M25 junction 10/A3 Wisley interchange TR010030

9.157 Applicant's Response to Secretary of State's Letter - 20 January 2021 - legal opinion written by Michael Humphries QC and Caroline Daly

Planning Act 2008

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Development Consent Order 202[x]

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1. Introduction

1.1.1 This document contains a legal opinion written by Michael Humphries QC and Caroline Daly, both of Francis Taylor Building, on behalf of Highways England.

1.1.2 This document should be read in conjunction with the following:

- 9.154 Applicant's comments in response to the submissions of the Royal Horticultural Society on Habitats Regulations Assessment matters;
- 9.155 Other information in respect of environmental effects requested by the Secretary of State in relation to his Replacement Land proposals;
- 9.156 Other environmental information requested by the Secretary of State in respect of his Replacement Land proposals to inform the Appropriate Assessment; and
- 9.158 Figure showing Highway's England's interpretation of the Secretary of State's Replacement Land proposals.

HIGHWAYS ENGLAND'S APPLICATION FOR DEVELOPMENT CONSENT TO MAKE IMPROVEMENTS TO THE M25 JUNCTION 10 / A3 WISLEY INTERCHANGE

SHORT NOTE ON LEGAL ISSUES BY MICHAEL HUMPHRIES QC AND CAROLINE DALY

SECRETARY OF STATE'S LETTER OF 20 JANUARY 2021 – REQUEST 1

1. In the Secretary of State's letter of 20 January 2021 he makes the following request of the Applicant (Highways England):

Please would the Applicant provide information, to supplement the information provided in its response of 19 November 2020, to reflect the proposed amount of RL to be provided in the DCO, as set out below. It is the same amount of RL as suggested in the Secretary of State's letter of 4 November 2020 but with one addition. The additional information should include the Applicant's consideration of whether any new or different significant environmental effects <u>of any nature</u> would be likely as a consequence of the proposed amount of RL to be provided.

2. The information requested has been provided by the Applicant in the form of separate notes [Documents 9.155 and 9.156] prepared by expert environmental consultants.

<u>Environmental Impact Assessment</u>

3. The first part of this short legal note focusses on a related issue in the Freeths submission dated 19 November 2020 ('the Freeths note of 19/11/20') on behalf of RHS in response to question 4 of the Secretary of State's letter of 4 November 2020. Section 2 of the Freeths note of 19/11/20 made submissions on the 'legal requirements' of an environmental statement and concluded that, (a) were the Secretary of State to reduce 'replacement land' provision in the DCO then the Environmental Statement would become 'inaccurate and out of date' (para 2.8), and (b) that because of regulation 20 of the <u>Infrastructure Planning (Environmental Impact Assessment) Regulations 2017</u> ('the EIA Regs'), it *"would be necessary for the Secretary of State to abandon the current DCO application and start again, with a new ES properly reflecting the amended DCO Scheme"* (para 2.9). We do not agree with the conclusion of the Freeths note of 19/11/20 that

the Secretary of State cannot lawfully grant development consent with a reduced 'replacement land' provision.

4. In our view the correct legal analysis is as follows (all underlining added):

   a. The Applicant (Highways England) has not sought to 'change' the application to reduce the 'replacement land' provision in the DCO; indeed, it has made it clear that it disagrees with any reduction in 'replacement land' [see HE Response to Secretary of State's letter of 4 November 2020 (Doc 9.150 para 3.1.3)], but has nevertheless commented upon the reduction in replacement land being considered by the Secretary of State in his letters, as requested. Reg. 5(2) of the EIA Regs states, in terms that *"The EIA must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on …"*. This is reinforced by reg. 14(2) that also provides that *"An environmental statement is a statement which includes at least— (a) a description of the proposed development comprising information on the site, design, size and other relevant features of the development; (b) a description of the likely significant effects of the proposed development on the environment; …"*. The expression 'the proposed development' is used throughout the EIA Regs and, in this case, *"the proposed development"* (i.e. the development proposed by the Applicant and which is assessed in the Environmental Statement ('ES')) does not include a reduced 'replacement land' provision. Thus the ES accurately describes 'the proposed development' and the environmental effects of 'the proposed development' and no party, including RHS, has suggested otherwise in respect of 'the replacement land'.

