

M25 junction 10/A3 Wisley interchange

TR010030

9.151 Applicant's Comments on the Royal Horticultural Society D12 Submission [REP12-056] – Response by counsel – Michael Humphries QC and Caroline Daly

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Author:	M25 junction 10/A3 Wisley interchange project team, Highways England and Atkins

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**HIGHWAYS ENGLAND RESPONSE
TO RHS's DEADLINE 12 REPS [REP12-056] BY FREETHS ON
HABITATS REGULATIONS ASSESSMENT ISSUES**

Introduction

1. This is the response of Highways England ('HE') to the Deadline 12 submissions of RHS Wisley ('RHS') entitled 'Submissions on the DCO Scheme in relation to Regulations 63, 64 and 68 of the Conservation of Habitats and Species Regulations 2017' [REP12-056] ('the RHS Deadline 12 Submission').
2. The essential premise underlying the RHS Deadline 12 Submission is that HE is incorrect to conclude that there will be no adverse effect on site integrity of the Thames Basin Heath SPA ('the SPA') from the DCO Scheme either alone or in combination with other plans or projects arising from air quality impacts. As HE has previously explained in detail on a number of occasions, the RHS position is itself incorrect and its assertion that there will be an adverse effect on integrity of the Thames Basin Heath SPA arising from changes in air quality is misconceived.
3. HE has responded to RHS's submissions with regard to air quality impacts on the SPA on 20 occasions:
 - a. Applicant's comments on written representations [REP2-014] (responses REP1-038-4, REP1-038-5, REP1-038-6 on pages 80-83);
 - b. Response to RHS comments on air quality [REP2-022];
 - c. Written summary of oral case for ISH2 [REP3-009] (agenda items 4 and 5 on pages 21-28);
 - d. Applicant's comments on RHS's Deadline 3 submission [REP4-005] (points 8-13 on pages 7-21 and REP1-038-4, REP1-038-5, REP1-038-6 on pages 33-39, and section 5 on pages 43 to 57);
 - e. Applicant's response to RHS's Deadline 4 submission [REP5-015] (points 6-9 on pages 6-8);
 - f. Revised nitrogen deposition rates within the Thames Basin Heaths SPA [REP5-024];

- g. Applicant's comments on RHS's Deadline 5 submission [REP6-010] (sections 3 and 4 on pages 8-15);
 - h. Applicant's comments on IP responses to ExQ2 [REP6-013] (2.3.2 and 2.3.4 on page 5);
 - i. Applicant's response to ExQ3 [REP7-004] (3.4.3 on pages 14-17);
 - j. Applicant's comments on RHS's Deadline 6 submission [REP7-008] (section 2.2 on pages 5-13 and Appendix A on pages 19-21);
 - k. Applicant's comments on RHS's Deadline 7 submission [REP8-045] (3.1.2 on pages 6-7 and 4.1.2, 4.2.1, 4.3.1, 4.4.3, 4.4.4, 4.5.1, 4.5.2, 4.5.4, 4.5.3 and 4.5.4 on pages 8-16);
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 - l. Applicant's comments on IP responses to ExQ3 [REP8-047] (3.4.2 on pages 28-29 and Appendix C on pages 62-66);
 - m. SOCG between Highways England and Natural England [REP8-022];
 - n. Applicant's comments on RHS's Deadline 8 submissions [REP9-003] (Section 4 on pages 7-10);
 - o. Applicant's comments on Deadline 9 submissions [REP10-003] (Sections 4 and 5 on pages 6-9);
 - p. Applicant's comments to ExQ4 [REP10-004] (Response 4.3.3 and responses 4.4.1-4.4.19 on pages 6-12);
 - q. Applicant's comments to ExQ4 4.3.3 [REP10-007] (Section 1.2 on pages 5 and 6);
 - r. Applicant's comments to Deadline 10 submissions [REP11-007] (Section 6, Responses to questions 4.2.1, 4.3.3, 4.4.7, 4.4.12, 4.4.13, 4.4.15, 4.4.18 and 4.4.19 on pages 10-20);
 - s. IAQM guidance 'A guide to the assessment of air quality impacts on designated nature conservation sites' [REP11-015]; and
 - t. Applicant's comments to RHS's Submission [REP12-024].
4. The RHS Deadline 12 Submission misunderstands and, therefore, mischaracterises the evidence on various Habitats Regulations Assessment ('HRA') issues and thus comes to a series of erroneous conclusions on that evidence. Where the RHS Deadline 12 Submission then purports to undertake a legal analysis based on such conclusions, within the context of the Conservation of Habitats and Species Regulations 2017 ('the Habitats Regulations') and relevant domestic and European case law, that analysis is incorrect and fundamentally flawed

due to RHS's misunderstanding and mischaracterisation of the evidence that is before the Secretary of State.

