



DEADLINE 9 RESPONSE

Interested party ref no: 20035310

KENT DOWNS AONB UNIT RESPONSE TO APPLICANT'S SUBMISSIONS AT DEADLINE 8

**Response to Applicants Post Hearing Submission to ISH 11
[\[REP8-110\]](#), incorporating:**

- **Action Point 1 The Levelling-up and Regeneration Act 2023 (LURA) - section 245 (5) & (6)(a)**
- **Action Point 3 Local Landscape Character Area boundaries**
- **Action Point 4 Kent Downs AONB landscape impact assessments**
- **Action Point 7 Width of the Green Bridges**
- **Action Point 16 Nitrogen deposition compensation – spatial relationship between impact and compensation**

Action Point 1 - The Levelling-up and Regeneration Act 2023 (LURA) - section 245 (5) & (6)(a)

Section 245 (5) & (6)(a) of LURA, will amend the Countryside and Rights of Way Act 2000 in respect of the “general duty” imposed on Public Bodies dealing with functions in an AONB. Please provide a commentary on the effect of this for the Development and the assessments which have been submitted. In addition, provide a view as to the effect of the new “general duty” on the policy framework in the NNNPS (paragraphs 5.150 - 5.153). In particular, please consider the use of the wording “where possible” in the Policy and “must seek” in LURA. Please set out reasons for conclusions that the amended “general duty” does or does not affect the application of policy. Other IPs may respond by D9.

Nature of the new duty

The AONB Unit welcomes and agrees with the Applicant’s acknowledgement that the amendment will strengthen the obligation under section 85 of CROW on “relevant authorities”, the definition of which applies both to National Highways, the Planning Inspectorate, Natural England and to the DoT Secretary of State as decision maker on the DCO application.

We also agree that there is limited information at this stage about how the revised duty is intended to operate. We can advise however, that in informal briefings from DEFRA and Natural England on the new duty in advance of the Hearing, it was confirmed that this is an active duty. At the very least, it requires greater weight to be given to the need to ensure that AONBs are conserved and enhanced and that adverse impacts are avoided, minimised or adequately mitigated. Where impacts cannot be mitigated, residual impacts should be compensated for so that the overall effect of development on the AONB is one that achieves conservation or enhancement of its natural beauty.

In the absence of any guidance on the implementation of the new duty, we would draw the attention of the ExA to the Marine and Coastal Access Act 2009¹. That Act contains a requirement in section 125 – “**General duties of public authorities in relation to MCZs**” – for public authorities to ‘*exercise its functions in the manner which the authority considers best furthers the conservation objectives stated for the MCZ*’ and ‘*where it is not possible to exercise its functions in a manner which furthers those objectives, exercise them in the manner which the authority considers least hinders the achievement of those objectives*’.

Although the statutory duties are expressed in different terms, and arguably the CroW Act revision is more active, the use of the language of “furthering” particular conservation objectives means the relevant published guidance may be of some limited assistance in attributing a meaning to the new duty.

An Explanatory Note for the Marine Conservation Zones Designation was published by DEFRA in 2013.² At paragraph 23, advice on what the term ‘best furthers’ means is provided:

‘The term “best furthers” means that the public authority should proceed in the manner which is most conducive to achieving the conservation objectives of the MCZ. Where there is an overriding public interest case for an activity to be permitted despite it having a negative

¹ Marine and Coastal Access Act 2009 <https://www.legislation.gov.uk/ukpga/2009/23/contents>

² Marine Conservation Zones Designation Explanatory Note November 2013 <https://assets.publishing.service.gov.uk/media/5a7c9bc4ed915d12ab4bbddf/pb14078-mcz-explanatory-note.pdf>

impact on the MCZ, then the public authority should identify an approach to this which would “least hinder” the conservation objectives of the MCZ being achieved. Consideration should be given to whether there is another means for the activity to occur which may have a substantially lower impact on the MCZ. In the case of licensed activities, where these are considered essential but they are damaging to an MCZ, then measures of compensatory environmental benefits equivalent to the damage to the MCZ should be secured.’

Application to current policy

While we agree with the comments of the Applicant that the new Duty is relevant across all functions and not limited to planning, we do not agree with their assertion that the change merely ‘brings non-planning functions into line with planning policies which already have the equivalent effect in relation to development in AONBs’.

