

TRAIL RIDERS FELLOWSHIP (“TRF”)

IN THE MATTER OF THE A303 (AMESBURY TO BERWICK DOWN) DEVELOPMENT CONSENT ORDER 202[*] (“THE ORDER”)

WRITTEN SUMMARY OF ORAL SUBMISSIONS FROM ISSUE SPECIFIC HEARING 9 ON 22 AUGUST 2019 RELATING TO THE TRF’S PROPOSED CHANGES TO THE ORDER

Introduction

1. This is a summary of the oral submissions made on behalf of the TRF at the Issue Specific Hearing 9 (“ISH 9”) on 22 August 2019. It also contains the TRF’s response to submissions made at that ISH by others and in particular by Highways England (“HE”). For the sake of convenience the text below deals with matters in the same order as set out in the Agenda circulated prior to ISH 9 by the Examining Authority (“ExA”). This document is intended to supplement, rather than replace, the TRF’s previous written submissions¹ dealing with these matters and as such should be read alongside them.

Agenda Item 4.1

Amendment 1: To avoid extinguishment of link between byways AMES11 and AMES12 – Amend Part 1 of Schedule 3 of the draft Development Consent Order (dDCO) to create a new length of Byway Open to All Traffic (BOAT) between AMES11 and AMES12. Alternatively amend the extent of stopping up of the A303 in Part 1 of Schedule 3 of the dDCO so that it does not stop up the road between the byways and specifies a width.

2. Amendment 1 has two variations.
 - a. Variation (a) would involve:

¹ See AS-048, REP2-141, REP2-197-206, REP3-096, REP4-001, REP4-058 and REP5-025.

- i. creating a new section of Restricted Byway (“RB”) between the Longbarrow Roundabout and the A303’s junction with B12;
 - ii. creating a new section of RB between the Countess Roundabout and the A303’s junction with B11; and
 - iii. specifying that the c. 400m stretch of highway between the A303’s junction with B12 and the A303’s junction with B11 is to be re-classified as a Byway Open To All Traffic (“BOAT”).²
- b. Variation (b) would involve:
- i. creating a new section of RB between the Longbarrow Roundabout and the A303’s junction with B12;
 - ii. creating a new section of RB between the Countess Roundabout and the A303’s junction with B11;
 - iii. creating a new section of RB (whose precise North-South width would need to be specified) over the c. 400m stretch of highway between the A303’s junction with B12 and the A303’s junction with B11; and
 - iv. specifying that the *remaining* highway land over the c. 400m stretch of highway between the A303’s junction with B12 and the A303’s junction with B11 (whose precise North-South width would need to be specified) is to be re-classified as a BOAT.

² It should be noted that since B12 is not proposed to be severed at the junction with the A303, it will be necessary for the Order to specify a width of highway (which will, by default, be a BOAT) which will enable vehicles including motorcycles to ‘cross’ the old A303 using B12. In other words the Order will need to specify a width of BOAT cutting across the proposed RB in order to preserve the integrity of B12 as it intersects the A303. It is not clear that the draft Order does this at present and this will need to be rectified.

3. As to para. (b)(iv) above the TRF consider that a width of 6-8 feet would be ample to enable two motorcycles to safely pass one another on the width of the old A303 which would be a BOAT. There are a great many BOATs in the locality whose width is considerably less than this. The TRF consider that such a width would render the specified width BOAT unsuitable for 4-wheel vehicles (“4WVss”) and accordingly the concerns by others (and in particular GLEAM) regarding 4WVs using the proposed link would be addressed. Indeed, if Wiltshire Council (“WC”) thought it expedient to do so in the future it would be perfectly possible to prevent 4WVs from using the link by way of a Traffic Regulation Order (“TRO”).

4. At ISH 9 the TRF were asked to clarify what Variation 1(b) (and indeed 2(b) below) would “look like”. The answer to this is simply that there are a great many possibilities as to how a specified-width BOAT could look. It would depend on how WC (as the proposed Highway Authority for the de-trunked A303) would want it to look. It would be possible for the BOAT to be segregated from the RB, or not to be. If so it would be possible to achieve this segregation by way of ditches, earth bunding, fencing, hedging, or a raised kerb or a combination of any of those things. There is no reason to think that the segregation of the BOAT from the RB (if this is what WC) wanted would be unattractive or discordant in context.

Agenda Item 4.2

Amendment 2: To ensure motorcycle-only use of the link; prohibition of use by motorised vehicles except for invalid carriages and two-wheeled motor vehicles.

