

# A63 Castle Street Improvement, Hull

Scheme Number: TR010016

6.3 Environmental Statement – The Appendices

APFP Regulation 5(2)(a)

Planning Act 2008

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



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Infrastructure Planning

Planning Act 2008

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

**A63 (Castle Street Improvement, Hull)  
Development Consent Order 20[ ]**

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**ENVIRONMENTAL STATEMENT – THE APPENDICES**

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# **A63 Castle Street Improvements, Hull Environmental Statement**

**Volume 3 Appendix 1.1**

**INTRODUCTION - APPLICABILITY OF THE EIA REGULATIONS 2009**

**TR010016/APP/6.3  
HE514508-MMSJV-EGN-S0-RP-LE-000014  
31 July 2018**

## THE A63 CASTLE STREET IMPROVEMENTS

### APPLICABILITY OF THE INFRASTRUCTURE PLANNING (ENVIRONMENTAL IMPACT ASSESSMENT) REGULATIONS 2009

#### 1 Executive Summary

- 1.1 This note has been provided in relation to the A63 Castle Street Improvements (the **Project**) and, in particular, a request from the Examining Authority for a submission on the applicability of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (the **2009 Regulations**).
- 1.2 By way of summary, the 2009 Regulations apply to the Scheme for the following three reasons:
- 1.2.1 The effect of the Infrastructure Act 2015 (Strategic Highways Companies) (Consequential, Transitional and Savings Provisions) Regulations 2015 is that anything done by the Secretary of State (including acting by the Highways Agency) in relation to its functions transferred to Highways England is to be treated as though it were done by Highways England.
- 1.2.2 There is a Transfer Scheme transferring all property, rights and liabilities relating to the highway undertaking to Highways England. This also transfers to Highways England any transactions effected or other things done by or in relation to the Highways Agency so far as may be necessary for the purposes of or in connection with properties, rights or liabilities transferred (which would capture the relevant legitimate expectation that the procedures contained in the 2009 Regulations continue to apply).
- 1.2.3 In addition, a correct reading of the relevant transitional provisions does not require the applicant to be the same person that requested the scoping opinion.

#### 2 Background

- 2.1 The Highways Agency, Highways England's predecessor, was an Executive Agency of the Department for Transport, and was responsible for operating, maintaining and improving the strategic road network in England on behalf of the Secretary of State for Transport. As an executive agency, the Highways Agency operated under delegated powers from the Department of Transport and property held by it was held by the Secretary of State for Transport.
- 2.2 On 4th March 2013, the Secretary of State (SoS) received a scoping report submitted by the Highways Agency under Regulation 8 of the 2009 Regulations in order to request a scoping opinion. . The Scoping Opinion itself was issued in April 2013.<sup>1</sup>
- 2.3 Section 1 of the Infrastructure Act 2015 (the **2015 Act**) provides that the Secretary of State may by order appoint one or more companies as strategic highway companies. By virtue of Article 2 of the Appointment of a Strategic Highways Company Order 2015, Highways England Company Limited was appointed as a strategic highway company from 1 April 2015 in respect of the whole of England. In particular Highways England was appointed as the highway authority for all highways within that area for which the Secretary of State for Transport was the highway authority prior to that date (subject to exceptions as set out in Article 2(3)).

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<sup>1</sup> <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010020/TR010020-000064-A184%20Junction%20Improvement%20Scoping%20Opinion.pdf>



- 2.4 Highways England, therefore, took responsibility for the Scheme. The Examining Authority has asked Highways England to make a submission explaining the applicability of the 2009 Regulations following the transfer from the Highways Agency to Highways England.

### 3 Legislative Background

- 3.1 Regulation 37 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (the **2017 Regulations**) revoke the 2009 Regulations subject to the exceptions in Regulation 37(2).

