

M25 JUNCTION 10/A3 WISLEY INTERCHANGE IMPROVEMENT SCHEME
PROPOSED M25 JUNCTION 10/A3 WISLEY INTERCHANGE DEVELOPMENT
CONSENT ORDER (“DCO”)
ROYAL HORTICULTURAL SOCIETY (“RHS”) – REGISTRATION NUMBER
20022900

RESPONSE TO THE SECRETARY OF STATE’S LETTER DATED 27 NOVEMBER
2020

These comments are submitted on behalf of the RHS. Richard Max & Co LLP are the duly appointed solicitors to the RHS and are authorised to submit these comments and other documents on its behalf.

OVERVIEW

1. These comments address matters raised in the Secretary of State’s letter dated 27 November 2020 to Highways England; Elmbridge Borough Council; the RHS; Girlguiding Greater London West; and all Interested Parties.
2. These comments include an Opinion from David Forsdick QC, dealing with points raised by Michael Humphries QC and Caroline Daly in:
<https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010030/TR010030-001240-1%20-%20Highways%20England%20-%20comments%20on%20RHS%20D12.pdf>.

Mr Forsdick QC’s opinion explains why the Applicant’s approach in relation to assessment of the DCO Scheme’s impact on the Thames Basin Heaths SPA is wrong as a matter of law.

RHS RESPONSE TO QUESTION 1

3. In its response to the consultation of 4 November 2020, the RHS set out the consequences of reducing the Replacement Land as proposed by the

Secretary of State. The Applicant's new Replacement Land proposal continues to present a substantial reduction in the Replacement Land provision and in the mitigation/compensation measures previously promoted by the Applicant. It does not resolve any of the fundamental issues identified in the RHS's previous consultation response.

4. If an assessment of environmental impacts is to take into account environmental information beyond that contained in the existing ES, it will be necessary to abandon the current DCO application and start again, with a new ES properly reflecting the amended DCO Scheme. The assertions made in the Applicant's consultation response are not a lawful substitute for a proper EIA process. A copy of the response prepared by Freeths on this issue is attached as **Appendix 1**.

RHS RESPONSE TO QUESTION 4

5. The RHS has no objection to the proposed reworded Requirement 18 and thinks it is preferable to the version previously proposed by the Applicant.

RHS RESPONSE TO QUESTION 6

6. Comments on highways and traffic matters raised in the legal submissions of Michael Humphries QC and Caroline Daly are appended as **Appendix 2**.
7. Freeths LLP has provided a response to Michael Humphries QC's submissions of 19 November 2020 made on behalf of HE. This is attached as **Appendix 3** and it includes a legal opinion from David Forsdick QC. These together show that Michael Humphries QC has adopted an incorrect and unlawful approach to the SPA's conservation objectives which means that his views in relation to the Habitat Regulations Assessment "*no adverse effect on integrity test*" and "*no alternative solutions test*" are wrong. All of RHS' representations in REP12-056 remain entirely valid and continue to stand.

CONCLUSIONS

8. For the reasons consistently set out in the RHS's evidence and legal submissions, it is clear that the DCO Scheme must be refused.

Richard Max & Co LLP for and on behalf of the RHS

7 December 2020

FREETHS

RHS' SUBMISSIONS IN RESPONSE TO QUESTION 1 OF THE DEPARTMENT FOR TRANSPORT'S LETTER DATED 27 NOVEMBER 2020

QUESTION 1: PROPOSAL BY THE APPLICANT FOR REDUCED REPLACEMENT LAND

1. Background and overview

- 1.1. In a consultation letter dated 4 November 2020, the Secretary of State sought views on the proposed removal of 23.4Ha, or 59%, of the Replacement Land ("RL") that had been included in the original DCO Scheme.
- 1.2. In response, the Applicant has recognised that the proposed reduction in the RL would be detrimental to the DCO Scheme. At paragraph 4.10.3 of its consultation response¹, the Applicant acknowledges that "*The proposed changes to replacement land by the Secretary of State would detract from the biodiversity enhancements and mitigation that the replacement land provides*".
- 1.3. However, the Applicant suggests that, *if* the Secretary of State is minded to reduce the RL provision, the DCO should include RL parcels PBF1, PBF2 and the south part of PBF3 (as previously proposed by the Secretary of State) *and* RL parcels CF1 and CF2 (which had been proposed for removal by the Secretary of State). Under the Applicant's proposal, the DCO Scheme would *not* include the northern part of PBF3, CF3, CF4, HE1 or HE2.
- 1.4. The Secretary of State now seeks comments from interested parties on the Applicant's proposal.
- 1.5. As we said in our response to the consultation letter dated 4 November 2020, while the RL is primarily required to compensate for the loss of common land, open space and open public access land, the Applicant has also promoted the function of the RL in mitigating the ecological effects of the DCO. This principle is recognised in the Applicant's consultation response. At paragraph 4.1.1, it says:

"As set out at section 8 of [REP11-011], whilst the primary purpose and function of the replacement land is to provide recreational and public access land in compensation for that lost as a result of the Scheme, the habitat management measures proposed for the replacement land parcels will provide biodiversity enhancement".
- 1.6. In our response to the consultation of 4 November 2020, we set out detailed observations as to the consequences of reducing the RL as proposed by the Secretary of State, noting that removal of RL parcels CF1 to CF4 was likely to have a particularly significant impact.
- 1.7. We demonstrated that, if a substantial part of the RL was removed from the DCO Scheme:

¹ TR010030; 9.150 Applicant's Response to Secretary of State's Consultation Letter – 4 November 2020