5. Amendment 2 also has two variations.
 - a. Variation (a) would involve:
 - i. creating a new section of RB between the Longbarrow Roundabout and the A303’s junction with B12;

- ii. creating a new section of RB between the Countess Roundabout and the A303's junction with B11; and
 - iii. specifying that the c. 400m stretch of highway between the A303's junction with B12 and the A303's junction with B11 is to be re-classified as a Byway Open To All Traffic ("BOAT"); and
 - iv. creating (in Sch. 10 to the draft Order) a TRO in respect of that 400m long BOAT between B11 and B12 prohibiting its use by mechanically-propelled vehicles ("MPVs") save for invalid carriages and two-wheeled motor vehicles.
- b. Variation (b) would involve:
- i. creating a new section of RB between the Longbarrow Roundabout and the A303's junction with B12;
 - ii. creating a new section of RB between the Countess Roundabout and the A303's junction with B11;
 - iii. creating a new section of RB (whose precise North-South width would need to be specified) over the c. 400m stretch of highway between the A303's junction with B12 and the A303's junction with B11; and
 - iv. specifying that the *remaining* highway land over the c. 400m stretch of highway between the A303's junction with B12 and the A303's junction with B11 (whose precise North-South width would need to be specified) is to be re-classified as a BOAT; and
 - v. creating (in Sch. 10 to the draft Order) a TRO in respect of that 400m long BOAT between B11 and B12 prohibiting its use by MPVs save for

invalid carriages and two-wheeled motor vehicles.

6. In essence Amendment 2(a) and (b) is the same as Amendment 1(a) and (b) above save that in Amendment 2 the section of BOAT would be subject to a TRO prohibiting its use by MPVs save for except for invalid carriages and two-wheeled motor vehicles. This would allay the concerns of others that the BOAT section of the B11-B12 link would come to used by 4WVs. Motorcycles would still be able to use the link.
7. It is said by HE that Amendment 2 would be “contrary to public policy”³ since it would “create a novel and unprecedented class of way; one that can be used by motorcycles together with other excepted motor vehicles but no other.” With respect to HE this submission is overstated and misconceived. There are a great many highways in England which are BOATs⁴ as a matter of law because they accommodate *some* vehicular use and as such are neither footpaths nor bridleways, even though they do not carry rights of way for all vehicular traffic. An obvious example would be a narrow unsealed BOAT in the countryside with a width or height restriction. On HE’s view, such a BOAT would conflict with public policy. HE are wrong on this point, among others.
8. As to what Variation 2(b) would “look like” see para. 4 above. In addition as Mr Kind pointed out at ISH 9 it would be possible for miniature roundels at near-to-ground level (such as on gates) rather than full-size full-height signage to visually express the nature of the TRO. The suggestion by GLEAM that the use of such signage would amount to a material change in the Scheme is entirely devoid of any merit. Materiality is discussed in more detail below.

³ See p. 5 para. 3.23 of HE’s Deadline 4a Submission (REP4a-0001).

⁴ Which are defined in s. 66(1) of the Wildlife and Countryside Act 1981 as “a right of way for vehicular and all other kinds of traffic, but which was used by the public mainly for the purpose for which footpaths and bridleways were so used.” It can be seen from this that the statutory definition of a BOAT does not require there to be a right of way for all vehicular traffic. The reference to “all traffic” is to embrace vehicular, pedestrian, equestrian and other (e.g. cycle) traffic and not all specifically all vehicular traffic.

Agenda Item 4.3

Amendment 3: To retain use of the A303 for small capacity vehicles ie creation of a BOAT rather than a restricted byway, subject to a prohibition of vehicles, except motorcycles with a capacity of less than 50cc.

9. While Amendments 1 and 2 concern the stretch of the A303 between B11 and B12, Amendment 3 in effect concerns the following two portions of A303 which the draft Order will de-trunk:
 - a. firstly, that between Longbarrow Roundabout and the A303's junction with B12 and
 - b. secondly, that between Countess Roundabout and the A303's junction with B11.

10. In Amendments 1 and 2 above these two stretches of highway would become RB. In Amendment 3 these two stretches of highway would be BOAT instead of RB but they would also be subject to a TRO (to be contained in Sch. 10 to the draft Order) preventing them being used by MPVs except for motorcycles with a capacity of less than 50cc.