5. The approach adopted by HE to the impact of the DCO Scheme on the SPA, the identification, on a precautionary basis, of likely significant adverse effects, the consideration of alternatives, the consideration of imperative reasons of overriding public importance ('IROPI') and the identification of relevant compensatory measures has been in compliance with European and domestic legal and policy requirements.
6. With regard to air quality impacts specifically, Natural England is right to advise the Secretary of State that there will be no adverse effect on the integrity of the SPA as a result of air quality changes with the consequence that the issue of alternatives, the consideration of IROPI and the identification of compensatory measures simply do not arise.
7. In order to assist the Secretary of State, HE has sought to identify the key issues identified in the RHS Deadline 12 Submission and provide a succinct summary of the response to those matters, with cross-references to HE documents in which the same submission has been responded to and dealt with previously. This document should therefore be read in conjunction with the material to which the cross-references are provided.

Key issues in the RHS Deadline 12 Submission

8. The key issues raised in the RHS Deadline 12 Submission are as follows (paragraph references are to the RHS Deadline 12 Submission):
 - (1) The Alleged Lack of Assessment of the effect on SPA integrity through air quality impacts on certain areas of the SPA woodland that are to be woodland-thinned or woodland-cleared as referred to in the Surrey Wildlife Trust's 2010-2020 Management Plan (see paragraphs 5.1, 33.1, 35-71);
 - (2) The Alleged Inadequacy of the Assessment of, and Conclusions Reached in respect of, the impact of the DCO Scheme on SPA integrity through changes in air quality (see paragraphs 5.2, 14-31, 33.2, 72-89);

- (3) The Alleged Failure to take account of the Impact on SPA Integrity of the Loss of, or Changes to, the SPA Woodland Habitat in order to Deliver Compensatory Measures (see paragraphs 6, 90-93);
- (4) The Alleged Failure of HE to Consider Alternatives to the DCO Scheme that might better respect the SPA with regard to air quality, specifically the 'RHS Alternative' (see paragraphs 7-11, 94-149);
- (5) The Alleged Inadequacy/Invalidity of the Compensatory Measures Proposed by HE, specifically:
 - (i) The Failure to make Provision for Compensatory Measures regarding air quality impacts (see paragraphs 12.1, 156-159);
 - (ii) The Alleged Reliance upon Habitat that is already subject to SWT's Management Plan 2010-2020 as Compensatory Habitat (see paragraphs 12.2, 161-172);
 - (iii) The Alleged Invalidity of Compensatory Measures directed towards SPA enhancement due to Air Quality Impacts (see paragraphs 12.3, 174-191);
 - (iv) The Alleged Failure to Apply a Discount to Compensatory Measures directed towards Enhancement of Woodland Habitat due to the pre-existing benefits of the woodland to the integrity of the SPA (see paragraphs 12.4, 192-196).

(1) The Alleged Lack of Assessment of the effect on SPA integrity through air quality impacts on certain areas of the SPA woodland that are to be woodland-thinned or woodland-cleared as referred to in the Surrey Wildlife Trust's 2010-2020 Management Plan

9. The allegation made is that HE has failed to assess the impact on SPA integrity from air quality changes in certain areas within the woodland habitat in the 0m-150m zone of the SPA that are, under the Surrey Wildlife Trust's ('SWT') 2010-2020 Management Plan, proposed to be subject to woodland thinning or woodland clearance. This claim is factually inaccurate.
10. As is explained in section 3.2 of the HE comments on RHS's Deadline 11 Submission REP12-024 and also by SWT itself at p. 2 of REP12-043, the thinning and clearance works that were to be undertaken by SWT as part of their 2010-2020 Management Plan were completed by the early 2010s, with no further works of this nature proposed to be undertaken.

11. The correct position therefore was for HE to consider the SPA baseline as it did, namely in its current state with the present extent of woodland and heathland areas as, absent the DCO Scheme, the SWT had already fulfilled the remit of the Management Plan and made the necessary changes.
12. It also follows that the suite of compensatory measures proposed do not overlap with, but are instead additional to, the works undertaken by the SWT, as is explained by HE at paragraph 3.2.6 of REP12-024.
13. The approach adopted by HE to compensatory measures is consistent with the CJEU judgment in *Briels* C-521/12¹, in which the CJEU was required to consider whether the provision of new molinia meadows within a Special Area of Conservation, in circumstances in which the pre-existing molinia meadows would be adversely affected by nitrogen deposition as a consequence of the construction of a new road, could comprise mitigation measures to prevent an adverse effect under Article 6(3) or whether they were compensatory measures under Article 6(4). The CJEU came to the view that the provision of new meadow to compensate for the loss of area and quality of meadow on the SAC could not be a mitigation measure but rather had to be considered as a compensatory measure (see [28]-[31]).
14. In respect of the loss of woodland habitat in the SPA, HE accepts, consistent with *Briels*, that the measures that it has proposed in respect of an extension to the SPA and enhancement measures to the pre-existing SPA are compensatory rather than mitigating in nature. They are also, for the reasons explained, plainly not conservation measures that would be undertaken in any event in the absence of the DCO Scheme.
15. With regard to RHS's reference to the need for certainty as to the success of mitigation measures, in reliance on the *Dutch Nitrogen* cases², with specific reference to the management measures included within the SWT Management Plan 2010-2020 and their impact on air quality, this line of analysis in the RHS Deadline 12 Submission is wholly misconceived. The measures provided in the SWT Management Plan have already been

¹ See paragraph 69.1 of the RHS Deadline 12 Submission.