FREETHS

- 1.7.1. the existing Environmental Statement (“**ES**”) would not comply with the minimum requirements of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (the “**IP (EIA) Regulations**”);
 - 1.7.2. any conclusion as to the significant effects of the DCO Scheme, based on the existing ES, would be flawed; and
 - 1.7.3. it would be necessary to abandon the current DCO application and start again, with a new ES properly reflecting the amended DCO Scheme.
- 1.8. We also demonstrated that the Secretary of State could not be satisfied that disturbance from recreational impacts from the DCO Scheme would not adversely affect the integrity of the Thames Basin Heaths SPA and that this impact would have to be carried through to an assessment of alternative solutions, imperative reasons of overriding public interest and necessary compensatory habitat, pursuant to the Conservation of Habitats and Species Regulations 2017 (the “**Habitats Regulations**”).
- 1.9. Finally, we demonstrated that to grant consent to the DCO Scheme in these circumstances would be contrary to the National Policy Statement for National Networks (Department of Transport, December 2014) and the Secretary of State’s duty to conserve biodiversity under section 40 of the Natural Environment and Rural Communities Act 2006 (“**NERC**”).
- 1.10. The Applicant’s new RL proposal continues to present a substantial reduction in the RL provision contained in the original DCO and in the mitigation/compensation measures previously promoted by the Applicant. Accordingly, the Applicant’s proposal does not resolve any of the fundamental issues we identified in our earlier consultation response.

2. The Environmental Statement

- 2.1. We set out the relevant legal requirements for Environmental Impact Assessment (“**EIA**”) in our response to the consultation letter dated 4 November 2020. We do not repeat them here.
- 2.2. We explained that the RL is central to the mitigation and compensation measures upon which the ecological assessment in the ES relies and we identified some key aspects of the assessment which would be directly impacted by removal of the listed RL parcels from the DCO Scheme.
- 2.3. The Applicant’s consultation response recognises that the residual impact assessment in the ES takes into account the suite of measures to be provided on the RL. By way of example, it recognises that such measures are relied on to conclude that the DCO Scheme will have a moderate permanent positive effect on the Ockham and Wisley Commons SSSI (paragraph 4.3.1) and on the Ockham and Wisley Local Nature Reserve (paragraph 4.4.1). Impacts on the Ockham and Wisley Commons SSSI are, of course, particularly significant given that it is a component of the Thames Basin Heaths SPA.
- 2.4. As we have said, the Applicant’s alternative proposal for the provision of RL continues to represent a substantial reduction in the RL that would be provided by the DCO Scheme. Nothing in the Applicant’s proposal changes the fact that the ES as drafted will contain:

FREETHS

- 2.4.1. an inaccurate description of the development including land use requirements;
 - 2.4.2. an inaccurate and out of date description of likely significant effects on biodiversity (including habitats and individual species);
 - 2.4.3. an inaccurate and out of date description of features or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment; and
 - 2.4.4. an inaccurate or incomplete explanation of the extent to which likely significant adverse effects are avoided, prevented, reduced or offset.
- 2.5. It remains the case that any conclusion as to the significant effects of the DCO Scheme will be flawed if based on the existing ES.
- 2.6. Although the Applicant seeks to address some aspects of the impact assessment in its response to the 4 November 2020 consultation, it does not do so in a manner that satisfies the requirements of an ES. By way of example, it simply dismisses any issue that may be associated with the proposed reduction in the RL by asserting, without further analysis, that there would still be a moderate permanent positive residual significance of effect on the Ockham and Wisley Common SSSI and Ockham and Wisley Local Nature Reserve (sections 4.3 and 4.4 of the consultation response, respectively). It is simply contradictory to have relied on the benefits of mitigation measures that are said to be embedded in the DCO Scheme and then to dismiss their removal as inconsequential.
- 2.7. Similarly, in its consultation response, the Applicant continues to recognise the importance of, for example, the enhancements to ancient woodland at PBF3 and CF3 but then dismisses the consequences of not including these parcels in its own, alternative RL proposal. At paragraph 4.8.4 of its consultation response, the Applicant identifies the reduction in woodland enhancement as the greatest change resulting from the Secretary of State's proposal. The Applicant specifically observes (paragraphs 4.1.2 and 4.1.3) that the Secretary of State's proposal will reduce the amount of woodland planting and woodland enhancement, including areas of ancient woodland at PBF3 and CF3 and, at paragraph 4.6.3, states that, "*it would clearly be preferable to provide the ancient woodland enhancement measures in PBF3 and at CF3 (The Bogs) as proposed by the Applicant*". In contradiction to these assertions, these enhancements are not then provided by the Applicant's proposal.
- 2.8. In any event, as we said in our response to the consultation of 4th November 2020, if an assessment of environmental impacts is to take into account environmental information *beyond* that contained in the existing ES, it will be necessary to abandon the current DCO application and start again, with a new ES properly reflecting the amended DCO Scheme. The assertions made in the Applicant's consultation response are not a lawful substitute for a proper EIA process.

3. The Habitats Regulations Assessment

- 3.1. Again, we set out the relevant legal requirements for Habitats Regulations Assessment ("**HRA**") in our response to the consultation letter dated 4 November 2020.
- 3.2. The Applicant's consultation response recognises (paragraph 4.2.2) that the RL informs the appropriate assessment with regards to potential disturbance of ground nesting birds (that is, qualifying features of the SPA) by changes in recreational use once the Scheme is operational.

FREETHS

- 3.3. At paragraph 4.2.4, the Applicant asserts that even without the provision of Chatley Farm replacement land, recreational users will still *potentially* be drawn away from the SPA (our emphasis). However, it is again contradictory to rely on mitigation measures in an HRA and then to simply dismiss the consequences of their removal.
- 3.4. As we have said, the Applicant's proposal continues to represent the removal of a substantial amount of RL from the original DCO proposal. Therefore, nothing in the Applicant's proposal changes the conclusion that the Secretary of State cannot be satisfied that disturbance from recreational impacts from the DCO Scheme will not adversely affect the integrity of the Thames Basin Heaths SPA. This impact would have to be carried through to an assessment of alternative solutions, imperative reasons of overriding public interest and necessary compensatory habitat.

