

Gravesham Borough Council (IP Ref: 20035747)

Response to Secretary of State's 2nd consultation on Lower Thames Crossing seeking comments from the Applicant, Natural England and other interested Parties

Amendment of Section 85 of the Countryside and Rights of Way (CRoW) Act (2000)

Introduction

On 19 April 2024, the Secretary of State (SoS) issued a letter inviting comments from the Applicant, Natural England and other interested parties on various issues. Amongst these were the following:

Amendment of section 85 of the Countryside and Rights of Way (CRoW) Act 2000

- 1. In response to the Secretary of State's consultation letter of 28 March 2024, the Applicant provided a response on the implications of the amendment of section 85 of the Countryside and Rights of Way Act (CroW) 2000, in relation to Areas of Outstanding Natural Beauty (AONB). The Applicant's response has been published on the Planning Inspectorate's website.*
- 2. The Secretary of State invites **Natural England and other interested parties** to provide any comments that they might wish to add on this response.*

Whilst the letter was not explicitly addressed to Gravesham Borough Council ('Gravesham'), it is a host authority to the Project. The Borough Council has responsibilities in relation to the Kent Downs AONB (now the Kent Downs National Landscape, but for the purposes of this response Kent Downs AONB will be used), which it exercises through participation in the Kent Downs National Landscape Partnership. It, therefore, considers itself an 'interested party' under the terms of the SoS's letter and provides the following response.

The comments provided here are without prejudice to Gravesham's stated opposition in principle to the Project, as set out during the examination process. However, these comments are put forward to assist the SoS in determining the application and to secure the best outcome for this area should the SoS be minded to permit the Lower Thames Crossing.

The Question posed to National Highways (the 'Applicant') and its response

On 28 March 2024, the SoS asked National Highways the following question:

Amendment of section 85 of the Countryside and Rights of Way (CRoW) Act 2000

1. The Secretary of State notes the amendment of section 85 of the Countryside and Rights of Way Act, in relation to Areas of Outstanding Natural Beauty (AONB). This duty did not apply during the Examination, but it came into effect on 26 December 2023 and is now a relevant legislative consideration.

The Secretary of State invites the Applicant to provide comments on the implications of this amendment, and in particular, whether and if so, why it considers the Secretary of State could be satisfied that the amended duty placed on him under section 85 would be complied with if development consent were to be given to the Proposed Development.

The applicant responded by letter dated 11 April 2024, at Annex A, effectively arguing that:

- The SoS can be satisfied that the amended duty is complied with having regard to the meaning of the duty and having regard to compliance with the relevant National Policy Statement for National Networks (NPSNN 2014) which provide substantial protection for nationally designated areas. (Paragraph A.2.7)
- That the Section 85 amendment to 'seek to further' can be considered a proactive measure and not an outcome-based duty. In terms of decision making, the SoS in determining an application affecting land (either directly or indirectly) within an AONB, is not required so as to achieve those purposes in every case only so as to try to achieve them. (Paragraphs A.2.8 and A.2.17)
- Where it is concluded that a scheme will not conserve or enhance the natural beauty, wildlife and cultural heritage of the AONB, to comply with the duty, the SoS, in determining the application, will need to consider whether there is anything further that reasonably could be done, including mitigation to avoid or mitigate any harm identified. Only if there is not, would the SoS have fulfilled his duty to seek to further those purposes. (paragraph A.2.10)
- The revised duty reflects NPSNN 2014 policy at paragraphs 5.150 to 5.153 and that these, in combination, have the same effect as they require the consideration of meeting the need for the scheme in a way that does not affect the AONB and requires mitigation of the impacts where it cannot. (Paragraph A.2.11)
- The Project is both NPSNN (2014) paragraph 5.130 – 5.153 policy compliant and the revised duty for the reasons set out. (at Paragraph A.2.14 a – f)
- The Applicant's interpretation of the revised duty is consistent with submission made by National Highways at the A66 Northern-Pennine DCO examination, the force of which were recognised by the SoS in his decision letter on that scheme. (Paragraph A.2.12)

Discussion of the revised duty at the Examination stage

The issue of the implications of the revised duty under Section 85 of the Countryside and Rights of Way Act 1985 was discussed in detail at Issue Specific Hearing 11 (ISH11 see transcript at [EV-084f](#)). Gravesham's position on this was set out in its response to Action Point 1 following ISH11 at page 4 of [REP9-281](#). Similar concerns were raised regarding unmitigated impacts and policy compliance by the Kent Downs AONB Unit (now the Kent Downs National Landscape Unit) in its final position statement at [REP9A-133](#), whilst Natural England also considered that more could be done at [REP9A-122](#) in the following terms:

Kent Downs Area of Outstanding Natural Beauty

3.14.8 *Whilst Natural England notes the Applicant's agreement to a compensatory enhancement fund for residual impacts to the Kent Downs AONB, we consider that additional measures could have been provided by the Applicant to reduce the residual adverse landscape and visual impacts to the AONB. These were detailed in our Written Representation (Examination Document REP1-262) and whilst some progress has been made, our advice remains that additional measures could be delivered. These were summarised in our Deadline 8 response (Examination Document REP8-154) and we suggested amended wording to design principles within our Deadline 9 response (Examination Document REP9-292).*

3.14.9 *Given these unresolved matters, in our final Statement of Common Ground to be submitted by the Applicant at Deadline 9a, regrettably records Item 2.1.29 (Landscape Mitigation) as a 'matter not agreed'.*

The meaning, interpretation, and application of the revised duty under Section 85 and associated policy are matters for the decision-maker and, ultimately, the Courts. Gravesham, therefore, does not wish to add further to the observations made to the Examining Authority (ExA) at ISH11.