11. The reason for this is that <50cc motorcycles are currently permitted to ride on the trunked A303 between Countess and Longbarrow Roundabouts. The effect of the Scheme will be to place the A303 in a tunnel. It is proposed in Sch. 10 of the draft Order that <50cc motorcycles will not be able to use the tunnelled A303 because of self-evident safety concerns. It follows that the effect of the Order will be to extinguish the ability of <50cc motorcycles to use the relevant section of the A303. No alternative is proposed and HE's position is that such small-bore machines should use alternative routes.

12. These routes are not adequate. The time that it will take for such vehicles to use the alternative route suggested by HE means that the alternative is not a genuine alternative. These machines can only travel at speeds of up to 28mph. As Mr Kind explained at ISH 9 this is a *maximum* speed. The *average* speed will be significantly lower due to acceleration and deceleration times. HE has failed to

factor this into their assessment of the satisfactoriness of the alternative. In addition these routes are busy, fast and dangerous (particularly for users of 50cc machines) and in no realistic sense of the word can they be regarded as convenient alternatives to the ability to use the old A303 to travel the short distance between the Countess and Longbarrow Roundabouts.

Agenda Item 4.4

Amendment 4: To retain use of the A303 for motorcycles only.

13. The TRF fairly confirmed at ISH 9 that in the event that the ExA were minded to support Amendments 1 or 2 (or the variations of each as set out above) then it would not be necessary to consider Amendment 4. Accordingly the discussion below in relation to, *inter alia*, materiality, safety and impact on heritage and landscape etc. concerns Amendments 1, 2 and 3 rather than Amendment 4.

Agenda Item 4.5

Materiality of the TRF's proposed changes

14. It is entirely inconceivable that an amendment to the draft Order the effect of which would be to enable on average one motorcycle per day⁵ to be able to ride along a 400m stretch of highway (which will already be used by agricultural traffic as well as traffic with private rights of access) so as to connect two BOATs (on which there will also be vehicular traffic, in the case of B12 within 250m of the Stones) would be material in the context of the Scheme as a whole.
15. On the spectrum of materiality, there are some changes to a DCO that are so far-reaching that there simply is no power for them to be made whether during the examination process or after the event once the DCO has been made, because in effect the Scheme would be so different that the application, consultation and examination process was rendered otiose. The TRF does not understand

⁵ Confirmed at ISH 9 by HE.

anybody's case to be that the provision of a B11-B12 link for motorcycles would be a change of this order of magnitude such that it would be *ultra vires* for the ExA to make it.

16. Accordingly the starting point is that there *is* a power to make the amendments sought by the TRF notwithstanding that they are not promoted by HE itself. The critical issue is therefore whether that power should be exercised. This will depend on (a) the existence of a sound justification for making the amendments (as to which see below) and (b) the absence of any procedural bars to exercising the power to amend the draft Order. The question of 'materiality' in Agenda Item 4.5 effectively goes to this issue, i.e. issue (b).

17. In British Telecommunications Ltd v Gloucester CC [2002] 2 P & CR 33 Elias J considered the "Wheatcroft principle" and held at [35] that:

“...provided there is a proper opportunity given for adequate consultation, and that any other potentially relevant matters are taken into account, such as whether the amendment requires the modification of an environmental impact statement, it is difficult to see in most cases what prejudice is suffered by permitting the change to be effected by way of amendment.”

18. Accordingly the issues that arise are:

- a. has a proper opportunity been given for adequate consultation?
- b. are there other potentially relevant matters to be taken into account?
- c. would the TRF's Amendments 1 or 2 and/or 3 require the modification of the Environmental Statement? and

19. As to (a) above the TRF's proposed amendments have *already* been consulted on in the lead up to ISH 9. The results of that consultation were that ISH 9 took place and all interested parties were able to provide their views on the proposed amendments to the ExA. This requirement is plainly satisfied. It may be thought that it is somewhat ironic for HE to suggest, at an ISH dealing specifically with the TRF's proposed amendments at which all known interested parties were

present and were able to make submissions to the ExA, that a further round of public consultation needs to take place on the TRF's proposed amendments.

20. As to (b) above the DCLG Guidance to Changes to Development Consent Orders (December 2015) provides that potentially relevant matters are:
- a. the effect of the change on the local community; and
 - b. the likely level of public interest in the change.

The retention of the ability to ride motorcycles along 400m of the old A303 is not considered to have a material impact on the local community (to the extent that there is such a community in the vicinity of this stretch of road). The level of public interest in the proposed amendment, such as it is, has been expressed in the context of ISH 9.