   b. The Secretary of State is entitled to make an order granting development consent ('a DCO') with modifications. Section 114(1) of the Planning Act 2008 ('PA 2008') states that *"When the Secretary of State has decided an application for an order granting development consent, the Secretary of State must either - (a) make an order granting development consent, or (b) refuse development consent."* Section 114(2) states that Secretary of State may make regulations setting out any procedure he should follow if he proposes to make an order on terms materially different from those proposed in the application, but he has declined to do so; in other words, the inherent power to grant development consent on terms materially different from those proposed is not constrained by any procedure. In reality, in granting development consent the Secretary of State frequently 'modifies' the terms of a draft DCO, often to accommodate the objections of Interested Parties or Affected Persons.

c. Although the Secretary of State may make a DCO on terms different from those applied for, reg. 21(1) of the EIA Regs provides that *"When deciding whether to make an order granting development consent for EIA development the Secretary of State must - (a) examine the environmental information; (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph[1] (a) and, where appropriate, any supplementary examination considered necessary; (c) integrate that conclusion into the decision as to whether an order is to be granted; and (d) if an order is to be made, consider whether it is appropriate to impose monitoring measures."* The term 'environmental information' is important in this context.

d. Reg. 3(1) of the EIA Regs defines this term as follows: *"'environmental information' means the environmental statement (or in the case of a subsequent application, the updated environmental statement), including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations and any representations duly made by any other person about the environmental effects of the development and of any associated development;"*. Thus the 'environmental information' that the Secretary of State must 'examine' under reg. 21 comprises (a) the ES that reports the environmental effects of 'the proposed development' (see above), (b) further information, (c) any other information, and (d) certain 'representations'.

e. Regulation 3(1) makes clear that *"'further information' means additional information which, in the view of the Examining authority, the Secretary of State or the relevant authority, is directly relevant to reaching a reasoned conclusion on the significant effects of the development on the environment and which it is necessary to include in an environmental statement or updated environmental statement in order for it to satisfy the requirements of regulation 14(2);"*. The Secretary of State's request for 'information' is, rightly, not expressed to be a request for 'further information' as defined (and used throughout the EIA Regs) and, furthermore, it is not suggested that the ES does not comply with the requirements of reg. 14(2), which (as discussed above) relate to 'the

[1] Reg 21(2) of the EIA Regs requires that the Secretary of State's "reasoned conclusion referred to in paragraph 1(b)" be up to date at the time that the decision as to whether the order is to be granted is taken. The reasoned conclusion referred to in paragraph 1(b) is a conclusion on the "significant effects of the proposed development". As explained in paragraph 4a., the Applicant has not sought to change the proposed development. The environmental information submitted by the Applicant describes the significant effects of the proposed development and remains up to date. It provides the appropriate information to allow the Secretary of State to discharge his duty in respect of Reg. 21(2).

proposed development'. Indeed, the Secretary of State's letter of 20 January 2021 states in terms that *"This letter is without prejudice to the Secretary of State's decision whether or not to grant development consent for the M25 Junction 10/A3 Wisley Interchange Improvement or the content of the DCO should it be granted, and nothing in this letter is to be taken to imply what that decision might be."* Thus 'the proposed development' remains as in HE's application before the Examining Authority (together with any 'changes' to the proposed development requested by the Applicant and accepted by the Examining Authority) and there is no suggestion that 'further information' is required in relation to that development; rather, the information is requested in relation to a possible 'modification' of the terms of the order that would reduce the 'replacement land' provision in the proposed development.