² Ibid, paragraph 69.2.

undertaken and so it is not a surprise that they are not relied upon by HE as mitigation measures to avoid an adverse impact on the SPA integrity through air quality. There is no need to consider the certainty of the success of a measure that has already been taken for reasons wholly outside the scope of the DCO Scheme. Further, and in any event, the DCO Scheme will not give rise to adverse effects on the integrity of the SPA through changes in air quality. There is not therefore an adverse effect on integrity resulting from changes in air quality, against which mitigation measures are to be considered.

(2) The Alleged Inadequacy of the Assessment of, and Conclusions Reached in respect of, the impact of the DCO Scheme on SPA integrity through changes in air quality

16. The allegation made is that HE's assessment of, and conclusions reached in respect of, the impact of the DCO Scheme on the integrity of the SPA through changes in air quality are flawed. RHS invites the Secretary of State to find that, under Regulation 63 of the Habitats Regulations, the DCO Scheme will have an adverse effect on the integrity of the SPA through such impacts with the effect that an analysis of alternatives, imperative reasons of overriding public interest and compensatory measures must be considered under Regulations 64 and 68 of the Habitats Regulations. The specific adverse impact postulated by RHS relates to increased nitrogen deposition affecting invertebrate prey in the woodland habitat in the 0-150m zone.
17. Sections 3.3-3.7 (pages 8-14) of REP12-024 provides an overall summary from HE as to why the Habitats Regulations Assessment was correct to rule out an adverse effect on the SPA as a result of air quality. As has been explained on a number of occasions by HE, including in sections 3.4 and 3.5 of REP12-024, the established woodland habitat to which RHS refers is not a direct supporting habitat of the SPA qualifying species, and does not provide nesting, roosting or foraging habitat. Therefore the air quality conservation objective in the Natural England: Supplementary Advice on Conserving and Restoring Site Features to *"restore as necessary the concentrations and deposition of air pollutants to at or below the site-relevant Critical Load or Level values given for this feature of the site on the Air Pollution Information System"*, as referred to at paragraph 28.1 of the RHS Deadline 12 Submission, does not apply to the established woodland buffer.

18. As a consequence, it was entirely appropriate for HE to consider the established woodland area in the context of its invertebrate resource contribution to the wider SPA and, further, to consider whether the DCO Scheme would lead to increases in nitrogen deposition when compared against the current baseline that would deplete this invertebrate resource at such a level that would lead to an adverse effect on the integrity of the SPA.
19. RHS has acknowledged that HE is correct to conclude that all nitrogen deposition rates for all transect points with the DCO Scheme in place will fall below the current baseline (paragraph 6 of REP11-037 and paragraph 28 of the Deadline 12 Submission). It is for this reason that HE can conclude with certainty that the invertebrate resource of the established woodland habitat will continue to function in the context of the SPA qualifying species in the same manner as it does at present. This conclusion is not, as is suggested in the RHS Deadline 12 Submission at paragraph 86, inconsistent with the European case law regarding certainty with no reasonable scientific doubt as to the absence of adverse effects and nor is it a 'red herring', as RHS alleges.
20. In asserting that the fall below the current baseline is a 'red herring', RHS (a) incorrectly seeks to rely on the Natural England conservation objective in relation to air quality (see above), but also (b) refers to the DCO Scheme giving rise to "*significant increases*" in nitrogen deposition within the woodland habitat of the SPA (see paragraph 28.2) and HE's references to the forecast changes in nitrogen deposition rates having the potential to cause a very small impact on the assemblage of invertebrate species in the woodland habitat (see paragraph 28.3).
21. With regard to the first of these points – the reference to "*significant increases*" in nitrogen arising as a consequence of the DCO Scheme in the woodland habitat – RHS misunderstands the use of the term "*significant*" where it relates to the assessment of designated ecological sites in the process. As demonstrated in bullet points 3 and 4 of paragraph 4.1.3 on pages 8 and 9 of REP9-003, the Natural England NEA001 guidance sets out that an effect is "*significant*" if it is likely to undermine the conservation objectives for the site. Where a change in the nitrogen deposition rate is more than 1% of the critical load, this does not mean that the effect is 'significant'; but simply that further investigation is needed, as it cannot be screened out.