21. As to (c) above, the TRF do not consider that there is any evidence whatsoever to suggest that the findings of the Environmental Statement ("ES") would need to be revisited in the event that the TRF's amendments were supported. The ES would only need to be revisited if the amendments would be likely to give rise to a Significant Environmental Effect ("SEE") that has not already been assessed in the ES. Nothing in the current ES indicates that this would be the case. Indeed, the highest that HE put their case is that:

"Reintroduction of a link for motorised vehicles between AMES 11 and AMES 12, along the old A303, could reduce the beneficial impact currently assessed, potentially to the extent that some of the significant effects identified in the ES would no longer be significant."⁶

22. In other words HE do not say that the TRF amendments would cause any new SEEs that the ES has not yet already assessed. Rather they say that the amendments "could" cause some (unspecified) matters which had previously been regarded as SEEs to no longer be SEEs. In other words the effect of this (even if accepted) would be to reduce the number of SEEs that ought to have been assessed in the ES rather than to introduce any new and unassessed SEEs. On that basis there is no need to revisit the ES.

⁶ See p. 11 para. 6.16 of HE's HE's Deadline 4a Submission (REP4a-0001).

23. Furthermore, it should be noted that the ES does not indicate that the use of B11 and B12 (which are able to be used by motorcycles as well as 4WVs) in the WHS cause any SEEs. B12 in particular enables motorcycles and 4WVs to pass within 250m of the Stones which is closer than the proposed BOAT link. If the ES did not consider that the use of ‘de-linked’ B11 and B12 would give rise to any SEEs, then it is impossible to see any reason why the use of ‘linked’ B11 and B12 would give rise to SEEs, particularly given that the TRF’s proposed amendments are only to facilitate motorcycle (and not 4WV) use.
24. Accordingly the TRF consider that there is no bar to their amendments being supported by the ExA.

Agenda Item 4.6

Evidence of harm to cultural heritage, landscape, tranquility and other potential impacts arising from the proposed changes.

25. HE and others’ suggestion that the retention of the ability of motorcycles to use a 400m stretch of the old A303 to link B11 and B12 would or could cause harm to cultural heritage and/or the landscape is far-fetched. As set out above in the context of the discussion concerning materiality, there is no credible reason to think that the effect of the provision of such a link would cause any significant environmental effects and, indeed, no effects at all beyond those which would arise in any event due to vehicular use of B12 which goes within 250m of the Stones.
26. Regrettably, the approach of HE (and others including the National Trust and Historic England) to the TRF’s proposed Amendments 1 and 2 has been driven by a failure to properly understand the objectives of the World Heritage Site (“WHS”) Management Plan (2015) (“the WHS MP”). HE’s written comments in relation to Amendments 1 and 2, for example, are replete with instances in which it is said that the Scheme objective is to “remove the sight and sound of

traffic from much of the WHS landscape, a key aspiration of the WHS MP.”⁷

This is not however what the WHS MP says. In fact:

- a. Policy 6a is to “Identify and implement measures to reduce the negative impacts of roads, traffic and parking on the WHS...”; and
- b. Policy 6b is to “Manage vehicular access to byways within the WHS to avoid damage to archaeology...”

27. There is all the difference in the world between “removing the sight and sound of traffic” and “reducing the negative impacts of roads, traffic and parking”. In particular if it was in fact the WHS MP’s goal to “remove” rather than “reduce” traffic then no doubt B11 and B12 would have been stopped up and converted to RBs. The retention of a small stretch of highway between B11 and B12 to facilitate motorcycles crossing between these two BOATs is entirely consistent with the WHS MP’s goals since the Scheme will, even if modified in accordance with Amendment 1 or 2, will still achieve a very significant reduction of traffic from the WHS.
28. There is no conceivable way that the provision of the BOAT link, bearing in mind that it is predicted to be used on average by one motorcycle per day (according to HE’s latest evidence presented to the ExA at ISH 9) will cause harm to the significance of the WHS. Nor would it cause harm to archaeology, because it is the connection between B11 and B12 would be made using the existing A303. This is therefore wholly unlike the previously-proposed (and subsequently abandoned) B11-B12 link which would have been a new link in the vicinity of the Normanton Downs and would also have had an effect on ground nesting birds. The same cannot be said of the TRF’s proposal for the link to be along the line of the old A303.
29. As to tranquillity, GLEAM suggested that motorcycles can create 70dB noise events. The basis for this assertion and its applicability to the case of small displacement trail motorcycles, travelling at low speeds, for the purpose of enjoying the countryside (as opposed to for racing for example) is highly

⁷ See for example p. 10 para. 6.8 of HE’s Deadline 4a Submission (REP4a-0001).

questionable and should attract no weight. Agricultural vehicles are far louder than motorcycles and the WHS is full of them. The use of the link would not have a material effect on tranquillity and nor would it have adverse landscape effects over and above those which would arise in any event due to B11 and B12 retaining BOAT status. If this was regarded by HE as an acceptable matter, in the context of the Scheme's goals, then it must follow that the provision of the B11-B12 link would too.