f. The other category of 'environmental information' in the EIA Regs is 'any other information'. Reg. 3(1) provides that *"'any other information' means any other substantive information provided by the applicant in relation to the environmental statement or updated environmental statement"*. In this case, the Secretary of State has simply requested the Applicant to provide 'information' in the context of his consideration of 'replacement land' and this is clearly 'any other information' within the above definition. In other words, if the Secretary of State does decide to grant development consent on terms materially different from those proposed in the application, he wishes to have 'environmental information' (in this case 'any other information') on which to do so in order to comply with the requirements of reg. 21.

g. Reg. 20 of the EIA Regs is relied upon in the Freeths note of 19/11/20 for its conclusion on the lawfulness of the Secretary of State's decision, should he grant development consent with reduced 'replacement land' provision. Reg. 20 applies *"(1) Where an Examining authority is examining an application for an order granting development consent and paragraph (2) applies …"* and para (2) states that *"This paragraph applies if - (a) the applicant has submitted a statement that the applicant refers to as an environmental statement; and (b) the Examining authority is of the view that it is necessary for the statement to contain further information."* It is clear that (a) an Examining Authority is not currently examining an application for development consent and so reg. 20 is simply not engaged, but (b) even if it was, there has rightly been no request for 'further information' for the reasons above. Reg. 20 is not, therefore, a reason for *"the Secretary of State to abandon the current DCO application and start again, with*

a new ES properly reflecting the amended DCO Scheme" (the Freeths note of 19/11/20 para 2.9).

5. It follows from the above that the Secretary of State is not precluded from making the modification to the draft DCO considered in his letter of 20 January 2021 as if he chooses to do so, he will have taken into account 'environmental information' (being 'any other information' provided by the applicant) that will inform him of any materially different likely significant effects of such a decision.

Natural Environment and Rural Communities Act 2006

6. We also address section 8 of the Freeths note of 19/11/20, where it made a submission that the grant of consent for the DCO Scheme with a reduced amount of 'replacement land' would be contrary to the Secretary of State's duty under s.40 of the Natural Environment and Rural Communities Act 2006. This is repeated at section 4 of the Freeths note of 4 December 2020.

7. We do not agree that a decision to grant the DCO Scheme with a reduction in 'replacement land' would be inconsistent, as a matter of law, with the s.40 duty.

8. Section 40(1) states:

"The public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity."

9. The duty is to have regard to a matter, namely the purpose of conserving biodiversity, in the exercise of a public authority's functions. As Mr Justice Cranston said in relation to s.40(1) and other similar provisions in *Howell v Secretary of State for Communities and Local Government* [2014] EWHC 3627 (Admin) at [46]:

"To have regard to a matter means simply that that matter must be specifically considered, not that it must be given greater weight than other matters, certainly not that it is some sort of trump card. It does not impose a presumption in favour of particular result or a duty to achieve that result. In the circumstances of the case other matters may outweigh it in the balance of decision-making. On careful consideration the matter may be given little, if any, weight."

10. The s.40 duty does not mandate a particular outcome in respect of the Replacement Land or indeed any other aspect of the Scheme of relevance to the conservation of biodiversity. So long as the Secretary of State pays regard to the duty in making consideration of whether to grant consent for the DCO Scheme, the duty will be discharged.

SECRETARY OF STATE'S LETTER OF 20 JANUARY 2021 – REQUEST 2

11. In the Secretary of State's letter of 20 January 2021 he makes the following further request of the Applicant:

The Secretary of State requests comments from the Applicant on the submissions of the Royal Horticultural Society ("RHS") relating to the Habitats Regulations Assessment as contained in RHS' Response to the Secretary of State's letter dated 4 November 2020 (RHS/RMCo/13) and its Response to the Secretary of State's letter dated 27 November 2020 (RHS/RMCo/14). In particular, the Secretary of State invites comments on the Opinion from David Forsdick QC that was appended to the response.