22. HE has previously provided responses in relation to the conservation objectives for this site, notably at REP12-024 sections 3.4 and 3.5, as well as Section 4.3 of Applicant's comments on Deadline 9 submissions REP10-003 and the response to question 4.4.13 on pages 16-18 of HE's comments to Deadline 10 submissions REP11-007. As already stated above, these responses show that the conservation objectives do not apply within the established woodland buffer close to the A3, as this is not feeding, nesting or roosting habitat, and given that with the DCO Scheme, there will be lower nitrogen deposition in the woodland habitat, there will be no adverse effect on the invertebrate species in supporting the qualifying bird species. The effect of the DCO scheme on the integrity of the SPA cannot, therefore, be described as significant with regards nitrogen deposition rates.
23. With regard to the second of the points (above) – reference to a small impact on the assemblage of invertebrate species – this is incorrect and does not accurately reflect HE's position. At section 3.6 of REP12-024, HE explains, by reference to paragraphs 2.2.4- 2.2.29 of REP7-008, that because the predicted nitrogen deposition rates as a result of the operational Scheme will fall below the existing baseline, the invertebrate assemblage will not change and will continue to function in its current form and provide the invertebrate resources that it currently does.
24. At paragraph 21 of the RHS Deadline 12 Submission it is said that the ammonia contribution to nitrogen deposition may be underestimated by assuming a doubling of nitrogen oxides contribution to nitrogen deposition. HE explained its approach to ammonia at REP7-008 at 2.2.43-2.2.48. Furthermore, RHS accepted HE's use of this doubling approach for ammonia at REP12-024 at 3.12.1 and REP10-025 at 4.4.8. Indeed, although there may be some uncertainty in forecasting future ammonia levels due to uncertainties around vehicle fleets, with the increasing uptake in the future of electric vehicles which do not emit nitrogen oxides or ammonia the contribution to nitrogen deposition from these pollutants should fall: see REP5-049 p.36 Figure 22.
25. Furthermore, whilst nitrogen deposition rates may rise with the proposed development at some locations near to the A3 (see paras 24-25 of RHS Deadline 12 Submissions), this will not

lead to an adverse effect on the SPA qualifying species, as noted in paragraphs 17, 18, 19 and 22 above.

26. At paragraph 83.3 of the RHS Deadline 12 Submission it is said that SPA qualifying species do have feeding preferences so that, if nitrogen deposition were to affect certain invertebrate prey in the woodlands, this could adversely affect the birds. Again, this just mischaracterises the evidence. The Statement to inform Appropriate Assessment (SiAA) demonstrated [REP4-018 at 7.2.15-7.2.18] that (a) Dartford warblers are solely reliant on heathland and associated invertebrate resource and the surrounding woodland does not contribute to their invertebrate resource, (b) the heathland component of the SPA provides a suitable invertebrate resource for woodlark in the absence of surrounding woodland, and (c) nightjars forage over open heathland, forest rides and woodland edges and do not forage within the woodlands to be lost as a result of the scheme. Furthermore, in relation to nightjars, REP10-004 at 4.4.4.13 makes the point that the 'pollutant impacts by species' section of the APIS website states that nightjars are not sensitive to nitrogen impacts on coniferous woodland, indicating that nitrogen changes within this habitat type would not have an effect on nightjars. In addition, as explained in paragraph 19 above, the nitrogen deposition rates will fall below the current baseline in any event. It is clear, therefore, that nitrogen deposition within the 150m 'buffer zone' will not have an adverse impact on the SPA qualifying species.
27. At paragraphs 29 and 89 of the RHS Deadline 12 Submission, it is suggested that HE's approach is at odds with Compton Parish Council v Guildford Borough Council [2019] EWHC 3242 (Admin) by "*disregarding for air quality impact assessment*" land within the SPA between 0m and 150m from the road on the basis that "*only air quality impacts on heathland are relevant and the nearest heathland is at 150m from the road*" and by relying on "*reductions in baseline emissions or the fact that with the development, emissions would still be much lower than at present*" in order to come to a conclusion that there is no significant adverse effect.
28. These criticisms neither properly report the assessment undertaken by HE as regards air quality impact on the woodland habitat and nor do they give rise to any inconsistency with the High Court's judgment in Compton. There, the Court stated at [207] that in relation to the

question of whether significant adverse effects were likely from the development plan proposed, which related to nitrogen deposition in woodland habitat in the same SPA:

“That could not be answered, one way or the other, by simply considering whether there were exceedances of critical loads or levels, albeit rather lower than currently. What was required was an assessment of the significance of the exceedances for the SPA birds and their habitats. Guildford BC did not just treat reductions in the baseline emissions or the fact that with Plan development, emissions would still be much lower than at present, as showing that there would be no adverse effect from the Plan development. The absence of adverse effect was established by reference to where the exceedances of NOx and nitrogen deposition would occur, albeit reduced, and a survey based understanding of how significant those areas were for foraging and nesting by the SPA birds. The approach and conclusion show no error by reference to the Regulations or CJEU jurisprudence...”