30. Quite rightly, nobody has suggested that the B11-B12 link would have any effect on other environmental matters such as flora, fauna, ecology, biodiversity etc.

Agenda Item 4.7

Evidence of benefits/need for the TRF's proposed changes.

31. The need for Amendment 3 has been addressed above. This text therefore concerns Amendments 1 and 2 which are to the same effect (and are therefore mutually exclusive) as they would both facilitate the use of the short stretch of highway between B11 and B12 for motorcycles to pass between the two BOATs. The need for connectivity between B11 and B12 has been dealt with extensively in the TRF's previous written submissions, but in a nutshell the Amendments are needed to safeguard the existing link between B11 and B12.
32. The link between B11 and B12 maximises the recreational amenity of both BOATs since, quite simply, it connects the two of them together. This in turn has the effect of connecting the wider highway networks connected to each BOAT. For example the Southern end of B11 starts in Lake in the Bourne Valley and can be incorporated into a matrix of riding routes leading to and from this area.
33. The Southern part of B12 starts from the A360 near Druids' Lodge and its Northern end connects with the Packway in Larkhill after taking in views of the Stones. It connects with the trail riding territory to the North of Stonehenge where there are few A roads but some good BOATs. Effectively B11 and B12

are both used by riders on circuits in this area and their inter-connectivity is critical to their ability to form part of the matrix of rideable BOATs in the area.

34. The effect of the extinguishment of the B11-B12 link would be to:
 - a. render B11 a cul-de-sac which would mean that inevitably any use of it would result in users having to turn around and double back on themselves at the junction with the old A303, the point at which the Stones can best be seen from. This would be somewhat depressing.
 - b. render B12 a 'through road' with no opportunity to connect with B11 which is an extremely high-quality BOAT with rare characteristics. It is wide, verdant, largely uninfluenced by development and allows views of the Stones.

35. There is a qualitative dimension to this matter which is that PROWs which connect to and link with other PROWs are simply subjectively more fun to walk or ride or cycle on (i.e. they offer a higher degree of recreational amenity) than ones which do not since one always knows that there will come a time when it will be necessary to 'turn back' and go back the way you came.

36. The best evidence of the benefit of, and need for, the B11-B12 link is the evidence of the TRF members who regularly use the BOATs for recreational trail riding. Such members have provided written evidence comprising a number of User Evidence Forms, the TRF's written submissions to the ExA and the various TRF members' compelling oral presentations to the ExA.

37. On the other hand it does not appear that HE have engaged to any acceptable degree with the significant amenity and benefit provided by, and facilitated by, the B11-B12 link. Their surveys of motorcyclists' use of B11 and B12 came late in the day; indeed the results of these surveys are still being processed. The TRF submit that HE do not have a clear or an adequate understanding of the true extent of the adverse effect on trial riding in the area the extinguishment of the B11-B12 link would have.

38. Certainly, it lies ill in HE's mouth to suggest that the link would not be a benefit or is not needed. The TRF have made good its case that the link is needed. Its omission from the Scheme and the Order is a major shortcoming and not, as suggested by HE, a trivial one that can be outweighed by the benefits of the Scheme as a whole.

Agenda Item 4.8

Implications of omitting link for motorised traffic and specifically motorcycles between byways AMES11 and AMES12 for European Convention on Human Rights Articles 9 and 14 and the Equality Act 2010, with particular regard to disability discrimination.

39. Riding trail motorcycles on BOATs in the countryside is a recreational activity that many disabled individuals indulge in. A number of TRF's members suffer from various types of disability and therefore have protected characteristics under the Equality Act 2010. For some of these individuals using a motorcycle is the most effective, if not the only, way of accessing the countryside. This is an important part of the context of HE's failure to provide for a link between B11 and B12 since it means that some disabled motorcyclists will need to use the fast busy A roads to go between B11 and B12. The safety concerns the TRF has are dealt with under Agenda Item 4.9. It is submitted that the lack of a B11-B12 link could disproportionately affect disabled motorcyclists.
40. At ISH 9 GLEAM suggested that the ability of motorcycles to use the 400m stretch of highway between B11 and B12 would have implications for disabled NMUs of the old A303. The TRF consider that this suggestion was exaggerated and is not credible. This is dealt with more fully immediately below under Agenda Item 4.9 which is applicable to disabled and non-disabled users of the old A303.