12. In respect of RHS's Response to the Secretary of State's letter dated 27 November 2020 (RHS/RMCo/14), which includes a note from Freeths of 7 December 2020 and an opinion of David Forsdick QC of the same date ('the DFQC opinion'), we respond to the submissions made that relate to the woodland buffer and air quality as follows.

13. The Freeths note of 7 December 2020 and the DFQC opinion submit that the Air Pollution Information System ('APIS') air quality and nitrogen deposition targets provided for and referred to in Natural England's European Site Conservation Objectives: Supplementary Advice on Conserving and Restoring Site Features, dated 9 May 2016 ('the Supplementary advice') for each of three qualifying features of the Thames Basin Heath SPA must be applicable to the woodland buffer within the SPA. The implication, it is said by Freeths and the DFQC opinion, is that the Applicant has erred in law in its approach to the assessment of whether it can be concluded that there will not be an adverse effect on the integrity of the SPA.

14. The Freeths note of 7 December 2020 submits that when the APIS targets are applied to the woodland buffer, the Secretary of State cannot 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 (see paragraphs 30-31 of the note).

15. We do not agree with the analysis that the Applicant's approach is based on an error of law, for the reasons that we explain below. We also do not accept that the conclusion of the Freeths note is well founded, namely that the Secretary of State cannot be certain that the Scheme will not give rise to an adverse effect on the integrity of the SPA as a consequence of its impact on the woodland buffer as regards air quality matters. We rely upon the substantial expert ecological evidence presented on behalf of the Applicant [see, in particular, document 9.154], which concludes that the Secretary of State can conclude that there will be no adverse effect on the integrity of the Thames Basin Heath SPA arising from air quality impacts on the woodland buffer. The implication of this conclusion is that there is no need to make consideration of alternatives in this regard, and the suggestion made by the Freeths note of 7 December 2020 is not well founded.

16. Mr Forsdick's opinion, to which the Freeths note of 7 December 2020 refers, relies upon the following key propositions in order to come to the conclusion that the Applicant's approach is in error (underlining added):

    a. In order to assess whether there is an impact on the 'integrity' of an SPA it is necessary to focus on the site's *"conservation objectives"* ('COs')(Opinion, paras 5-9);
    b. In this instance, the COs for the Thames Basin Heaths SPA include 'bullet 3' – *"the supporting processes on which the habitats of the qualifying features rely"* (para 11);
    c. The *"supporting processes"* extend to the *"Woodlands and to the processes in those woodlands which secure the food resource"* and *"the woodland thus provides a 'supporting process' on which the 'habitats of the qualifying features rely'"* (para 12(e));
    d. The SPA Supplementary advice refers to a nitrogen critical load target in APIS of 5-15kg N/ha/yr in coniferous woodland for nightjar and woodlark at the Thames Basin Heath SPA and to a recommendation of 10kg N/ha/yr to protect vegetation and soil processes, which "of course, both impact invertebrate resource" (paras 19-20);
    e. There is a 'chain' of logic running from the COs to a target of 10kg N/ha/yr for the coniferous woodland (para 21);
    f. The 'Supporting and/or Explanatory Notes' in the Supplementary advice are consistent with the 'chain' of logic and include the statement that *"the structure and function of the habitats which support the SPA populations are sensitive to changes in air quality".* Mr

Forsdick QC *"cannot read"* that as limited to *"nesting, feeding or roosting habitats"*, as *"'support' habitats can be and here are wider"* (paras 23-25);

g. The APIS advice that nightjars are not sensitive to nitrogen impact on coniferous woodland (see ref to MHQC/CD Advice para 26) does not assist in interpreting the COs read as a whole because this element of the APIS advice is not referred to in the Supplementary Advice. In the alternative, if this element of the APIS Advice is relevant to the 'restore as necessary' formulation in the Supplementary Advice, the equivalent table for woodlark does identify a potential negative impact (paras 27/28);

h. The air quality in the woodland falls to be considered in the Appropriate Assessment as a separate element (para 31); and

i. The SPA is not in 'favourable condition' and the CO requires the Applicant to *"restore"* such that 'not adversely affecting the current position' is not sufficient (para 32).