4. Policy / s40 of the Natural Environment and Rural Communities Act 2006

- 4.1. Given that the Applicant's revised proposal does not correct the fundamental flaws we have identified relating to the EIA and HRA, to grant the DCO on the basis of the Applicant's revised proposal would remain contrary to the National Policy Statement for National Networks (Department of Transport, December 2014) in that:
- 4.1.1. the ES would not contain an accurate or complete assessment of likely significant effects on designated sites, habitats of principal importance or individual species;
 - 4.1.2. the Secretary of State could not conclude that there would be no adverse effect from the DCO Scheme on the integrity of the Thames Basin Heaths SPA through recreational impacts; and
 - 4.1.3. a significant element of mitigation that was integral to, and embedded in, the DCO Scheme design will have been removed; and
 - 4.1.4. important opportunities for the DCO Scheme to conserve and enhance biodiversity will have been lost.
- 4.2. Finally, given the lost opportunity to enhance existing habitats and create new habitats as well as to mitigate against impacts on relevant SSSIs and European sites, the Secretary of State will not have complied with his duty under section 40(1) of NERC.

Freeths LLP
For the Royal Horticultural Society
4 December 2020

M25 JUNCTION 10/A3 WISLEY INTERCHANGE IMPROVEMENT SCHEME

DEVELOPMENT CONSENT ORDER

REPRESENTATION BY RHS

RESPONSE TO HIGHWAYS ENGLAND DOCUMENT 9.151

***'APPLICANT'S COMMENTS ON THE ROYAL HORTICULTURAL SOCIETY D12 SUBMISSION – RESPONSE
BY COUNSEL – MICHAEL HUMPHRIES QC AND CAROLINE DALY'***

HIGHWAY COMMENTS PREPARED BY TTHC

- 1.1 This representation has been prepared by Mr Hibbert of TTHC on behalf of RHS and provides comment on highway-related matters within the response by Counsel to RHS REP12-056.

Paragraph 40

- 1.2 Within paragraph 40, it is claimed that the Applicant has considered the RHS Alternative 'generally' and dismissed it. As noted in the response set out in paragraph 2.13.10 of REP5-054, this general consideration excluded any modelling of the RHS Alternative prior to the submission of the DCO. The RHS Alternative has never been examined against the Baseline position or the DCO Scheme in terms of its overall relative merits and benefits.
- 1.3 It was only in response to a request from the ExA at ExQ3 (Section 13), for traffic modelling of the South Facing Slips (SFS) component of the RHS Alternative, that even partial modelling was undertaken.
- 1.4 The Applicant has never undertaken any assessment of the RHS Alternative Scheme in terms of the overall operational and safety benefits on the surrounding highway network of the significant savings in journey time and distance travelled.

Paragraph 41

- 1.4 In response to the highway and safety claims against the RHS Alternative, the RHS position in respect of these matters is set out in the following representations:

- a. REP1-044 – Written Representation in response to DCO Application
- b. REP3-044 (inc REP3-048 and REP-049) – Response to REP2-014
- c. REP5-052 (inc REP5-051) – Responding to REP4-005 (item 3)
- d. REP5-053 (inc REP5-046, 047 and 048) – Responding to REP4-005
- e. REP5-054 – Responding to ExAQ2
- f. REP6-024 – Responses to Deadline 5 submissions
- g. REP7-039 – Responding to ExAQ3
- h. REP7-040 – Responses to REP6-010
- i. REP8-053 – Responses to REP7-004
- j. REP10-025 (inc REP10-032) – Responding to ExAQ4
- k. REP11-034A – Response to REP10-004
- l. REP11-035 – Response to REP8-040 and REP10-003

Paragraph 42

1.6 With regard to the reasons stated for rejecting the RHS Alternative, TTHC would respond as follows:

- a. Until the Applicant conceded that the RHS Alternative could comply with the 1km weaving length standard¹, the basis for HE’s objection to the retention of a connection from Wisley Lane to the A3 northbound carriageway was in relation to its presumed inability for the RHS Alternative scheme to achieve this weaving length². It is accepted that departures from standard would be needed for the ‘horizontal curvature’ and ‘near straight’ components of the Wisley Lane movement. However, departures from standard do not in themselves mean that a scheme would be unsafe. In this regard, the DCO Scheme itself will require ‘many’ which the Applicant has yet to disclose.
- b. The claim that the removal of u-turning traffic from Junction 28 (*sic* Junction 10) would be insufficient to make a material difference to the operational performance or accident rates at the junction is not based on any evidence. HE has resisted

¹ See Statement of Common Ground (REP8-031 pg40)

² See REP7-008 section 2.4.3, REP6-010 section 2.3, REP5-050 HE response in section 2.2

undertaking a full and proper assessment of the RHS Alternative to any level of detail which would enable this claim to be supported.

- c. Again, the claim that the reduction in RHS traffic routing through Ripley due to south-facing slips at Ockham park junction would be insufficient to make a significant difference to accident rates or traffic impacts along the B2215 is not based on any evidence. This claim sits against the backdrop that HE has never been able to validate its modelling within Ripley (REP3-051).
- d. For clarification, when comparing the DCO Scheme with the RHS Alternative, the additional journey time for RHS visitors (and other traffic travelling between Wisley Lane and the A3) is not a 'few extra minutes'. Whether Applicant data or RHS data is used, the RHS Alternative Scheme results in improved journey times for round trips throughout the day of between 6 to 14 minutes for those travelling to/from the south on the A3 and 3 to 4 minutes from those travelling to/from the north on the A3. The Applicant has presented no evidence of its claim that these differences in journey time would be insufficient to adversely affect visitor numbers whereas RHS has undertaken a number of visitor surveys and assessments to support its position in this regard. Furthermore, the DCO Scheme would provide an increase in travel distance via a more convoluted route (REP12-057 paragraphs 7 to 11).
- e. REP1-044 (paragraphs 4.16 to 4.20) makes reference to section 2.4 of HE's Side Roads Addendum report (REP3-017) which suggests the South Facing Slips would cost approximately £8m. Within the context of the overall DCO Scheme cost of £250m, this represents just over 3%. With regard to usage, REP11-035 provides a response to the South Facing Slips modelling report (REP8-040). It is not simply about the use of the slips themselves, but also what gains are made elsewhere (such as a reduction in traffic through the villages of Ripley and Send). Furthermore, based on the Applicant's modelling, when compared to the DCO Scheme, the SFS would reduce the annual travel on the Local Road Network by 1,049,000 vehicle kilometres. When the same comparison is undertaken including the effects on the Strategic Road Network (SRN), the reduction in annual travel would be 1,740,000 vehicle kilometres.