- 3.2 Regulation 37(2) of the 2017 Regulations state:

*(2) Notwithstanding the revocations in paragraph (1), the 2009 Regulations continue to apply to any application for an order granting development consent or subsequent consent where before the commencement of these Regulations—*

*(a) the applicant has—*

*(i) submitted an environmental statement or updated environmental statement (as defined in the 2009 Regulations), as the case may be, in connection with that application;*

*(ii) **requested the Secretary of State or the relevant authority to adopt a scoping opinion (as defined in the 2009 Regulations) in respect of the development to which the application relates;** or*

*(iii) made a request for—*

*(aa) a screening opinion under regulation 6(1)(a) of the 2009 Regulations (including a deemed request under regulation 12(1)); or*

*(bb) a subsequent screening opinion under regulation 6(2)(a) of the 2009 Regulations; or*

*(b) the Secretary of State has initiated the making of a screening direction under regulation 5(2)(b)(i) of the 2009 Regulations.<sup>2</sup>*

### 4 Applicability of the 2009 Regulations

- 4.1 There is a presumption that where a provision repeals an enactment or regulation, it is not taken as (unless the contrary intention appears) affecting any right, privilege, obligation or liability acquired, accrued or incurred under that provision.<sup>3</sup> The starting point therefore is that, a right or a privilege (such as requesting the scoping opinion and the legitimate expectation that the associated procedural consequences will continue to apply) should not be taken as being affected unless there are strong reasons for suggesting that it has been discontinued.
- 4.2 There is no explicit provision stating that rights or privileges accrued under the 2009 Regulations do not continue to apply. On the contrary, as set out below, the explicit intention is to ensure legal certainty

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<sup>2</sup> <http://www.legislation.gov.uk/ukxi/2017/572/regulation/37/made>

<sup>3</sup> As reflected in section 16(1)(c) of the Interpretation Act 1978

in the application of the 2009 Regulations where steps have been taken in relation to a particular project prior to 16 May 2017.

4.3 The 2009 Regulations apply to the Scheme for the following reasons:

#### **(1) Transfer of Functions**

4.3.1 Regulation 4 of Infrastructure Act 2015 (Strategic Highways Companies) (Consequential, Transitional and Savings Provisions) Regulations 2015 states that:

*(2) Anything (including the conduct of legal proceedings) which, immediately before the appointment, is in the process of being done by or in relation to the Secretary of State may, so far as it relates to a transferred function, be continued by or in relation to the company.*

*(3) Anything done (or having effect as if done) by or in relation to the Secretary of State for the purposes of or in connection with a transferred function has effect, so far as necessary for continuing its effect after the appointment, as if done by or in relation to the company.*

*(4) Any enactment, instrument or other document passed or made before the appointment has effect, so far as necessary for the purposes of or in consequence of paragraph (2) or (3), as if references to the Secretary of State (and references which are to be read as references to the Secretary of State) were references to the company.*

The request for the scoping opinion by the Secretary of State (acting by the Highways Agency) in respect of the function of undertaking works to the A19 at Testo's Junction can be said to come under all three subparagraphs quoted above.

#### **(2) Transfer Scheme**

4.3.2 Section 15 of the Infrastructure Act 2015 made provision for the Secretary of State to make a transfer scheme in respect of property, rights and liabilities. The transfer scheme accordingly made, dated 30 March 2015 (the **Transfer Scheme**) appended to this document, means that Highways England can be taken as having the relevant rights and privileges in respect of the request for scoping opinion for the following reasons:

- (a) The Secretary of State made provision in the Transfer Scheme so that any transactions effected or other things done by or in relation to the Secretary of State (such as requesting a scoping opinion) are to be treated, so far as may be necessary for the purposes of or in connection with properties, rights or liabilities transferred by the Transfer Scheme (which includes the A19), as though it were made, effected or done by Highways England (as per clause 14.1).
- (b) The Transfer Scheme states that any reference in an instrument (e.g. the 2017 Regulations) or other document (e.g. a scoping opinion) is to have effect so far as may be necessary for the purposes of or in connection with properties, rights or liabilities transferred by the Transfer Scheme (which includes the A19), as though it were made, effected or done by Highways England (as per clause 14.2).
- (c) The Transfer Scheme also transfers the property, rights and liabilities held by the Secretary of State which were held by the Secretary of State exclusively or primarily for the purpose of "Relevant HA Activities" which are defined as activities which before the transfer were carried out by the Highways Agency or concerned the exercise of functions related to the transferred highways (as per clause 3).