29. HE has done precisely as is required of it, in accordance with Compton. It undertook an assessment of the significance of exceedances of critical loads or levels for the SPA birds and their habitats. It did not simply treat reductions in baseline emissions with the DCO Scheme as showing that there would be no adverse effect from the Scheme. Instead, it undertook an assessment of the impact of air quality changes on the invertebrate species in the woodland habitat, and came to the conclusion that with the DCO Scheme, neither the assemblage nor the biomass of the invertebrates available to the qualifying bird species would be adversely affected.
30. With regard to RHS's reference to the CJEU decision in Holohan v. An Bord Pleanála C-461/17 at paragraph 81.6.2, HE has undertaken the assessment of air quality impacts on the woodland habitat in the SPA in compliance with Holohan. It has, in its appropriate assessment, identified and examined the implications of the DCO Scheme for *“the species present on that site, and for which that site has not been listed”*, namely the invertebrate species in the woodland habitat. It has not found there to be a significant adverse effect on the invertebrate species. RHS incorrectly conflates the process undertaken, namely to assess the impact on species for which the site has not been listed, and the conclusions reached as a consequence of that process, namely that they will not be adversely affected through air quality impacts. It

suggests the former has not been undertaken whereas the position is, in fact, that it incorrectly disputes the conclusion reached as a consequence of that process.

31. The evidence clearly demonstrates that, contrary to what is asserted by RHS, there is no significant adverse effect on the integrity of the SPA arising from the air quality impacts of the DCO project. The legal effect of such a conclusion is that Regulations 64 and 68 of the Habitat Regulations relating to alternatives, IROPI and compensatory measures are simply not engaged in relation to air quality.

(3) The Alleged Failure to take account of the Impact on SPA Integrity of the Loss of, or Changes to, the SPA Woodland Habitat in order to Deliver Compensatory Measures

32. RHS asserts that HE should have undertaken an assessment of the effect on SPA integrity arising from the compensatory measures proposed to be taken as enhancement measures to the woodland habitat.
33. This incorrectly conflates two separate issues.
34. First, when considering whether to grant consent for a plan or project, a competent authority must make an appropriate assessment of the implications of a plan or project for a European protected site in view of that site's conservation objectives, and may only grant consent "*after having ascertained that it will not adversely affect the integrity of the European site*" (See Regulation 63(1) and (5) of the Habitat Regulations). HE has indeed undertaken such an assessment and has concluded through its SiAA that the DCO Scheme does give rise to an adverse effect on the integrity of the SPA due to loss of woodland habitat through a permanent loss of 5.9 ha, and temporary loss of 8.7 ha, and the potential for an adverse effect on the invertebrate resource of the qualifying species in the view of the structure and function of the habitats of the qualifying features. HE's approach, therefore, is entirely correct.
35. Second, HE has proposed a suite of compensatory measures due to the adverse effect on integrity by reason of the loss of woodland habitat (see above); but not due to any adverse effect on integrity by reason of air quality impacts, as there are none (see above). The

compensatory measures proposed consist of a mixture of SPA compensation land to replace the SPA land take, and SPA enhancement areas to improve the suitability of the SPA for its qualifying features (by providing more nesting and foraging habitat and increased food resources). Contrary to what is suggested by RHS, compensatory measures are not to be assessed against the integrity of the SPA. Rather, Regulation 68 of the Habitats Regulations states that the appropriate authority must “*secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected*”. That is precisely the purpose of the compensatory measures selected by HE. It is therefore incorrect to suggest that the selection of compensatory measures must be assessed as against the integrity of the SPA. It is clear that HE has correctly approached the assessment of appropriate compensation measures.

36. In any event, there is clear evidence that historical clearance of woodland to create heathland within Ockham and Wisley Commons has, in fact, resulted in an increase in SPA qualifying species within the SPA: see Surrey Wildlife Trust (SWT) responses at REP5-044 (response to Q2.4.7f), REP10—018 (bird records), and REP12-043 (final comments). This was clearly taken into account when devising the SPA consultation strategy: see the HRA stages 3-5 report - REP4-014 at section 5.2 (see, in particular, para 5.1.80).

(4) The Alleged Failure of HE to Consider Alternatives to the DCO Scheme that might better respect the SPA with regard to air quality, specifically the ‘RHS Alternative’

37. This section of the RHS Deadline 12 Submission (paragraphs 7-11, 94-149) is predicated upon a conclusion that there will be an adverse effect on the integrity of the SPA through air quality changes arising from the DCO Scheme. As HE has explained above, and in several previous submissions (including paragraph 13 of section 3.7 of [REP12-024]), an adverse effect as a result of air quality changes has correctly been ruled out. As explained above, however, HE did identify an adverse effect on the integrity of the SPA as a result of land take. Therefore, the assessment of alternatives was correct to focus on land take, rather than air quality changes.