- f. The Ministerial Statement does not pre-empt the DCO process.

- g. The inclusion of south-facing slips would remove the impacts brought about by the DCO Scheme within the village of Ripley, which is an outstanding matter the local highway authority, Surrey County Council, remain concerned with, so much so that they are seeking the DCO Scheme to fund mitigation measures to address these impacts.

FREETHS

**RHS RESPONSE TO
MICHAEL HUMPHRIES QC'S SUBMISSIONS FOR HE DATED 19 NOVEMBER 2020
ON
RHS' DEADLINE 12 REPS BY FREETHS LLP ON
HABITAT REGULATIONS ASSESSMENT ISSUES [REP12-056]**

1. *Introduction*

2. There is nothing in Michael Humphries QC's document (TR010030/001240-1 - his document has to date no REP number) which alters the validity of Freeths LLP's comprehensive submissions in RHS' REP12-056. All those submissions remain entirely valid and continue to stand.
3. This document addresses only some of the most significant errors in Michael Humphries QC's document.
4. It follows that where any point made by Michael Humphries QC is not specifically addressed below, this does not mean that it is accepted. Instead the correct position is as set out in RHS' REP12-056 and, where necessary in relation to the most significant errors in Michael Humphries QC's document, below.

HE's misunderstanding of RHS's case

5. We are surprised that Michael Humphries QC misunderstands a key aspect of RHS's case.
6. He states that RHS asserts on a number of occasions that "there will be an adverse effect on integrity of the Thames Basin Heaths SPA arising from air quality" (for example his paragraphs 2 and 16).
7. This is incorrect.
8. RHS's position could not be clearer. It is that, based on the evidence before the Examination, it cannot be concluded by the Secretary of State (with certainty, as the caselaw requires¹) that there will be no adverse effect on the integrity of the Thames Basin Heaths SPA from the DCO Scheme alone or in combination with other plans or projects.
9. This is stated repeatedly throughout RHS' REP12-056, for example RHS' paragraphs 8, 9, 70 and 82.
10. This is also stated clearly in paragraph 4 of the RHS closing submissions (REP12-057).

The Ockham and Wisley Common Management Plan 2010-2020 (REP10-019)

11. Michael Humphries QC takes the position that "*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*" (paragraph 10); "*the SWT had already fulfilled the remit of the Management Plan and made the necessary changes*" (paragraph 11); and "*The measures provided in the SWT Management Plan have already been undertaken*" (paragraph 15).
12. The documentary evidence is wholly inconsistent with this.

¹ See paragraph 4 of Annex 1 of Freeths LLP's document REP12-056

FREETHS

13. The Management Plan (REP10-019) itself plainly shows that, at the time the Plan was drawn up, a swathe of management works was envisaged to be delivered between 2010-2020 as necessary management for the Ockham and Wisley Common component of the Thames Basin Heaths SPA. This management included thinning and felling woodland within the 0-150m woodland zone, both in the period to 2012 and also beyond 2012 (see page 18 of the Management Plan where this is clearly explained; and see paragraph 39 of RHS' REP12-056). This information, taken directly from the Management Plan, is shown conveniently and clearly on Baker Consultant Ltd's Figure 1 (REP11-042).
14. Note that it is obvious that not all the works envisaged in the Management Plan were delivered in the early 2010s because, if they had been, then it would not be possible for HE to refer to those same works now as future HRA compensatory measures (see Baker Consultant Ltd's Figure 3 (REP11-044) as a clear illustration of this). Furthermore, if all the works envisaged in the Management Plan had already taken place in the early 2010s, then those works could not have been going on recently. And yet they clearly have been going on recently: it has been acknowledged by HE in its SIAA (see paragraph 40 of RHS' REP12-056), and is repeated again by Michael Humphries QC in his submissions (paragraph 62), that recent management (ie woodland thinning) has been carried out on land within HE's SPA enhancement area E5, which is entirely consistent with the Management Plan's planned management for this land (E5 corresponds to the Management Plan's management compartments 5c/5a).
15. At paragraph 3.2.6 of REP12-024 HE states that *"..It was confirmed by Surrey Wildlife Trust and Natural England that 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 ..."* Again this simply flies in the face of the Management Plan itself, which plainly included planned management works which, as RHS has shown (see Baker Consultant Ltd's Figure 3 (REP11-044)), are now being proposed by HE as HRA compensatory measures.
16. We note that, bizarrely, no one from NE, HE or Surrey Wildlife Trust has chosen, or been able, to explain how it is that the full suite of works clearly envisaged by the Management Plan, which had been endorsed by NE (REP8-022 (3.2.8)), were not then in fact delivered.
17. The key point, however, is one that Michael Humphries QC fails entirely to address.
18. This is that *delivery of this Management Plan is tied into the SPA's conservation objective targets*, as is made clear by the wording of NE's Conservation Objective Supplementary Advice (see paragraphs 41 and 42 of RHS' REP12-056).
19. As such the works set out / clearly listed in the Management Plan 2010-2020 (as shown on Baker Consultant Ltd's Figure 1 (REP11-042)), including the planned thinning and felling works in the 0-150m woodland zone, must be regarded as needed for the management of this component of the SPA by the Secretary of State when undertaking his Habitats Regulations Assessment of the DCO Scheme.
20. This is irrespective of the fact that some of those planned works have not (for reasons which are unknown and have not been explained) to date apparently been carried out.
21. Therefore RHS' position, in relation to all points in RHS' REP12-056 where the Management Plan is at issue, remains valid and unchanged.