17. With regard to point (a) above, we agree with David Forsdick QC that the basic legal framework regarding the correct approach to take in ascertaining whether a project will not adversely affect the integrity of the site concerned is clear and not in dispute (para 5). We agree that in order to assess whether there is an impact on the 'integrity' of an SPA, the site's COs are fundamental and it is necessary to place focus upon them. Where we fundamentally disagree with Mr Forsdick's conclusions is in the way he has then interpreted those SPA conservation objectives, as he says, without *"considering the scientific material or technical justifications for the judgements reached by HE or others"* (para 1). On those issues Highways England relies on the technical analysis provided by its consultant ecologist, Paul Watts, and the evidence of Natural England, Surrey Wildlife Trust and the RSPB; all of which support its position.

18. The Applicant has already provided a summary of the correct legal approach in [REP4-005] (see pp. 10-11, 16). In that document, it was said that the critical question to be addressed by an appropriate assessment is explained by Advocate General Sharpston in paragraph 50 of her opinion in the case of *Sweetman* (Peter Sweetman and Others v An Bord Pleanála Case C-258/11), and is to ask 'what will happen to this site if this plan or project goes ahead; and is that consistent with maintaining or restoring the 'Favourable Conservation Status' of the habitats or species concerned'. Whilst the concept of favourable conservation status does not apply to an SPA, the question can be rephrased accordingly to refer instead to 'achieving the aims of the Wild Birds Directive'.

19. REP4-005 also refers to the EC guidance (European Commission (2019) Managing Natura 2000: The provisions of article 6 of the Habitats Directive 92/43/EEC), which explains the concept of the 'integrity of the site' at section 4.6.4, which states that *"It is clear from the context and from the purpose of the Directive that the 'integrity of a site' relates to the site's conservation objectives… In other words, if none of the habitat types or species for which the site has been designated is significantly affected then the site's integrity cannot be considered to be adversely affected."*

20. Whereas Special Areas of Conservation are designated for their habitats per se, Special Protection Areas are designated for the bird species that constitute the site's qualifying features along with *"their eggs, nests, and habitats"* (see article 1(2) of the Wild Birds Directive 2009/147/EC).

21. The Thames Basin Heaths SPA is a protected area in which the bird species for which it qualifies as a protected site do not make use of all physical locations within the SPA, most particularly in the context of the Scheme, the woodland buffer. Mr Watts explains the function of the woodland buffer at paragraphs 2.1.54-2.1.55 of document 9.154.

22. Natural England's guidance has clearly recognised that a site's conservation objectives are unlikely to apply equally to all parts of a site (see paragraph 4.18 of Natural England's approach to advising competent authorities on the assessment of road traffic emissions under the Habitats Regulations).

23. Where a site is classified as an SPA the integrity test cannot be answered one way or another by simply considering, for example, whether a critical load or level is exceeded. Instead, it is necessary to consider how any predicted change in air quality might undermine the achievement of the site's conservation objectives, read in a *"common sense way, and in context"* (*R (RSPB) v. Secretary of State for Environment Food and Rural Affairs and British Aerospace* [2015] EWCA Civ 227 at [21]).

24. As referred to in REP4-005 and in our submissions of 19 November 2020, *Compton Parish Council v Guildford Borough Council* [2019] EWHC 3242 (Admin) ('the Compton Case') explains the correct approach to be taken to air quality considerations and nitrogen deposition in woodland habitat in the same SPA. Paragraph 207 states:

"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..."

25. Paragraph 207 makes clear that the assessment of air quality impacts should focus on the protected species (i.e. the qualifying features) and their habitats. The Compton Case sets out an approach that is entirely consistent with the air quality assessment undertaken by the Applicant, which is summarised by Mr Watts at paragraphs 2.1.90-2.1.99 in document 9.154.

