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National Highways
The Applicant

Your Ref:
Our Ref: TR010032
Date: 14 July 2023

Dear Dr Wright,

Application by National Highways for an Order Granting Development Consent for the Lower Thames Crossing

Planning Act 2008 (as amended) sections 51 and 89(3) and the Infrastructure Planning (Examination Procedure) Rules 2010 – Rule 9

Procedural Decision¹ addressing proposed changes to the Application

Provision of Advice

Thank you for your letter Dated 3 July 2023 (the Change Notification Letter), and the accompanying Notification Report giving notice of National Highways' intention to submit a request to make changes to the application for the Lower Thames Crossing (the Project). The Change Notification Letter [[Link](#)] and Notification Report [[Link](#)] have been published on the project page of the National Infrastructure Planning website and can be found in the Examination Library.

In accordance with The Planning Inspectorate's 'Advice Note 16: How to request a change which may be material' (AN16), the Change Notification Letter [[Link](#)] is accompanied by a Notification Report [[Link](#)] identifying the nature of the changes proposed, which informs the ExA of the following relevant points:

- There are seven proposed modifications.
- It is the Applicant's initial view that only two of the seven modifications constitute "formal changes" to the Project for which a consultative process is required (EC01 and EC02 in the Notification Report), and that five of the seven modifications constitute amendments of limited scope and effect, which may be taken up in the Examination process without further consultation.

¹ Procedural Decisions are recorded in a log [[PD-007](#)], to which the decisions made here have been added starting at number 9 (following on from the previous decisions that are already published).

- The two proposed “formal changes” are a result of ongoing discussions with Statutory Undertakers and would entail a realignment of utility works requiring the compulsory acquisition of additional permanent rights for Statutory Undertakers over land for long term access and maintenance.
- It is the Applicant’s initial view that neither of the two proposed formal changes constitute “material” changes to the Project and can therefore be progressed under the non-material change process shown in Figure 2 of AN16.
- The Applicant has therefore proposed to carry out a targeted non-statutory consultation for the two proposed formal changes in July and August 2023, prior to making the formal change request.
- The Applicant aims to obtain consent from all persons with an interest in the additional land affected by the proposed “formal changes” (the “additional Affected Persons”) to include such further powers of compulsory acquisition within the DCO application. If consent cannot be obtained from all additional Affected Persons, the Applicant advises that it would then comply with the procedural requirements applying to additional land set out in the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 (the CA Regulations).
- The submission date for the Change Application to address the formal changes is proposed to be at or around **Deadline 4, Tuesday 19 September 2023**.
- The Applicant advises that the other five amendments give effect to ongoing discussions with stakeholders (EA01, EA02, EA03, EA04 and EA05 in the Notification Report). These amendments would either reduce the order limits, remove permanent acquisition of rights over land and/or correct drafting errors in the DCO / Land Plans. Having regard to paragraph 2.4 of AN16, in the Applicant’s view, these amendments do not require a formal request to change the application.
- As the Applicant has already engaged with the Affected Persons impacted by the five amendments, the Applicant does not propose to undertake any further formal consultation with Interested Parties or Other Persons in relation to those amendments.
- The submission date for the proposed amendments will be at **Deadline 3, Thursday 24 August 2023**.

The applicant seeks the views of the ExA on the landowner consultation exercise proposed for the “formal changes”. Before providing this advice, it is appropriate for the ExA to consider the materiality of the proposed formal changes and amendments and their potential procedural pathways into the Examination process. Arising from this consideration, the ExA has made the following procedural decisions about the procedural pathways for the notified changes.

31.1 Procedural Pathway for the Proposed Minor Amendments (EA01, EA02, EA03, EA04 and EA05)

The ExA has considered the information provided in the Notification Report and the advice contained in AN16. It concurs with the Applicant that the minor amendments, if made, could be submitted to the ExA without the need for a formal Change Application.

Provisionally, the submission of these minor amendments at Deadline 3 as proposed by the Applicant is acceptable to the ExA.

32. Procedural Pathway for the Proposed “Formal Changes” (EC01 and EC02)

The ExA has considered the proposed “formal changes” (numbered EC01 and EC02 in the Notification Report). It agrees with the Applicant that these would constitute “changes” to the Project that would require a Change Application.