Air quality and the "woodland buffer"

22. We refer here to the legal opinion from David Forsdick QC at Appendix 1.

FREETHS

23. Mr Forsdick QC represented the Royal Society for the Protection of Birds in the Court of Appeal in the leading case on the interpretation of SPA conservation objectives *R (RSPB) v. Secretary of State for Environment Food and Rural Affairs and British Aerospace* [2015] EWCA Civ 227.
24. Mr Forsdick QC's opinion explains (paragraphs 1-34) that, contrary to Michael Humphries QC's view, the air quality critical load / levels targets provided (for each species) in the three tables contained in NE's Supplementary Advice do apply to the woodland within the SPA.
25. The opinion explains that Michael Humphries QC has therefore adopted an incorrect and unlawful approach to appropriate assessment in this case (see for example paragraphs 31 and 33 of Mr Forsdick QC's opinion).
26. So Michael Humphries QC's conclusion (e.g. see paragraph 26) that "*...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 features*") is incorrect.
27. The correct appropriate assessment approach to be adopted by the Secretary of State in this case is to consider the air quality data as against all the conservation objectives and their targets. This includes the air quality target "*to restore*" (nightjar) or "*to maintain or restore*" (woodlark / Dartford warbler) "*as necessary 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*".
28. As RHS stated in its REP12-056 (paragraph 87) the baseline is therefore not the "current baseline" claimed by Michael Humphries QC. It is instead the health of the SPA, including the levels of invertebrates in the woodland, if the levels of nitrogen deposition / NOx across the SPA were at or below the required critical load / levels.
29. The Secretary of State must take into account in his appropriate assessment that: (i) the SPA is currently suffering huge exceedances in nitrogen deposition (paragraph 28.1 and 83.4 of REP12-056) and it can be expected that these exceedances are already having an adverse effect on the SPA; (ii) on the basis of the air quality data presented² the DCO Scheme will have the effect of pulling air quality further away from the required critical loads / levels than would otherwise be the case (see paragraphs 23, 24 and 25 and 28.1 of RHS' REP12-056); and (iii) this data is in any event a likely underestimate of the true nitrogen deposition levels arising from the DCO Scheme (paragraphs 21 and 22 RHS' REP 12-056).
30. The Secretary of State must then consider whether, in view of these factors and in view of the other SPA conservation objectives (and the Supplementary Advice supporting those objectives), he can be certain that the effect of the DCO Scheme, alone or in combination, will not have an adverse effect on the integrity of the SPA through effects on the woodland / its invertebrates.
31. The simple point is that the Secretary of State cannot be certain of this, for the myriad of reasons previously stated in paragraphs 26, 30, 59, 60, 66, 81.1, 83, 84, 85, 86 of REP12-056. Michael Humphries QC has failed to address adequately / at all these reasons in his document.
32. It is plainly insufficient and incorrect merely to consider (as Michael Humphries QC does) the predicted increases of nitrogen deposition as against the "current baseline" and to thereby

² Note that the most complete data available is in RHS' Table A (REP11-040) and RHS' corrected figures for HE's transect 4 (REP11-041)

FREETHS

conclude that there arises (i) no concern for invertebrates or for the SPA birds; and (ii) certainty as to an absence of adverse effects on the integrity of the SPA.

33. We note that Michael Humphries QC (at his paragraph 23) now seeks to distance HE from HE's own previous statement (HE at 2.2.12 of REP7-008 (see para 83.2.2 of REP12-056)) that the forecast changes in nitrogen deposition rates have the potential to cause a very small impact on the assemblage of invertebrate species in the woodland habitat. This adds, yet further, to the mercurial nature of HE's case (see 84 of REP12-056).
34. As to Michael Humphries QC's comments about the birds' feeding preferences (paragraph 26), his assertions are incorrect, see RHS' REP12-056 paragraphs 81.1 and 83.3.
35. For the avoidance of doubt, the two additional and separate points that Freeths LLP makes in relation to appropriate assessment (summarised in paragraphs 5.1 and 6 in the Summary of RHS' REP12-056) remain valid.
36. *No alternative solution test*
37. Michael Humphries QC states 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. The effect of the DCO scheme therefore cannot be described as significant with regards to nitrogen deposition rates" (paragraph 49); and "the nitrogen deposition rates will fall below the baseline in the woods ...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" (paragraph 50).
38. This seems to be going even further than his earlier position in that he now appears to assert that the conservation objectives *generally* do not apply to the woodland, rather than just the air quality conservation objective target. This is plainly wrong, take for example HE's own SIAA REP4-018, paragraphs 7.4.6, 7.4.7 and Table 12 which clearly acknowledge the applicability of two conservation objective targets to the woodland.
39. But, this aside, again Mr Humphries QC errs in his view that the air quality differences between the DCO Scheme and the RHS Alternative do not matter because he has incorrectly taken the view that "*the conservation objectives do not apply within the established woodland buffer*".
40. The air quality conservation objective target does apply to the woodland and hence the air quality differences between the DCO Scheme and the RHS Alternative do indeed matter.
41. We refer again to David Forsdick QC's opinion, in particular paragraphs 35-37.
42. *Air quality impacts on HE's SPA Enhancement Areas*
43. Michael Humphries QC's submissions here serve only to confirm that the required assessment in relation to air quality impacts on SPA Enhancement Area E2 (paragraphs 182 and 183 in RHS' REP12-056) has not been undertaken.
44. We refer to David Forsdick QC's opinion, paragraph 38.