26. With regard to points (b)-(f) above, Mr Watts's analysis in document 9.154 explains why the stages in Mr Forsdick's 'chain' of logic are incorrect and why the APIS targets, as referred to in the Supplementary Advice, are not applicable to the woodland buffer. Mr Watts explains that the principal habitats of the qualifying features do not include the woodland buffer because the reference to coniferous woodland as a principal habitat in the Supplementary Advice is to rotationally managed coniferous woodland, and the woodland buffer does not fall within this category. The woodland buffer is not a supporting habitat of the qualifying features (see paragraphs 2.1.51-2.1.53 of document 9.154). Its potential contribution to the qualifying features is the provision of an additional invertebrate resource to nightjars only.

27. Mr Watts also explains that the reference in APIS to 'coniferous woodland' is to the 'rotationally managed coniferous woodland' where it provides a supporting habitat to the qualifying features, and so the APIS targets do not apply to the woodland buffer (see paragraphs 2.1.61-2.1.74 of document 9.154).

28. Further, Mr Watts explains that the conservation objective 'bullet 3' is not relevant to the woodland buffer in the Ockham and Wisley SSSI component of the SPA (see paragraphs 2.1.56-2.1.60 of document 9.154) because the woodland buffer's potential contribution is to the

invertebrate resource of the nightjar and this resource is not relied upon by the habitats (i.e. the heathland and, where relevant within the wider SPA, rotationally managed coniferous woodland) of the qualifying features in order for those habitats to function. It is not a "supporting process on which the habitats of the QFs rely".

29. There is, therefore, no 'chain' of logic between the conservation objective upon which Mr Forsdick relies and the air quality and nitrogen deposition targets in APIS, as referred to in the Supplementary advice.

30. Mr Watts's evidence demonstrates that Mr Forsdick's approach to the conservation objectives and the APIS targets in respect of the woodland buffer are incorrect and do not have an evidential basis in the ecological context of the site. We consider that there is no error of law in the Applicant's approach to the appropriate assessment in the context of the woodland buffer, and that it has correctly understood the conservation objectives, in their proper context.

31. Mr Watts provides a summary of the Applicant's approach to the assessment of air quality within the woodland buffer at paragraph 2.1.90-2.1.99 of document 9.154. With regard to point (h) above, the Applicant has considered air quality in the appropriate assessment, but it has concluded that the APIS targets are not relevant or applicable to the consideration of the impact of the Scheme on the qualifying features and their supporting habitats in the context of the woodland buffer because it provides no supporting habitat for the protected species. Insofar as the woodland buffer provides a potential invertebrate resource for the nightjars, the Applicant's assessment, having regard to air quality and nitrogen deposition with the Scheme in place, is that this resource will not be adversely affected by the Scheme and so an adverse effect on the integrity of the SPA arising from air quality can be ruled out. Contrary to what is suggested by Mr Forsdick, in response to point (i) above, the current baseline is the appropriate baseline for the invertebrate species within the woodland buffer, and there is no need for the Applicant to seek to 'restore' the invertebrate species of the woodland buffer due to their present condition.

32. Finally, with regard to paragraph 43 of the Freeths note of 7 December 2020 and paragraph 38 of Mr Forsdick's advice, we do not accept that any *"required assessment"* regarding air quality in respect of the compensatory enhancement area E2 in the woodland buffer has been omitted. As we explained at paragraph 35 of our 19 November 2020 submissions, the 'integrity' test that is relevant to the consideration of whether or not a scheme will adversely affect a European site does not apply to the consideration of compensatory measures, the purpose of which is *"to*

ensure that the overall coherence of Natura 2000 is protected" (Reg 68 of the Habitats Regulations). The basis for the selection of each compensatory measure, including E2, has been explained in detail to the Secretary of State, including the references in our submissions of 19 November 2020 (see paragraphs 59 and 60 in relation to E2 and the creation of a heathland green bridge between Ockham Common and Wisley Common).

Michael Humphries QC

Caroline Daly

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