It is our view that the intention goes well beyond this and effectively reinforces the requirement for harm to AONBs to be avoided. It places a requirement for a higher level of satisfaction on the determining authority that all reasonable steps to achieve the furthering of the purposes have been taken along with all possible measures taken to ensure that the statutory purposes of the AONB are advanced.

We disagree with the Applicant’s comments that the amendment is not ‘outcome based’. It is our view that in order to achieve the furthering the purposes, measures that go beyond avoiding and mitigating harm arising from a Project need to be provided in addition. The outcome should be that the special character and qualities of the AONB are improved as a result of the proposals rather than harmed as little as possible.

The AONB Unit accepts that as set out at A.2.5d in the Applicant’s submission the Planning Act 2008 provides that consent may be granted where a proposal is compliant with the relevant National Policy Statement and its adverse impacts are outweighed by its benefit. This can include projects which have adverse effects on the natural beauty of AONBs. Nonetheless, as set out above, it is our view that the new duty places a requirement for a higher level of satisfaction on the determining authority that all reasonable steps to achieve avoidance of harm and measures to further the conservation and enhancement of the AONB have been taken and secured.

Effect on National Planning Policy Statement for National Networks

In respect of the Applicant’s analysis of NPSNN Paragraphs 5.150 to 5.153 set out at Table A.1, we comment as follows:

Paragraph 5.150 – We disagree with the Applicant that the amendment does not materially change the effect of this paragraph; as set out above, the replacement of the ‘duty of regard’ with the duty of ‘must to seek to further’ places a higher level of obligation on the SoS to ensure that all possible measures to conserve and enhance the natural beauty of the AONB have been taken. A requirement to “have regard” merely requires giving account to something. “Furthering”, as a duty requires active steps to ‘seek to further the purpose’ in the decision-making process and in the implementation of the scheme, should it be given permission.

Paragraph 5.151- Again, we disagree with the Applicant’s position that this paragraph is consistent with the duty to ‘seek to further’. We consider the new duty goes well beyond the current requirement which is for consideration of ‘*the detrimental impact on the environment and the landscape, and the extent to which that could be moderated*’ and makes no reference to requirements for additional measures to ensure the AONB is conserved and

enhanced. We note that the NPS is merely a policy statement approved by Parliament as a form of secondary legislation. As such, it is outweighed by the provisions of the new primary legislation.

Paragraph 5.152 – The AONB Unit does not consider the amendments to impact on the application of this paragraph.

Paragraph 5.153 – The AONB Unit once again disagrees with the Applicant’s position that this paragraph is consistent with the duty to ‘seek to further’. We consider the new duty to ‘seek to further’ goes beyond the current requirement to include measures to enhance other aspects of the environment ‘*where possible*’, which are unspecified in quantity and may not amount to a furthering of the conservation and enhancement of the AONB. “Where possible” is a qualified requirement; the requirement in the new duty is unqualified. We consider the new duty requires the Secretary of State to be satisfied that an Applicant has done *as much as is possible* to conserve and enhance achieve the purpose, when considering the scale and effect of a Project impacting on an AONB. We do not consider that the application meets this requirement in its current form and that further measures are required to demonstrate compliance with this, as set out in our submission at ISH 11.

Action Point 3 - Local Landscape Character Area boundaries

Provide more information on the design re-evaluation/assessment of significance in respect of the changes made between the 2020 application and the current application. Please specify the design changes and how these informed the re-grading of the impact of the scheme.

The AONB Unit remains of the view that neither the changes to the design set out in Appendix A to [\[REP8-110\]](#) nor the re-evaluation of the sensitivity of receptors and significance matrix referred to at A.4.3 of the Applicant's response provide sufficient justification to explain the differences in the assessment ratings, particularly given that it is confirmed that the LCA sub area boundaries had already been adjusted for the 2020 assessment.

At A.4.5.the Applicant advise that 'in terms of the significance matrix in Table 3.8.1 of Design Manual for Roads and Bridges LA 104, the significance of effect has been assessed as moderate rather than large due to the localised and contained nature of effects'. The AONB Unit strongly disagrees with the assigned significance of effect of Moderate rather than Large at Design Year on the basis of the localised and contained nature of effects. While the effects might be regarded as contained, we consider it wholly inappropriate to suggest that they are localised. The effects would extend across the entire width of the LLCA (see figure 1 below), affecting a length of approximately 2.5km of land within the AONB, one of, if not the, largest proposals to ever be proposed within the Kent Downs.