Freeths LLP
7 December 2020

FREETHS

APPENDIX 1
Legal Opinion of David Forsdick QC

M25/A3 WISLEY INTERCHANGE

CONSERVATION OBJECTIVES OF THE THAMES BASIN HEATH SPA

OPINION

1. I am asked by the Royal Horticultural Society (“**RHS**”) to provide my Opinion as to the correct interpretation and application of the Conservation Objectives (“**COs**”) for the Thames Basin Heaths SPA (“the SPA”) and the consequences, if any, for the consideration of alternatives. The context is an application by Highways England (“**HE**”) for a Development Consent Order for improvements to junction 10 of the M25 with the A3 at Wisley (“**the Project**”)¹. I am not asked to consider the scientific material or technical justifications for the judgements reached by HE or others. This Opinion is thus focussed on the correct legal approach rather than how that approach is to be applied to the specific facts. I refer where appropriate to HE’s Submission of 19th November² (“**HE’s Submission**”) and Freeths LLP’s analysis of the relevant regulations³ (“**Freeths’ Submission**”).
2. HE considers that the sections of the “*Natural England Thames Basin Heath SPA Supplementary Advice on Conserving and Restoring Site Features*” (“**the Supplementary Advice**”) dealing with air quality (“**AQ**”) and, as part of that, nitrogen disposition (“**ND**”) does not apply to the woodland areas of the SPA closest to the Project but only to the heathland areas beyond. It accepts that: (1) the woodland supports the SPA’s qualifying features (European Nightjar; Woodlark and Dartford Warbler – “the **QFs**”) through the provision of food (invertebrate) resource; and (2) that AQ is a pathway of impact by which that resource could be negatively affected. However, it contends that the AQ targets themselves do not apply (HE Submission e.g. paras 17 and 22) to the woodland as a separate requirement/objective such that a breach of them is not relevant to the integrity test. Whether HE is correct will turn on the interpretation of the COs.

¹ In reaching my Opinion, I first analysed the material without reference to what any of the parties considered was the correct approach and reached my own view. I then read in detail the views of HE and those acting for the RHS to see if anything they said altered or impacted my views.

² TRO10030/001240-1

³ REP12-056

3. Based on its view that the AQ targets do not apply for the woodland, HE considers that because the AQ/ND will not be worse in the future than currently⁴, the invertebrate resource will not be worse in the future than currently, the woodland will “continue to function in the context of the SPA qualifying species in the same manner as it does at present” and there is thus no impact on the integrity of the SPA (HE Submission e.g. paras 19 and 23). If, on the contrary, the AQ target does apply then the correct question would be different – namely whether there is certainty that the Project will have no adverse impact on the integrity of the SPA by pulling against or making achievement of the AQ target more difficult and thus failing to “restore” the AQ to that consistent with favourable condition of the SPA.
4. It appears to be common ground (and is in any event clearly demonstrated by the data) that:
 - a. the SPA does not meet the Supplementary Advice AQ and specifically ND targets by a considerable margin (the woodland target being 10kg N/ha/yr);
 - b. the Project will reduce AQ and increase ND compared to the position without the Project; and
 - c. the critical load objectives for ND for the woodland (if applicable) will not be met in the foreseeable future and any future achievement of them will be dependent on “autonomous” future measures unrelated to the Project.

SPAs – the Legal Approach

5. The basic legal framework is clear and is not in dispute. I will not repeat it but just highlight what I consider to be the most important relevant principles. The appropriate starting point is the Court of Appeal in ***R (on the application of Mynydd v Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy*** [2018] EWCA Civ 231 which has set out comprehensively the principles guiding appropriate assessments.

⁴ This is because it is stated that autonomous measures (principally relating to technological improvements reducing vehicle emissions unrelated to the Project and which will happen irrespective as to the Project) will offset the harm caused by the Project

6. SPAs are, by definition, designated because they are the areas most suitable in England for the conservation of the QFs - Art 4 of the Birds Directive⁵. Their boundaries are drawn around areas fitting that description – and are not drawn to include areas which do not. As a general rule, areas are included only if they do or could contribute to the conservation of the QFs⁶.
7. What is meant by the integrity of a European site (here the SPA) was considered in *Sweetman v An Bord Pleanála* (Case C-258/11) [2013] 3 CMLR 16 – see Advocate General @ [54]-[56] endorsed by the Court @ [39] of its judgment. “Integrity” is “the essential unity of the site”; “the continued wholeness and soundness of the constitutive characteristics of the site concerned”. The relevant constitutive characteristics of the site are “those in respect of which the site was designated and their associated conservation objectives” such that the central question is – why was this site designated and what are its COs? Thus the site needs to be preserved in (or restored to) favourable condition – namely the “lasting preservation of the constitutive characteristics whose preservation was the objective justifying the designation”.
8. Managing Natura 2000 (para 4.6.3) comments that the “integrity of the site involves its ecological functions. The decision as to whether it is adversely affected should focus on and be limited to the conservation objectives.”
9. It follows that the Conservation Objectives are fundamental to the assessment of integrity – see *R (RSPB) v. Secretary of State for Environment Food and Rural Affairs and British Aerospace* [2015] EWCA Civ 227 @ [7] (“BAe”). The COs “mean what they say” [21] and whilst they should not be construed as enactments they must be read “in a common-sense way, and in context” [21]. In that case a repeated cull which would maintain the population at a level below that at designation was contrary to the CO’s properly understood and the assessment of integrity was thus flawed.

⁵ “Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species....”

⁶ I have seen no evidence here that the SPA boundaries were wrongly drawn or that somehow the woodland was included by mistake and without regard to the functions it provided for the QFs

The Conservation Objectives here

10. As shown in BAe, the COs mean what they say and it is necessary to read the COs in a common-sense way in their context. That context naturally includes the underlying purpose of the designation in the first place and the extent of that designation⁷.

11. The COs are:

“With regard to the SPA and the individual species ...for which the site has been classified...:

Ensure that the integrity of the site is maintained or restored as appropriate, and ensure that the site contributes to achieving the aims of the Wild Birds Directive, by maintaining or restoring:

- ***the extent and distribution of the habitats of the [QFs];***
- ***the structure and function of the habitats of the [QFs]***
- ***the supporting processes on which the habitats of the [QFs] rely***
- ***the population of each of the [QFs]; and***
- ***the distribution of the [QFs] within the site.***

This document should be read in conjunction with the accompanying Supplementary Advice document which provides more detailed advice and information to enable the application and achievement of the Objectives set out above”.