Agenda Item 4.9

Safety considerations.

41. There are two sets of safety considerations in play, namely:

- a. the fact that the ability of motorcycles to use a 400m section of the old A303 to connect B11 and B12 **would not** adversely affect the safety of other users of the old A303; and
- b. the fact that the inability of motorcycles to use a 400m section of the old A303 to connect B11 and B12 **would** adversely affect the safety of motorcyclists who would need to use alternative routes using busy and fast A-roads subject to national speed limits (i.e. 60mph) to proceed from B11 and B12 (and vice versa).

These are dealt with in turn below.

Safety of other users of the old A303

- 42. There is no evidential basis whatsoever for the assertion that the use of 400m of BOAT by motorcycles moving between B11 and B12 would compromise the safety of other users of the old A303. In this case the proof is in the pudding since there is no historical record of any incident(s) on B11 or B12 involving motorcycles and non-motorised users (“NMUs”). These are BOATs (with no road markings) on which there has therefore been an entirely incident-free accommodation as between motorcycles and NMUs. There is no reason – and indeed no evidence – to think that matters would be different in respect of the proposed 400m B11-B12 link sought by the TRF.
- 43. The width of the old A303 is such that it would be able to accommodate both NMUs and the occasional motorcycle connecting B11 and B12 without adversely affecting the safety of those walking, cycling or riding horses along the old A303. As Mr Kind explained at ISH 9 typically a motorcycle only needs a matter of feet of space in order to proceed – such that there would be ample room for the old A303 to accommodate these different types of BOAT user. This is particularly so given that TRF members are well-versed in respectfully sharing byways with other users.
- 44. This is, it must be remembered, not a location where motorcycles would be travelling at high speeds. The TRF Code of Conduct indicates that riders should not travel more than 25mph on byways. This is not a location where that speed

(or anything like it) would be reached. Motorcycles would need to commence from a stationary (or nearly stationary) position at each of the junctions (i.e. the B11/old A303 and the B12/old A303) before using the link. Motorcyclists exploring the countryside using BOATs do not, and do not need to, travel quickly.

45. The suggestion by others at ISH 9 (and in particular by GLEAM) that motorcycles travelling between B11 and B12 would be “dangerous” is alarmist, hyperbolic and unsound. Furthermore it is not based on any credible evidence.

Safety of motorcyclists using alternative connections between B11 and B12

46. If the link between B11 and B12 proposed by the TRF were to be omitted from the Order, in order for riders to proceed from B11 to B12 (and vice versa) they would be obliged to use a series of busy and straight “A” roads. In particular the A roads which they would be obliged to use are subject to unrestricted speed limits (i.e. 60mph since they are single carriageway).
47. Traffic is fast on these roads and they are used by HGVs. Overtaking using the offside lane can be necessary. Mr Higgs, who has extensive knowledge of these roads and their safety credentials, said that it was common to be overtaken by other fast-moving vehicles including HGVs. When HGVs overtake they are loud and their draft can be dangerous to motorcyclists. Such roads are dangerous places for all motorcyclists, but particularly for trail riders whose machines and off-road tyres are more suited to the pace of BOATs than classified A roads. It is a matter of record that a motorcyclist has been killed on one of these roads.
48. There can be no doubt whatsoever that for these reasons the suggestion by HE that there is an alternative means of travelling between B11 and B12 should carry little weight. These routes are neither safe nor convenient and in any event they certainly do not preserve the amenity of the ability to link B11 and B12 – something that does not seem to have been considered by HE at any point. The ability to connect B11 and B12 is not a simple A-to-B matter. The qualitative dimension is more significant.

Agenda Item 4.10

Implications of omitting proposed link for s136(1) of the Planning Act 2008, s130 of the Highways Act 1980 and para 5.185 of the National Policy Statement for National Networks.

Section 136(1) of the Planning Act 2008 (“the 2008 Act”)

49. Section 136(1) of the 2008 Act is a simple and straightforward provision which is in these terms:

“136 Public rights of way

(1) An order granting development consent may extinguish a public right of way over land only if the Secretary of State is satisfied that—
(a) an alternative right of way has been or will be provided, or
(b) the provision of an alternative right of way is not required.”