38. Thus, contrary to what is said by RHS at paragraph 96, there was, and is, no need to consider the 'alternative solutions test' in the context of air quality.
39. With regard to the RHS alternative, RHS assert at paragraph 101.2 that HE has failed to consider its proposed alternative, which is said to comprise essentially the DCO Scheme with the retention of an improved Wisley Lane entry to A3 northbound carriageway and the addition of south facing slips at the Ockham Roundabout ('the RHS Alternative').
40. This is wrong. HE has considered the RHS Alternative generally and dismissed it, as has been explained on a number of previous occasions. What HE did not do, as it was not necessary to do so for the reasons explained above, was consider the RHS Alternative in the context of Regulation 64 of the Habitats Regulations (i.e. the 'no alternative solutions' test).
41. With regard to the highways and safety aspects of the RHS Alternative generally, these matters have already been responded to at considerable length by HE. See for example:
- a. REP2-014 Responses to REP1-038-2, REP1-038-3, REP1-038-6 and REP1-038-9.
 - b. REP2-013 #1.13.15 and #1.13.16 (regarding U-turns at J10) and #1.1.18
 - c. REP3-018 Ministerial Statement regarding South Facing slips
 - d. REP3-009 #2.1.14 and #2.1.49 to 2.1.59
 - e. REP4-005 Response 10 (Air Quality), Section 3, Section4 (REP1-38-2 South Facing Slips & REP1-038-3, REP1-38-6 & Section 5 2.4)
 - f. REP5-014 #2.13.10 and #2.13.12 (with reference to U-turns at J10)
 - g. REP6-010 Section 2.3 (Safety)
 - h. REP7-008 Section 2.1
 - i. REP7-004 #3.13.2 and #3.13.9
 - j. REP8-047 #3.13.7 (Design standards)
 - k. REP8-040 Traffic Modelling Report (South facing Slips)
 - l. REP8-031 (SoCG) NA5, NA10 & NA11, Propositions 2.2, 2.3 & 4.4
 - m. REP9-003 #3.1.1 and #3.1.3
 - n. REP10-004 #4.4.1
 - o. REP11-007 Section6 #6.1.1 to 6.1.12 and #6.1.15
 - p. REP12-024 #2.1.1 to 2.1.3 & #2.3.1

42. In short, the RHS Alternative was rejected because:
- a. A left turn from Wisley Lane onto the A3 would not be compliant with applicable design standards in the Design Manual for Roads and Bridges (DMRB) and would be unsafe;
 - b. The U-turning traffic removed from Junction 28 by the RHS Alternative compared to the DCO Scheme would be insufficient to make a material difference to the operational performance or accident rates at Junction 28;
 - c. The reduction in RHS traffic routing through Ripley due to south-facing slips at Ockham Park junction compared to the DCO Scheme would be insufficient to make a significant difference to accident rates or traffic impacts along the B2215;
 - d. The additional journey times of a few extra minutes for some RHS visitors due to the DCO Scheme compared to the RHS alternative are insufficient to adversely affect visitor numbers in the context of the overall investment in time made by RHS visitors, which is likely to be several hours comprising of both duration of stay and travel time;
 - e. The south-facing slips would be a major undertaking and expensive to introduce, as they would require modifications to the Ockham roundabout and the Ripley Services' slip roads to and from the A3. They would also be very lightly used, so the business case for them is likely to be weak;
 - f. The south-facing slips at Ockham were rejected by the Government in a Ministerial Statement;
 - g. The south-facing slips would predominantly benefit the proposed Wisley Airfield development and RHS Wisley Garden and would not offer any significant wider strategic benefits; and
 - h. North-facing slips at Burnt Common, not south-facing slips at Ockham, are Guildford Borough Council's and Surrey County Council's identified solution to accommodate forecast traffic growth generated by the Guildford Local Plan, particularly that generated by the proposed Wisley Airfield development.
43. RHS asserts that the additional SPA land take that would occur with its Wisley Lane left-out solution should be classed as 'site fabric' (see paragraphs 126-129). This simply ignores the fact, however, that the alternative solution does not comply with design standards and is unsafe; whether it is 'site fabric' or not does not change that hard fact. Furthermore, the

additional SPA land take for the RHS Alternative was considered by HE and, in this respect, concluded not to be a better alternative to the DCO Scheme: see REP6-010 at section 4.5, REP8-045 at 4.5.1 and REP9-003 at 4.1.6 point 16.

44. The RHS Deadline 12 Submission at paragraph 130-149, once again, mischaracterises the position where states that the effect that the RHS Alternative better respects the integrity of the SPA than the DCO Scheme in relation to air quality impacts by bringing about *“significant improvements that will help drive down nitrogen deposition levels within the SPA by comparison to the position under the DCO Scheme”*.
45. It is simply incorrect for RHS to assert that the RHS Alternative will bring about significant improvements in nitrogen deposition rates as compared to the DCO Scheme simply because there are changes over 1% (see paragraph 140).
46. As noted in Highways England's response at REP12-024 paragraph 3.8.9, at the location of the supporting habitats of the qualifying features (i.e. the habitat where they feed, nest and roost), the change in nitrogen deposition rates with the RHS Alternative is less than 1% of the critical load and cannot be described as significant.
47. The air quality differences between the RHS Alternative and the DCO Scheme are confined to the established woodland habitat.
48. As demonstrated in bullet points 3 and 4 of paragraph 4.1.3 on pages 8 and 9 of REP9-003, the Natural England NEA001 guidance sets out that an effect is *“significant”* if it is likely to undermine the conservation objectives for the site. Where a change in the nitrogen deposition rate is more than 1% of the critical load, this does not mean that the effect is 'significant', but simply that further investigation is needed, as it cannot be screened out.
49. HE has previously provided responses in relation to the conservation objectives for this site, at REP12-024 sections 3.4 and 3.5, as well as Section 4.3 of Applicant's comments on Deadline 9 submissions [REP10-003] and the response to question 4.4.13 on pages 16-18 of HE's comments on Deadline 10 submissions [REP11-007]. These responses show that the

conservation objectives do not apply within the established woodland buffer close the A3, as this is not feeding, nesting or roosting habitat. The effect of the DCO scheme therefore cannot be described as significant with regards nitrogen deposition rates.