Action Point 4 - Kent Downs AONB landscape impact assessments

On a without prejudice basis, provide an assessment using the published Kent Downs AONB Unit landscape character area/sub areas boundaries in addition to the assessment already provided by the Applicant using adjusted boundaries. In addition, you may provide a commentary with reasoning setting out whether or not you consider that this alternative assessment could/should be adopted by the ExA. Other IPs can respond at D9.

Notwithstanding the AONB Unit's continued contention that the impacts to landscape character at Design Year are generally underassessed, the AONB Unit agrees with the Applicant's assessment set out in the revised landscape impact assessment tables at Appendix B that the impacts of the Project would increase in respect of impacts in the Cobham Sub Area (as a result of more of the Project falling within this Sub-area and as a result of a higher sensitivity) but would remain as reported for the Shorne Sub-area and overarching West Kent Downs LCA. We disagree there would be the assessed reduction at Construction in the Shorne Sub-Area from Major to Moderate however, given the extent and scale of works still taking place in this Sub-Area.

At A5.8 it is advised that *'The Applicant also notes that using the published landscape character area boundary in the Kent Downs AONB Landscape Character Assessment Update 2020, which follows the central reservation of the A2, introduces an element of double counting to the assessment in that the loss of the existing tree belt in the central reservation is assessed in both the Cobham and Shorne LLCA sub areas'*. This is incorrect. The boundaries from the published LCA are shown in Figure 1 below, which was provided in the AONB Unit's original Written Representation [[REP1-378](#)]. The boundary between the two Sub-areas is located along the southern boundary of the east bound carriageway of the A2; the central woodland belt between the east and west bound carriageways lies wholly within the Cobham Sub-area.

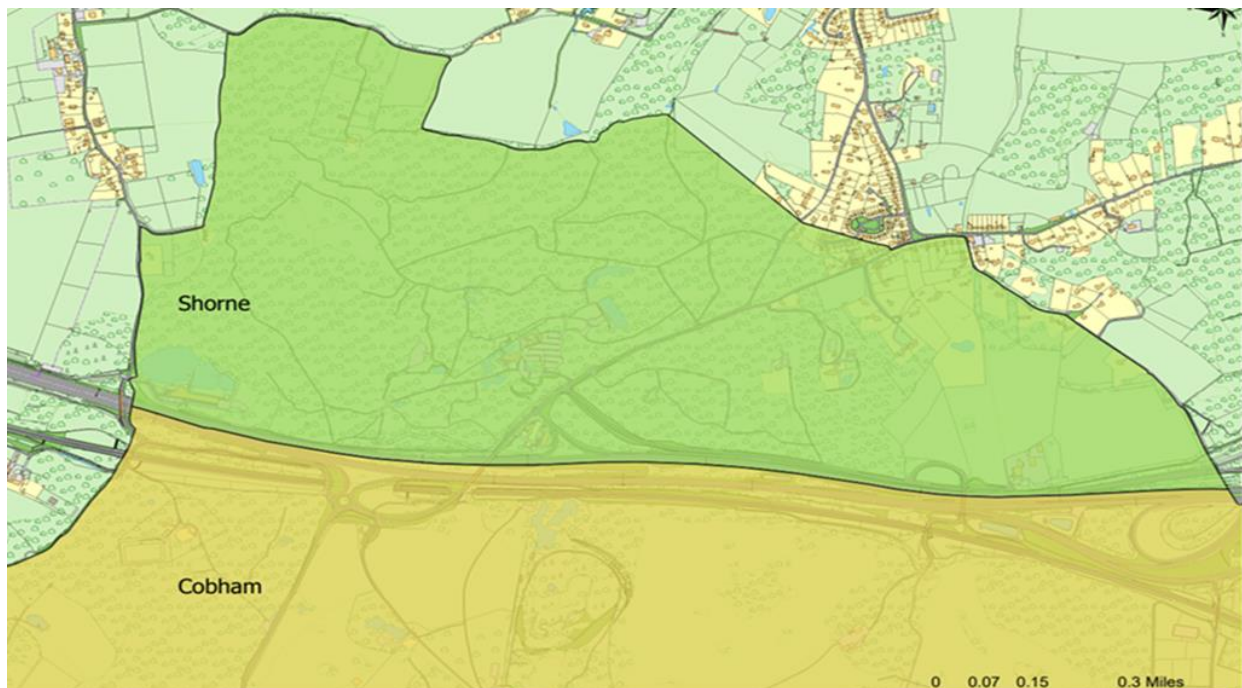


Fig 1 Local Landscape Character Area boundaries of the Kent Downs AONB LCA, West Kent Downs, Sub-areas Cobham and Shorne.