50. The effect of s. 136(1) is that it is unlawful for a DCO to extinguish a right of way over land unless either one of the conditions in sub-paras (a) or (b) are satisfied.
51. The ability for motorcycles to travel along the 400m stretch of A303(T) between B11 and B12 is very obviously a “right of way over land”. It is proposed to be extinguished by the draft Order. Accordingly the draft Order will be unlawful unless the ExA are satisfied either:
- a. that an alternative right of way has been or will be provided, or
 - b. that the provision of an alternative right of way is not required.
52. In this case there is no question that condition (a) above is satisfied. The draft Order does not make provision for an alternative right of way and no such alternative right of way “has been” provided. Accordingly the legality of the Order as a whole turns on meeting condition (b).

53. In order for condition (b) to be met the ExA need to be satisfied that “the provision of an alternative right of way is not required.” The TRF’s previous written submissions have explained that this means, in effect, “not required for the reasonable convenience or amenity of users of the extinguished right of way.” This tallies with the position under s. 116 of the 1980 Act and also with s. 59 of the Countryside and Rights of Way Act 2000 which provides as follows.

“59.— Effect of Part I on powers to stop up or divert highways.

(1) This section applies to any power to stop up or divert a highway of any description or to make or confirm an order authorising the stopping up or diversion of a highway of any description; and in the following provisions of this section—

(a) “*the relevant authority*” means the person exercising the power, and

(b) “*the existing highway*” means the highway to be stopped up or diverted.

(2) Where the relevant authority is required (expressly or by implication) to consider—

(a) whether the existing highway is unnecessary, or is needed for public use,

(b) whether an alternative highway should be provided, or

(c) whether any public right of way should be reserved,

the relevant authority, in considering that question, is not to regard the fact that any land is access land in respect of which the right conferred by section 2(1) is exercisable as reducing the need for the existing highway, for the provision of an alternative highway or for the reservation of a public right of way.”

54. In particular s. 59(2)(a) refers to “unnecessary for public use” and the reference to access land in s. 59(2) makes it clear that the focus of the enquiry, in exercising powers to which s. 59 applies (which includes the ExA’s power to make the Order) is on the relative ease and convenience of the public’s ability to use a right of way.

55. Of course s. 136(1) does not require alternative provision of extinguished rights of way where the extinguishment would not have a material effect on the convenience or amenity users of the way. Examples would be stopping up a few metres of length of highway at the end of a cul-de-sac or stopping up a width of

a footpath where sufficient was left to enable its full use by the public. It is inconceivable that the 2008 Act provides a licence to applicants to stop up rights of way over land, in the absence of alternative provision, if the effect would be to adversely affect the way's convenience and amenity for the public.

56. The applicant has, it appears, two arguments concerning s. 136(1) both of which are wholly devoid of merit. The clear implication is that HE has no answer to this point and are, in effect, promoting a DCO which would be unlawful if made.
57. The first (raised only for the first time in his oral submissions at ISH 9 by Mr Taylor QC without being trailed in any of HE's written material) is that s. 136(1) does *not* apply to *vehicular* rights of way over land. The basis is said to be that s. 136(2)(c) refers to a "right of way not enjoyable by vehicular traffic". The TRF find this submission very difficult to understand. Section 136(2) contains a set of conditions whose fulfilment engages "the following provisions of this section", i.e. ss(3)-(7). It has no effect on ss(1). Indeed the fact that special provision is made in ss(3)-(7) emphasises that ss(1) is concerned with *all* rights of way over land. If were not then it would not have been necessary for ss(2) to make special provision in respect of "the following provisions of this section".
58. The second is that it is said that s. 136(1)(b) is satisfied where, in effect, the provision of an alternative right of way is not required *in order to secure the goals of the underlying Scheme*. This interpretation of s. 136(1)(b) is problematic. This is because NSIP development is, by definition, of a scale that means it will rarely (if ever) be necessary to secure the alternative provision of an extinguished right of way in order to deliver or secure the goal of the scheme. If the goal of the NSIP scheme is something other than to secure the alternative provision of the right of way, then this will always be met and is pointless. This interpretation cannot be right.

Section 130 of the Highways Act 1980 ("the 1980 Act")

59. Section 130(1) of the 1980 Act is in the following terms:

“130.— Protection of public rights.

(1) It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it.”