50. With regards to paragraph 144 of the RHS Deadline 12 Submission, as has already been explained in section 3.6 of REP12-024, the nitrogen deposition rates will fall below the baseline in the woods on the basis of the DCO Scheme or the RHS Alternative, with the effect that the invertebrate resource in the woodland will not be affected and the air quality differences between the DCO Scheme and the RHS Alternative are not of material significance.

(5)(i) The Alleged Inadequacy/Invalidity of the Compensatory Measures - The Failure to make Provision for Compensatory Measures regarding air quality impacts

51. RHS alleges that additional compensatory measures are required to address the adverse air quality impacts of the DCO Scheme. For the reasons already explained by HE, there is no need to identify compensatory measures for adverse air quality impact in circumstances where there is no adverse effect on the integrity of the SPA arising as a consequence of the DCO Scheme.

(5)(ii) The Alleged Inadequacy/Invalidity of the Compensatory Measures –The Reliance upon Habitat that is already subject to SWT's Management Plan 2010-2020 as Compensatory Habitat

52. For the reasons already explained, the compensatory measures proposed in respect of the woodland habitat land take are additional to the measures that have already been completed under the SWT Management Plan 2010-2020. RHS's suggestion otherwise is incorrect as a matter of fact; see section 3.2 of REP12-024, where it is explained that the clearance as set out in the SWT Management Plan has already been completed. Paragraph 3.2.6 of that document is particularly relevant and explains why the proposals for the SPA enhancement areas fall outside 'normal practice' and would not have occurred as part of the existing management of the SPA. SWT also explain this in their bullets on page 2 of REP12-043.

(5)(iii) The Alleged Invalidity of Compensatory Measures directed towards SPA enhancement due to Air Quality Impacts

53. RHS is incorrect to allege that the compensatory measures selected by HE are invalid due to air quality impacts arising in the SPA enhancement areas.
54. The suite of compensatory measures were designed under consultation with Surrey Wildlife Trust and Natural England, as well as with RSPB, the Forestry Commission and Surrey County Council. The consultation process and selection process for the suite of compensatory measures is set out in Annex B [REP4-016] and Annex C [REP4-017] of the HRA.
55. The areas of clearance within the SPA enhancement areas within 150 m of the A3 are confined to four land parcels (there are no areas of clearance within the SPA enhancement areas within 150 m of the M25): E1, E2, E4 and E5.
56. In each instance where the SPA enhancement areas proposed for clearance have fallen closer than 150 m from the A3, there has been careful consideration and reason for their selection, which has been agreed with Natural England, Surrey Wildlife Trust, Forestry Commission, Surrey County Council and RSPB.
57. As explained on page 26 of the response to question 3.8.2 in the Applicant's response to ExQ3 [REP7-004], the mechanisms within the SPA management and monitoring plan [AS-015] allow for adaptive management within SPA enhancement and SPA compensation areas where required, including, for example, increased growth of competitive plants as a result of high levels of nitrogen deposition.
58. The reasoning for the selection of E1, E2, E4 and E5 are set out below.

Areas E1 and E2

59. As explained in response to question 3.8.2 on pages 25 and 26 of ExQ3 [REP7-004], a Designated Funds application is being made alongside the DCO submission for a green

element to be installed at the replacement Cockcrow overbridge. This would be a heathland green bridge and would link Ockham Common and Wisley Common for the first time since they were severed by the A3. In order to maximise the effectiveness of this green bridge, it has been agreed with all stakeholders that the Suite of Compensatory measures should include an area of woodland clearance either side of the green bridge (areas E1 and E2 as shown in Figure 13 of the HRA figures [AS-006]), enabling heathland restoration and providing a continuous heathland link either side of the green bridge. Therefore, the proposed woodland clearance falls within 150 m of the A3 in these locations.

60. These enhancement areas were discussed and agreed with Natural England on 9 October 2018, Surrey Wildlife Trust on 16 October 2018, Forestry Commission on the 29 October 2018 (plus follow up call on the 13 December 2018), RSPB on the 5 December 2018 and Surrey County Council on 1 February 2019 (refer to HRA Annex B consultation report [REP4-016] for meeting minutes).

Areas E4

61. An area adjacent to the southern edge of Bolder Mere will be cleared in order to complement the enhancement measures proposed around the southern edge of Bolder Mere, as set out in section 7.6 of the SPA management and monitoring plan [REP4-031]. This clearance area is not intended for heathland restoration, and instead will be cleared to allow more light to the edge of Bolder Mere. It will be managed as young woodland regrowth and will not be a supporting habitat for the SPA qualifying species. Therefore, its location, some of which falls within 150 m of the A3 is not relevant with regards to the SPA qualifying species.