Advice

Materiality and timing

It is ultimately for the ExA to decide whether a proposed change to the application is material. The ExA does not have sufficient information at this stage to reach a view as to materiality and nor would it be appropriate to do so. That decision will be taken once the proposed amendments are submitted at Deadline 3 and the proposed formal changes are submitted at Deadline 4. The ExA agrees with the proposed timing of these submissions. However, any view on procedure arising from the timing advice set out above is given without prejudice to the ExA’s formal decisions on materiality, based on the supporting information submitted to it at the relevant Deadline in due course.

The proposed formal changes EC01 and EC02 seek to acquire additional rights over private land. It is the ExA’s provisional view that this may necessitate the Compulsory Acquisition of “additional land” as defined in Regulation 4 of the CA Regulations) and consequently may give rise to new materially different or likely significant environmental effects as a result. It will be for the Applicant to submit further supporting information, either to demonstrate that the procedural requirements of the CA Regulations have been met, or alternatively that for clearly evidenced reasons, the CA Regulations are not engaged.

As a matter of established procedure, the ExA notes that a substantial number of proposed changes to NSIP applications that seek additional land and do invoke the CA Regulations have been considered on their facts to be material changes. Previous decisions taken on their own facts do not bind the ExA in this decision (which will be taken on its particular facts), but they do provide an indicator of past outcomes based on potentially similar facts. The ExA therefore reserves its judgement on materiality at the present time until the outcome of the consultation process relating to this additional land is known.

Consultation

Whether or not the proposed changes are material, the ExA considers that in order to ensure fairness, appropriate and proportionate non-statutory consultation should be carried out before they are submitted. AN16 ordinarily requires consultation on change applications to include *all those persons prescribed in the Planning Act 2008 under section*

42 (a) to (d) who would be affected by the proposed change (giving a minimum of 28 days from the receipt of the information for responses).

However, it is noted that the Applicant intends to confine the consultation process to landowners, persons with an interest in the land, and Statutory Undertakers only. Given the relatively confined nature and area of the proposed changes, the ExA does not disagree with this targeted consultation process, but for the avoidance of doubt, the ExA advises that each person affected by the changes who is within one or more of the categories set out in section 44 of the Planning Act 2008 should be identified and consulted on the change application, for no less than 28 days.

If the ExA decides to accept the changes (whether or not they are material), all Interested Parties will have an opportunity to make representations on the changed application in writing or orally at Hearings during the Examination. At that time, the ExA will also be able to consider any requests from persons made pursuant to sections 102A and B of the Planning Act 2008 to become new Interested Parties that may arise from the consultation that has been undertaken. Nonetheless, if the ExA is not satisfied with the extent of non-statutory consultation undertaken by the Applicant, the ExA may request that further consultation is carried out to safeguard the interests of and/or inform those potentially impacted by the changes who are not already involved in the Examination.

Specifically in relation to the proposed “formal changes” EC01 and EC02 and the potential application of the CA Regulations, if landowner consent is not received for the proposed new acquisition of permanent rights over the relevant land, then a statutory notice and consultation process under the CA Regulations would appear to be engaged. If that is the case, the information prescribed by Regulation 5 of the CA Regulations will need to be submitted with the Change Application along with clarification that the procedural requirements prescribed by the CA Regulations can and will be met by the Applicant. Change requests which engage the CA Regulations must demonstrate that there is sufficient time left in the statutory Examination timescale to accommodate the procedures established within those Regulations. It should be noted that these include the necessity to repeat a substantial number of Examination procedures, including hearings which have already concluded. With reference to transcripts and recordings, such events can be conducted in an efficient manner, but they do still impose additional process and time requirements on the Examination.

Unless the Applicant is currently in a position to demonstrate that it has already received the written consent of additional Affected Persons required to meet Regulation 4 (b) of the CA Regulations (in which case it is requested to provide this evidence at Deadline 1 on 18 July 2023), it would be advisable and prudent for it to proceed on the basis that any consultation undertaken in relation to proposed “formal changes” EC01 and EC02 should meet the requirements of those regulations from the outset.

If you have any questions on the content of this letter, please contact the Case Team using the contact details at the head of this letter.

Yours faithfully,

Rynd Smith

Rynd Smith
Lead Panel Member for the Examining Authority

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