“Property, rights and liabilities” should be given a wide meaning and the request for the scoping opinion and obtaining the legitimate expectation that such procedures would apply is an example of such a right.<sup>4</sup>

### (3) Correct reading of the 2017 Regulations

4.3.3 Regulation 3(1) of the 2017 Regulations defines the “applicant” for the purposes of a project under the Planning Act 2008 as “an applicant for an order granting development consent or a person who proposes to apply for such an order” (italics added for emphasis). If this latter part of the definition is substituted for “the applicant” in Regulation 37(2), it would read as follows:

*“... the 2009 Regulations continue to apply to any application for an order granting development consent or subsequent consent where before the commencement of these Regulations a person who proposes to apply for such an order has requested the Secretary of State or the relevant authority to adopt a scoping opinion (as defined in the 2009 Regulations) in respect of the development to which the application relates.”*

There is no requirement for the “applicant” who obtained the scoping opinion to be the same as the person now relying upon it. Instead, it merely requires that a *person who proposes to apply for a DCO* has requested a scoping opinion in the first place. The Highways Agency was, when it applied for the scoping opinion, proposing to apply for a DCO. Furthermore, the development to which the application by Highways England relates is the same as the one to which the scoping opinion obtained by Highways Agency related. The article therefore clearly applies to the Scheme.

4.3.4 The interpretation of the 2017 Regulations at section 4.3.3 results in a common-sense outcome where a project is unchanged. Moreover, and importantly, the approach is reinforced when looking at the underlying transitional provisions in Article 3(2) of Directive 2014/52/EU upon which the 2017 Regulations are based. This states:

*“Projects shall be subject to the obligations referred to in Article 3 and Articles 5 to 11 of Directive 2011/92/EU prior to its amendment by this Directive [i.e., the directive which lead to the 2017 Regulations] where, before 16 May 2017... the procedure regarding the opinion referred to in Article 5(2) of Directive 2011/92/EU [i.e., a scoping opinion request] was initiated.”*

There is no reference to a particular developer or promoter in Article 3(2); the reference is clearly to *projects* in respect of which the scoping opinion process has already been initiated.

**Bircham Dyson Bell**  
**28 November 2017**

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<sup>4</sup> As per Lord Neuberger in *Manchester Ship Canal Co Ltd v United Utilities Water plc Bridgewater Canal Co Ltd* [2014] UKSC 40 at [69]: “[Arden LJ] said that she thought that the right of discharge enjoyed by the water authorities was not within the expression “property, rights and liabilities”, as used in section 4 and elsewhere in the 1989 Act. She explained that this was because “the implied right of discharge was not a right in the usual sense” and “*was simply an incident of the statutory functions of the sewerage undertaker*”. For my part, *I do not see why the fact that a right is implied or incidental prevents it from falling within the word “rights” in the 1989 Act.*” Further, as noted by Newey J in the context of interpreting the phrase “property, rights and liabilities” as part of a transfer scheme provision, “... *powers and immunities are capable of being regarded as “rights” (as can “privileges”, another word which featured in submissions)*” [2012] EWHC 232 (Ch) at [25]. Also note, *Sinfield v London Transport Executive* [1970] 2 W.L.R. 1062 where a restrictive interpretation of “property, right and liabilities” was also cautioned against. Also note Lord MacDermott in *Smith v London Transport Executive* [1951] A.C. 555 : “*In my opinion the word “rights” in this sub-section must be given its general meaning and cannot be limited to rights which are of a proprietary nature*”