At A.5.8 the Applicant advises they consider the original 2022 Assessment using their adjusted boundaries should continue to stand, rather than the revised assessment produced here. We disagree. While the 2022 Assessment predicts the same effects for the overarching West Kent Downs LCA, using the adjusted boundaries results in an under-assessment of the effects of the Cobham Sub-Area and we do not consider there to be any valid justification for this. The Kent Downs LCA was reviewed and updated in 2020 when it was not considered that a boundary adjustment for the sub-areas of Cobham/Shorne was necessary.

Appendix B

Appendix B provides updated assessment tables of landscape effects for the West Kent Downs sub areas Cobham and Shorne using the published LCA boundaries. The AONB Unit agrees with the assessment set out in Table 1.3 that the Susceptibility to specific change would increase to High (from Medium) for Cobham Sub-area and would remain High for Shorne Sub-area and West Kent Downs LCA overall using the published LCA boundaries.

In respect of Table 2.3 Landscape Effects, the Magnitude of Effect increases for the Cobham Sub-Area from Minor Adverse to Moderate Adverse at Construction, and from Negligible adverse at Opening Year One to Moderate Adverse and from Negligible adverse at Design Year to Minor Adverse. While we agree that there would be an increase in the Magnitude of Effects, we consider that this is still under assessed. The Applicant advises that the Significance of Effect is reported as Large rather than Very Large at Opening Year and Moderate rather than Large at Design Year due to the 'localised nature of effects'. We strongly disagree with this assessment. The effects would in fact extend across virtually the entire width of the LLCA (see figure 1 above), affecting a length of approximately 2.5km of land within the AONB, with the Project being one of, if not the, largest proposals to ever be proposed within the Kent Downs in terms of geographical area directly impacted.

With regards to the amended effects for the Sub-Area of Shorne using the boundaries in the published LCA, at Construction, the magnitude of effects are assessed to reduce from Major Adverse to Moderate Adverse which results in a reduced significance of effect from Very Large to Large Adverse Effect. The AONB Unit strongly disagrees that there would be any significant reduction in Construction effects as a result of amended LCA boundaries given the extent and scale of works that would still be undertaken in the Shorne Sub-Area, notwithstanding the removal central reservation from this Sub-area. The Applicant assesses the effects to remain as predicted using the adjusted boundaries at both Design Year and Operation for the Shorne Sub Area. While the AONB Unit agrees that the effects would not reduce as a result of the adjusted boundaries, we remain of the view the effects are underassessed and would remain Moderate at Design Year, rather than reduce to Minor and have a Large adverse and therefore Significant Effect.

Similarly, the AONB Unit agrees that the effects would not change for the overall combined West Kent Downs LCA as a result of using the published LCA boundaries, but remains of the view a Moderate Adverse magnitude of effect would remain at Design Year (not Minor as reported) which would result in a Large adverse and therefore Significant Effect.

Action Point 7 - Width of the Green Bridges

Width of the Green Bridges

Please provide a supplement to the response at [\[REP4-182\]](#), giving a commentary as to the feasibility of any scope to widen the Green Bridges which would not significantly alter the linear extent of the structures.

At 7.2, the Applicant provides some general considerations and constraints that may limit the ability to widen the Green bridge at Brewers Lane and Thong Lane south, without providing any specific, evidenced justification for this not being possible. While the AONB Unit understands that an increase in width may be more difficult to achieve as well as more expensive, we remain of the view that best efforts to secure bridges of a width that achieve the desired outcomes of landscape connectivity are discounted too readily, particularly given the strengthened requirements set out in the updated duty to seek to further the conservation and enhancement requirements of AONBs in the CroW Act, introduced through the Levelling-up and Regeneration Act 2023.

Applicant's response to ExA questions on ISH 11, Agenda Item 5a) Nitrogen Deposition and Action Point 16 Nitrogen deposition compensation – spatial relationship between impact and compensation

We note the Applicant's post hearing written submission. In our view it fails to respond to questions that the Inspectors raised, nor to the points that the AONB Unit made at ISH 11. We therefore reject them and provide a concise rebuttal.