12. It is to be noted that:

- a. the operative provisions apply both to “the SPA and the individual species” – they are not focussed just on the species but on the SPA which sustains them;
- b. it is that site whose integrity is to be maintained or restored;
- c. the site must further contribute to achieving the aims of the Directive;
- d. bullets 1, 2 and 5 are focussed on the habitats “of” the QFs – thus primarily here the heathlands (although see use of woodlands by Nightjar – and on RHS’s case also Woodlark - for feeding);
- e. bullet 3 is concerned with the supporting processes on which those habitats rely. This is, by definition, a wider CO than one covering the extent, distribution, structure and function of those habitats under bullets 1 and 2. The supporting

⁷ It is not said here that any of the land with which this Opinion is concerned makes no contribution to the SPA – indeed it is acknowledged that the woodland serves a food resource function for the QFs

processes for the habitats of the QFs may, and (as here) often do, extend beyond the physical extent of those habitats alone. Thus, a supporting process may include natural irrigation or drainage which in turn may be dependent on processes, land and measures beyond the habitats directly used by the QFs. Here the physical extent of the supporting processes plainly extends to the woodlands and to processes in those woodlands which secure the food resource (see HE Submission para 22). The woodland thus provides “a supporting process” on which the “habitats of the QFs rely” (as appears to be acknowledged by HE); and

- f. the Supplementary Advice is incorporated by reference providing more detailed advice to enable the achievement of the objectives. That document is thus designed to provide the granular detail to achieve those headline COs.

13. Pausing there, the headline COs cover, as applicable, the whole SPA and are concerned with the unity and ecological purposes of the whole SPA and the lasting preservation of its constituent characteristics including through restoring its supporting processes. The key relevant role of the woodland to the QFs is to support the food resource available to the birds in their feeding habitats. The supporting processes including on land beyond the actual habitats of the QFs are fundamental to the success of any SPA and provide the basic rationale for bullet 3. HE’s approach pays insufficient heed to the purpose of bullet 3.

The Supplementary Advice

14. The Supplementary Advice sets out a range of complimentary measures which combined are designed to achieve the headline COs. It is not enough that one relevant attribute or target may be met – they are an interlinking web of targets which in total are designed to secure the integrity.

15. The Supplementary Advice in turn incorporates the Designated Sites search tool setting out the “Feature Condition Status” (page 3 of 21 of the Supplementary Advice), the Natura 2000 Standard Data Form providing Further Information (page 3 of 21) and the Air Pollution Information System (in Tables 1 - 3 of the Supplementary Advice. From the former, it appears to be clear that the SPA is not meeting its COs and, in particular, even using HE’s predictions of improvements in AQ over time, the AQ/ND objective in the

woodland (and on the heathland) is nowhere near being met (see also the TBA SPA Site Improvement Plan referred to in the tables).

16. The SPA *including woodland* is described at page 4 of the Supplementary Advice. The “principal”, but not only, habitats supporting the QFs are the heathland and rotationally managed coniferous plantation woodlands (page 4). To the extent that any of the woodland is “rotationally managed coniferous plantation woodland”, the Supplementary Advice thus makes clear that this is a *principal* habitat supporting for the qualifying species. I do not know if there is any such woodland but if there is, this sentence alone seems to be me to be (at the lowest) a clear indication that the AQ/ND targets apply to it. HE has not addressed this point.

17. In any event, the “Supplementary Advice” referred to in the COs is then set out in the tables – one for each species⁸.

18. The first section of each of the tables is concerned with “Supporting habitat (both within and outside the SPA): function/supporting processes”. This thus covers *inter alia* bullet 3 of the COs referred to above – supporting processes. Its ambit may, expressly, even extend beyond the SPA itself - “both within and outside” “in order to achieve this target”.

The Air Quality Attribute Target

19. Taking the Nightjar table as an example, the “air quality” attribute target under this section is 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 [“APIS”]. APIS gives the nitrogen critical load for woodland as 5 – 15kg N/ha/yr for Nightjar and Woodlark.

20. The heading to the table within the APIS has a link to “guidance”. That guidance makes clear that (where lichen protection is not a key issue) the recommended value is 10kg

⁸ there are separate tables for each qualifying species but the structure is all the same.

N/ha/yr (p6) to protect vegetation and soil processes which, of course, both impact invertebrate resource.

21. The suite of documents thus makes clear that the COs of the SPA include supporting processes which include AQ/ND and for these woodlands a target of 10kg N/ha/yr is set⁹. On careful analysis therefore one can see a direct chain from the COs to the application of the AQ/ND target (column 3 of the Supplementary Advice) to the woodland:

- a. CO bullet 3 – supporting processes;
- b. text below the COs – incorporating the Supplementary Advice – setting out more detail as to how the COs are to be achieved;
- c. Table 1 (Nightjar, as an example) – Attributes – covering the required supporting processes and setting a target by reference to APIS; and
- d. APIS setting a target for the woodland of 10kg N/ha/yr.

22. I do not consider that there is any ambiguity or scope for uncertainty as to that chain. In my opinion, the correct construction of the COs as a matter of law is as above. The logic of *BAe* applies.

23. The “Supporting and/or Explanator Notes” text is consistent with that. It states that “the structure and function of the habitats which support the SPA populations are sensitive to changes in air quality”. The woodland is a habitat which supports the SPA population, in particular, by contributing to its food resource. Its “structure and function” is what allows it to so contribute to the QFs. I cannot read “habitats which support the SPA populations” as limited to their nesting, feeding or roosting habitats. The latter habitats are the ones covered by bullets 1, 2 and 5 but the “support” habitats can be and here are wider (bullet 3). HE’s approach appears to pay insufficient heed to the ambit and purpose of bullet 3.

⁹ I have not seen any scientific evidence which shows that the upper end of the range (15) should be used instead and in any event on my understanding of HE’s data, even if the upper end of the range was used the woodland would not achieve it now or under the predicted scenarios.

