authorities to have due regard in the exercise of their functions to the need to eliminate unlawful discrimination, harassment and victimisation and any other conduct prohibited by the Act; advance equality of opportunity between people who share a protected characteristic and those who do not in respect of the following “protected characteristics”: age, gender, gender reassignment, disability, marriage and civil partnerships; pregnancy and maternity; religion and belief; and race. The Secretary of State has had due regard to the need to achieve the statutory objectives referred to in section 149 of the Equality Act and is satisfied that there is no evidence that granting this Application will adversely affect the achievement of those objectives.

Human Rights Act 1998

27. The Secretary of State has considered the potential infringement of human rights in relation to the European Convention on Human rights, by the Application. The Secretary of State considers that the grant of the non-material changes that would not be incompatible with any Convention right protected by the Human Rights Act 1998.

Section 40(1) of the Natural Environment and Rural Communities Act 2006

28. The Secretary of State, in accordance with the duty in section 40(1) of the Natural Environment and Rural Communities Act 2006, has to have regard to the purpose of conserving biodiversity, and in particular to the United Nations Environmental Programme Convention on Biological Diversity of 1992, when granting development consent. The Secretary of State is of the view that the Application considers biodiversity sufficiently to accord with this duty.

Secretary of State’s conclusions and decision

29. The Secretary of State is satisfied that the proposed changes are non-material and has decided under paragraph 2(1) of Schedule 6 to the 2008 Act to make non-material changes to the 2017 Order, so as to authorise the changes as detailed in the Application. This letter is the notification of the Secretary of State’s decision to make the proposed amendments to the 2017 Order in accordance with regulation 8 of the 2011 Regulations.

30. The Secretary of State acknowledges that there will be some short-term and temporary inconveniences and disruptions caused by the increased working hours. The Secretary of State is however content that there are sufficient management strategies already in place to manage and mitigate against any potential adverse effects and that the Application should result in completion of the construction phase of the Development as soon as possible. The Secretary of State is content that the benefits of the scheme are not outweighed by any short term and temporary impacts.
31. The Secretary of State has considered the nature of the proposed change, noting that it would have no additional significant environmental effect. He concludes that the proposed change is not material. Having considered the effects of any change and the benefits of the changes in facilitating the delivery of the scheme, the Secretary of State has concluded that it would be appropriate and advantageous to authorise the proposed changes as detailed in the Application.
32. The Secretary of State is also satisfied that the application accords with paragraphs 2.1-10 of the National Policy Statement for National Networks that there is a compelling need for the ongoing development of national networks to address road congestion, to provide safe, expeditious networks and to support economic growth.
33. For the reasons given in this letter, the Secretary of State considers that the proposed changes are non-material and that there is a compelling case for authorising the proposed changes. The Secretary of State is therefore today making the Amendment Order requested by the Applicant subject to a number of minor modifications and amendments which do not materially alter its effect.

Challenge to decision

34. The circumstances in which the Secretary of State's decision may be challenged are set out in the note attached at the Annex to this letter.

Publicity for decision

35. The Secretary of State's decision on this Application is being notified as required by regulation 8 of the 2011 Regulations.

Yours faithfully

Nicola Rudkin

ANNEX

LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS

Under section 118(5) of the Planning Act 2008, a decision under paragraph 2(1) of Schedule 6 to the Planning Act 2008 to make a change to an Order granting development consent can be challenged only by means of a claim for judicial review. A claim for judicial review must be made to the Planning Court during the period of 6 weeks beginning with the day after the day on which the Order is published. The Amending Order as made is being published on the date of this letter on the Planning Inspectorate website at the following address:

<https://infrastructure.planninginspectorate.gov.uk/projects/south-east/m20-junction-10a/>

These notes are provided for guidance only. A person who thinks they may have grounds for challenging this decision to make the Order referred to in this letter is advised to seek legal advice before taking any action. If you require advice on the process for making any challenge you should contact the Administrative Court Office at the Royal Courts of Justice, Strand, London, WC2A 2LL (020 7947 6655)