It is very unfortunate that the applicant continues to try to divert attention from the key issues at hand by pointing out the AONB is not an ecological designation, this is in part true, it is a landscape designation protected for its natural beauty. That said the rare and special wildlife of the AONB is very much a part of the natural beauty and so even this point is not fully correct. To be clear again, in considering Nitrogen Deposition impacts on designated sites we were not referring to the AONB designation but to sites designated for their wildlife interest identified by the applicant as being harmed (where there are residual significant effects).

At this point in the Examination it is important to keep to the substantive points, we have tried to do so concisely below:

- The applicant and Natural England both clearly expressed a strong preference to position compensatory habitat or make compensatory investments as close to the harm as possible. It is entirely possible to achieve this, either through land purchase (already justified by the Applicant in their evidence for Compulsory Acquisition) or through the deployment of a grant scheme(s) managed by the AONB Unit as we proposed to the applicant and in the Hearing. There is no compelling reason to move away from this original approach nor rely on a Designated Funds scheme established for other reasons.

In our response to Action Point 15 in respect of ISH 11 [\[REP8-144\]](#) we set out several instances that the Applicant's and Natural England's intentions with regards to Nitrogen Deposition compensation were made clear in their own submissions and therefore we will not repeat them here.

- We do not think that in their oral evidence, nor written submissions, the applicant has answered the Inspectors' question at Item 5 (a)(i):

Item 5(a)(i) There remain issues with the compensation offered for the Nitrogen Deposition and other woodland compensation/mitigation. The Applicant is to provide a simple explanation or summary indicating:

- *How the land in the Change Application [CR1-001 and 002] at Blue Bell Hill and Burham was originally considered to be necessary and is now considered to be no longer required to be provided elsewhere.*

Put simply, it appears to us that the applicant has submitted a lot of words, but no answers. It seems to us that the proposal for Hole Farm to provide significant Nitrogen Deposition compensation came rather late in the day and only once purchase of land at Bluebell Hill became more difficult than was anticipated. We see no change in the evidence base which supported the proposal to secure substantial areas of land at Bluebell Hill and at Burham for Nitrogen Deposition compensation purposes, the only substantive change apparent to us is a change in the ability to

secure that land. We therefore believe that the applicant should revert to their original compensation plan (justified in their submission on compulsory acquisition and elsewhere) or provide a satisfactory alternatives which meet their and Natural England's overarching objectives for compensation of Nitrogen Deposition, for example through a grant scheme. We are confident that the re-instatement of the Bluebell Hill and Burham compensation sites would not negatively impact landscape character and quality in the AONB, indeed the opposite is true, it would coincidentally help conserve and enhance the AONB.

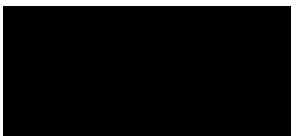
- We continue to argue that as Hole Farm was purchased using Designated Funds and not the Scheme itself there is an important point of principle that it should not be deployed in compensating for the scheme in any case.
- The applicant draws the ExA's attention to Defra guidance for compensation. It is worth noting that this is guidance prepared for European sites e.g. Special Areas of Conservation. We understand that only one of the sites identified as requiring N.Dep compensation is a European Site; that being the North Downs Woodlands. The Defra guidance is silent on compensation for other designated areas. That said, the guidance states a clear preference for compensation closer to the site.

The relevant section of the Guidance is reproduced below:

- *distance from the affected site - **compensation closer to the site is generally preferred**, unless measures further away will benefit the network of European sites as a whole.*

The applicant refers to building resilience in the network of habitats *at a landscape scale* (rather than '*the network of European Sites as a whole*'). We continue to argue that their approach of disproportionately building networks of habitats far away from the identified harm is arbitrary, we do not agree that the measures proposed far away from the harm can possibly benefit the network of affected sites (including European sites) in Kent 'as a whole'. Arguably, the Defra guidance (for European Sites) can only be relied upon in relation to the North Downs Woodlands in any case and therefore the initial advice from Natural England should have more force, in summary it says that they '*support the principle that the measures are seeking to build the resilience of the **affected sites** through **targeted habitat creation** that enhances habitat networks*'.

- The Applicant seems to both rely on Countryside Stewardship, and not rely on it, to support their case for Nitrogen Deposition compensation. We suggest that any consideration of the Countryside Stewardship Scheme with regards to Nitrogen Deposition should simply be dismissed.



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11 December 2023