60. HE are the Highway Authority for the 400m stretch of A303(T) between B11 and B12. They therefore have a statutory duty under s. 130(1) to “protect” the rights of motorcyclists to use and enjoy the 400m stretch of A303(T) between B11 and B12. It is impossible to see how it can be said that this duty can be complied with where HE propose to extinguish this right without making any alternative provision, in circumstances where it would be perfectly simple to preserve (i.e. to “protect”) the right by way of Amendments 1 and 2 above.

Paragraph 5.185 of the National Networks National Policy Statement (“the NPS”)

61. It is important not to view para. 5.185 of the NPS in isolation from the context in which it sits. Paragraph 5.185 itself sits within a series of paragraphs dealing with ‘mitigation’, namely paras 5.179 – 5.185. These in turn form part of the section in the NPS dealing with “Land use including open green space, green infrastructure and Green Belt” in paras 5.162 – 5.185. All of these paragraphs are relevant to the matter in hand. Paragraph 5.162 begins by stating that:

“5.162 Access to high quality open spaces and the countryside and opportunities for sport and recreation can be a means of providing necessary mitigation and/or compensation requirements.”

62. Paragraph 5.180 and 5.184 are critical and provides that:

“5.180 Where green infrastructure is affected, applicants should aim to ensure the functionality and connectivity of the green infrastructure network is maintained and any necessary works are undertaken, where possible, to mitigate any adverse impact and, where appropriate, to improve that network and other areas of open space, including appropriate access to new coastal access routes, National Trails and other public rights of way.

[...]

5.184 Public rights of way, National Trails, and other rights of access to land (e.g. open access land) are important recreational facilities for walkers, cyclists and equestrians. Applicants are expected to take appropriate mitigation measures to address adverse effects on coastal access, National Trails, other public rights of way and open access land and, where appropriate, to consider what opportunities there may be to improve access. In considering revisions to an existing right of way consideration needs to be given to the use, character, attractiveness and convenience of the right of way. The Secretary of State should consider whether the mitigation measures put forward by an applicant are acceptable and whether requirements in respect of these measures might be attached to any grant of development consent.” (emphasis added)

63. As to para. 5.180 the TRF consider that byways forming part of the PROW network comprise “green infrastructure” (“GI”) such that there is a policy imperative to “ensure the functionality and connectivity” of the GI network.
64. Paragraph 5.184 could not be clearer in indicating that applicants “are expected to take appropriate mitigation measures to address adverse effects...on other PROWs and to consider what opportunities there may be to improve access.” In this case HE is pointedly refusing to promote appropriate mitigation measures in respect of the severing of the link between B11 and B12 and certainly has failed to consider any opportunities to “improve” (i.e. do more than simply maintain the *status quo ante* by way of mitigation) access.
65. Paragraph 5.184 is also clear that “In considering revisions to an existing right of way consideration needs to be given to the use, character, attractiveness and convenience of the right of way.” These are all matters which have been canvassed under other Agenda Items above on the initiative of the ExA but which, regrettably, appear to have been wholly overlooked by HE following the decision to remove the proposed substitute link between B11 and B12 from the Scheme.

66. The TRF also observe that para. 5.184 expressly recognises that the ExA has a power to attach “requirements...to any grant of development consent” in order to ensure that any “mitigation measures put forward by an applicant are acceptable.” That is exactly what the TRF are proposing that the ExA do in this instance.

Agenda Item 4.11

Evidence of benefits/need for the Highways England’s proposed restricted byway along the route of the A303 from Longbarrow to Stonehenge Road.

67. The TRF do not specifically comment on this Agenda Item.

Conclusions

68. In the absence of the making of Amendments 1 or 2 (which seek to facilitate the same outcome such that they are mutually exclusive) and Amendment 3, the ExA are respectfully invited to refuse the application for the Order.
69. This is because firstly the Order (as presently drafted) is contrary to s. 136(1) of the 2008 Act. Beyond this however the Order is deficient in not making provision for the continuation of an important amenity to trail riders which presently exists and for whose removal there is no sound justification. It is clearly desirable that a link between B11 and B12 is retained and the order is sub-optimal in not doing so. In that sense the Order does not strike an appropriate balance between the objectives of the Scheme and the wider public implications of it.
70. The TRF has sought to propose some simple amendments to the draft Order in order to enable this important B11-B12 to be retained so that future generations of trail riders can enjoy the world-class opportunities for trail riding that exist in the region and in particular around the Stones. It is sincerely and respectfully hoped that the ExA will be minded to support the Amendments.

GEORGE MACKENZIE

**Francis Taylor Building
Inner Temple
London EC4Y 7BY**

6 September 2019