Areas E5

62. As explained in response to question 3.8.2 on page 26 of ExQ3 [REP7-004] and section 4.4 on pages 8 and 9 of Highways England's comments to Deadline 9 submissions [REP10-003], E5 has recently been thinned and is already fairly open habitat with scattered trees. However, the tree stumps have not been removed nor have the needle 'leaf litter' layer and humus layer been removed in order to expose the mineral soil layer and allow heathland to regenerate (a

process required in order to allow heathland to establish, as explained in section 7.4.3 of the SPA management and monitoring plan [AS-015]). This was one of the reasons for the selection of E5, and the key management for E5 will focus on the removal of the tree stumps and the pine needle layer, as well as the removal of some of the remaining scattered trees, in order to allow heathland to establish.

63. In addition, a woodland belt of approximately 75 m in depth will be retained, allowing a woodland buffer between the A3 and the heathland to be maintained.
64. Further to this, as can be seen when comparing 'do minimum' and 'do something' for the transect to the west of the A3 (in this approximate location) in Table 1.2 of Highways England's comments to ExQ4 4.33 [REP10-007], the levels of nitrogen deposition will actually reduce in this location as a result of the Scheme.
65. It was for all these reasons that E5 was considered an appropriate area for heathland restoration, even though it falls approximately 75 m from the A3 at its closest point.
66. **(5)(iv) The Alleged Failure to Apply a Discount to Compensatory Measures directed towards Enhancement of Woodland Habitat due to the pre-existing benefits of the woodland to the integrity of the SPA**
67. As set out in paragraphs 5.1.74-5.1.85 of the HRA stages 3-5 [REP4-014], the SPA enhancement measures will include 24.9 ha of woodland enhancement (thinning) to increase the woodland's invertebrate resource.
68. In addition, existing works on the site by SWT have shown that the clearance of woodland in order to create more heathland has significant and direct benefits for the SPA qualifying species. They increase as a direct result of conversion of woodland into heathland. Paragraph 7.2.12 of the SiAA [REP4-018] explains that the recent clearance of woodland in order to allow heathland restoration led to an increase in abundance of all three qualifying species. The increase in the SPA qualifying species as a result of reduced areas of woodland and increased areas of heathland indicates that the heathland itself is likely to provide all the invertebrate

resource that these qualifying species require, and that the clearance of woodland did not prevent the SPA qualifying species from increasing in response to the additional areas of heathland.

69. SWT identified increases in bird numbers as a direct result of clearance in REP10-018 (and state it at response 4.4.6 in REP10-017), and also state this in their conclusion on page 2 of REP12-043: *“Surrey County Council as the landowner and Surrey Wildlife Trust as the site manager have reversed the fortunes of the protected heathland habitats on Wisley and Ockham over the last 20 years. SPA bird populations have significantly increased due to the management works undertaken. There are examples of these populations recovering across the county following works similar to those contained with the mitigation and compensation proposals. We are convinced that these works will increase the numbers further on site.”*
70. The SPA enhancement measures do, therefore, take into account that the heathland restoration areas are already woodland, but acknowledges that the SPA qualifying species will directly benefit from these proposals.
71. Finally, at paragraph 198 of the RHS Deadline 12 Submission, RHS made the point that the Planning Inspectorate's 'Report on the Implications for European Sites' ('RIES') dated 9 April 2020 (PD-013) is out-of-date. Whatever the merits, or otherwise, of such an assertion, the RIES clearly represents the Examining Authority's conclusions at the date it was written, but the Secretary of State will be able to take that and all other material into account.

Annex 1 – Key Court of Justice of the European Union Case Law and Relevant Guidance

72. Annex 1 includes a summary of Key Court of Justice of the European Union Case Law and Relevant Guidance. This comprises quotations from CJEU cases and from the European Commission Guidance on Managing Natural 2000. It also includes reference to one domestic case, R (on the application of Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214.

73. There is nothing of note about the quotations cited, which set out basic aspects of the legal framework for undertaking Habitats Regulations Assessment and the approach taken by the European Commission in its guidance. Where RHS has alleged breach of any relevant parts of the correct legal approach when undertaking a Habitats Regulations Assessment, those allegations have been addressed in the body of the text above.

Conclusions

74. Contrary to what is suggested by RHS, HE's evidence demonstrates that there is no adverse effect on the integrity of the SPA arising as a consequence of air quality impacts. As a consequence, there is no impact from air quality that requires HE to consider alternative solutions under Regulation 64 of the Habitats Regulations and nor is there a need for it to provide compensatory measures directed towards air quality impacts under Regulation 68 of the Habitats Regulations. Where there is a physical loss of SPA land, HE has considered alternative solutions and has provided for compensatory measures in consultation with Natural England and SWT.
75. In all the circumstances, it is clear that as a matter of law that the Secretary of State is not precluded from granting development consent by virtue of the operation of Regulations 63, 64 and 68 of the Habitats Regulations or otherwise.

Michael Humphries QC

Caroline Daly

19 November 2020

Francis Taylor Building

Inner Temple,

London EC4Y 7BY

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