24. The next paragraph of that text appears to be the focus of HE's argument:

“Exceeding critical values for air pollutants may result in changes to the chemical status of the habitat substrate, accelerating or damaging plant growth, altering vegetation structure and composition and thereby affecting the quality and availability of nesting, feeding or roosting habitats.” [underlining added]

25. I cannot read this as somehow limiting the ambit of the target to just the nesting, feeding or roosting habitats themselves – and so reading that passage ignores its context and CO bullet 3. The Attribute is “supporting habitat” defined very widely including beyond the SPA and supporting processes (as one would expect given bullet 3). The whole of that wider habitat is the focus of the first two lines quoted above. It is because of impacts on that wide habitat that the more specific habitats of the QFs are affected – “thereby affecting”. I regard that as a classic and normal exposition of how the supporting process CO works – protect the supporting processes *in order* to protect the habitats of the QFs.

26. Any other reading artificially constrains the purpose and ambit of the supporting processes CO directly contrary to the basic framework of the COs and, as I understand it, the well accepted ecological fact of the interdependency of the habitats both those used by the QFs and those supporting that use.

27. HE relies on the final column in the APIS Nightjar tables at HE Submissions para 26. The reference in the Supplementary Advice table 1 (“Target” column 3) is to the target critical load in APIS. That is set out in column 5 of APIS table (nutrient nitrogen tab). The last column (column 11 – nutrient nitrogen tab) is not referred to in the Supplementary Advice and does not therefore assist in interpreting the COs read as a whole.

28. Even if that is wrong, and column 11 of APIS may assist in addressing the “restore as necessary” formulation in the Supplementary Advice (table 1 “Target” column), the equivalent table for woodlark states that for that species there is “potential negative impact on species due to impacts on the species’ broad habitats”.

29. “Food availability” is a separate Attribute for each of the Supplementary Advice tables (e.g. see page 6 for Nightjar): “maintain or restore the distribution, abundance and

availability of key prey items...”. The explanatory text explains that: “The availability of an abundant food supply is critically important for successful breeding... As a result...direct or indirect impacts which may affect distribution, abundance and availability of prey may adversely affect the population”. (Emphasis added). This is part of the interlinking web of attributes which I refer to at paragraph 14 above and which combined serve to secure the COs. It is common ground that one “indirect” impact which may affect abundance is AQ in the woodland. This Attribute thus strengthens the view I have reached above.

30. In my opinion, it follows that the COs properly understood and interpreted in accordance with their purpose (and the purpose of the legislation as a whole) mean that the AQ/ND targets apply to the woodland. I have seen no contrary analysis which addresses the role of bullet 3 or which considers the clear chain to which I have referred above¹⁰.

31. It follows that the impact of the Project on the AQ of, and ND in, the woodland falls to be considered in the appropriate assessment as a separate element. I have therefore reached the clear conclusion that HE’s Submission is wrong in law and has approached the exercise from a wrong understanding of the CO. That error needs to be remedied before any consequential gaps in the science, the evidence or the analysis can be identified and filled.

Implications

32. HE contends that further assessment is unnecessary because, it says, having assessed AQ/ND in the woodland and its impacts on the insect resource, the conclusion has been reached that the AQ/ND will not adversely affect the current position or the current insect resource [see e.g. HE Submission para 29] largely because of the autonomous measures. That approach seems to me to wrongly treat absence of a net worsening (once off-setting autonomous measures are taken into account) as sufficient. That reveals a misunderstanding of the role of COs in SPAs which are not in favourable condition and the “restore” imperative. Here the CO is to *restore* the supporting processes (bullet 3) to the level necessary for the favourable condition of the QFs by *inter alia* achieving the AQ/ND target. Not only is that target nowhere near being met (and thus this ecological element

¹⁰ I will of course consider any contrary analysis which is provided.

not at the level it needs to be to secure favourable condition) but the Project will pull against its achievement by making the position worse than if the Project did not go ahead. I do not comment on the quantum of effect, but if that effect is significant, then I fail to see how that cannot be relevant to the integrity question.

33. On the assumption (Compton para 207) that exceedances of the AQ/ND critical load alone would not demonstrate an adverse effect on integrity, it would be necessary to undertake the sort of analysis referred to in that paragraph – where are the exceedances, what is the impact of the exceedance on the invertebrate resource (compared to if the target was achieved) and what impact does that then have on the QFs.

34. HE rely on future projections of autonomous measures which show that with the Project the position will not get worse (HE's repeated position). I consider that that is the wrong and too low a test. "The invertebrate assemblage will not change and will continue to function in its current form" [HE Submission para 23] is the clearest example of this wrong test being applied. The reason is that: (1) if the Project alone (without the offsetting benefits of autonomous measures) will make the existing unfavourable condition worse or prevent or delay it improving; and (2) if, thus, the future possible benefits of the autonomous measures which may otherwise assist in meeting the target will instead be used up to mitigate the impacts of the Project, then that impact itself poses a risk of an adverse impact on the integrity of the SPA.

Alternatives

35. Taking the Project alone, unless it can be shown that the Project will not impact the AQ/ND targets (10kg N/ha/yr) in the woodland, the integrity test may be failed such as to trigger consideration of alternatives which have lesser AQ/ND implications. On this, HE contends (HE Submissions paras 45 – 50) that RHS's alternative does not better respect the integrity because the AQ/ND effects of it are confined to the woodland – in other words the range of alternatives is limited by what I consider to be HE's wrong interpretation of the COs. In my view, for the reasons set out above, AQ/ND improvements to the woodland are relevant and a scheme which has lesser AQ/ND impacts on the woodland may thus be a relevant alternative.

36. The RHS alternative appears feasible. Applying established principles, in this scenario it would fall to be considered. *Plan B Earth v. Secretary of State* [2020] EWCA Civ 214 (27th Feb 2020) is not on point.

37. Applying basic principles on the facts is a matter for the decision maker but I have not seen any basis related to the COs which would justify excluding the RHS scheme when the COs are properly understood.

Compensatory Measures

38. As I understand it, a key compensatory measure for the land take from the SPA is the management and habitat restoration of the existing woodlands in the SPA to heathland. I do not assess the technical detail but plainly the critical load target will be relevant to that assessment. I note that the AQ/ND in SPA Enhancement Area E2 will increase [Freeths' Submission para 173-191] and that increase does not appear to have been assessed.

David Forsdick QC

Landmark Chambers

7th December 2020