It is noted, however, that the statutory duty imposed by the revised Section 85 is a legal requirement and takes precedence over policy as set out in the NSPNN 2014.

The policy wording at paragraphs 5.150 to 5.153 of the NSPNN 2014 only states that the SoS should 'have regard to' the statutory purposes of the AONB when determining any application.

However, paragraphs 5.170 – 5.174 of the [NPSNN 2024](#) require that the Secretary of State should satisfy himself that the scheme's design and delivery comply with the revised duty and any regulations making provision about how the duty is to be complied with.

As such, the revisions contained in the NPSNN 2024 mirror the changes to legislation, which themselves were a result of concerns expressed at the Report stage of the Levelling Up and Regeneration Bill on [18 July 2023](#) (at columns 2280 – 2281) that the duty to 'have regard to' was weak and ineffective in practice.

The government accepted this argument and introduced its own amendment at the Third Reading on 21 September 2023, increasing the weight to be accorded to conserving and enhancing protected landscapes by inserting the requirement to seek to further the purpose of conserving and enhancing the natural beauty of AONBs.

Whilst no regulations pursuant to the Act have been issued to date, the revised duty requiring that the SoS 'must seek to further the purpose of conserving and enhancing the natural beauty' of the AONB still applies as it came into force on 26 December 2023.

The A66 Northern-Pennine DCO as a precedent

It is noted that the applicant relies on the SoS's position in determining the A66 Northern-Pennine DCO to support its case. However, whilst the SoS consulted on the implications of the revised duty under Section 85, this was in the context of the Examination having been concluded on 29 May 2023, prior to the amendment of the draft legislation and with it coming into force during the period of determination.

Having consulted on this, the SoS considered the differing positions of the various parties on the changes to the duty and concluded at paragraphs 302 – 311 of his decision that the revised duty had been complied with under any of the interpretations put forward. While recognising the force of the applicant's argument, the SoS did not actually make a determination in this respect.

However, what is also evident from the SoS's decision is that any judgement on this aspect is a matter of fact and degree and case sensitive. This is illustrated by the extract from the decision reproduced below:

309. *In light of the above and the steps taken by the Applicant, and in the absence of definitive guidance published by the Department for the Environment, Food and Rural Affairs, the Secretary of State is satisfied that the Applicant has sought to further purposes of the AONB and the two National Parks for the reasons given by the Applicant and has provided evidence of the ways in which it has done that. The Secretary of State in making his decision has also applied the duty of seeking to further those purposes. Whilst the Scheme will result in some harms (as identified above) the Secretary of State is satisfied that on the specific facts relating to this Scheme and in the absence of viable or less harmful alternatives (as considered above), all necessary steps have been taken to further the relevant purposes and to comply with the statutory duty in this particular case.*
310. *Whilst he notes the comments on this matter and the potential different approaches to the interpretation of the duty itself, he is satisfied that the duty to "seek to further" the statutory purposes is satisfied on the evidence whichever of the differing interpretations is applied. The Secretary of State welcomes the commitment by the Applicant during detailed design to consider ways in which to further the purposes of National Landscapes impacted by the Proposed Development appropriately. Furthermore, the Secretary of State considers that the BBLMP secured in the DCO, (and discussed in more detail in the Habitats Regulation Assessment), also furthers and enhances the existing National Landscape. These measures act to further support compliance with the statutory duty under section 11A and section 85 as amended by section 245 of the 2023 Act. Furthermore, the amendments which the Secretary of State has made to article 54 of the Order as detailed above at paragraphs 293 - 298 ensure that at the detailed design stage of the Proposed Development the Applicant is to take account of the amendments made by the 2023 Act.*
311. *The Secretary of State has had regard to the arguments presented by Interested parties as regards section 245 of the 2023 Act. The Secretary of State recognises the force of the Applicant's responses of 20 December 2023, 31 January and 12 February 2024 in relation to the effect of the amendments made by the 2023 Act and the consequential interpretation of those provisions. However, the Secretary of State considers that the requirements of the statutory duty have been satisfied in the context of this decision on the interpretation of the duty as advanced by CNP in any event.*

Therefore, the A66 Northern-Pennine DCO would appear to differ significantly from the Project under consideration. Whilst it was accepted that the A66 scheme would harm the landscape, the Examining Authority concluded that this could be reasonably mitigated through the approval of detailed designs of structures and planting, etc., and that it should only be accorded moderate weight in the planning balance.

However, a significant difference between the A66 case and the current Project was that both Natural England and the North Pennines AONB Partnership deemed the scheme to be acceptable. This is evidenced by the following extract from the [Report of Examination](#) dated 7 August 2023:

The effect of the Proposed Development on the North Pennines AONB at Scheme 06 (Appleby to Brough)

- 4.9.7. *The issue of the effect of the Proposed Development on the North Pennines AONB, particularly in relation to the Appleby to Brough (Scheme 06) Section of the Proposed Development was raised in RRs by a number of IPs [RR-001, RR-006, RR-115, RR-041, RR-191] and most notably by Warcop PC at D1 [REP1-137]. Land north of the A66 at Warcop contains MoD owned land and is designated AONB. Notwithstanding its designation, a number of the parties also considered the land to be in an unkempt state, comprising areas of hardstanding and dilapidated buildings. Whilst the issue of Alternatives is considered earlier in this Section of the Report, Warcop PC and others expressed the view that re-routing the A66 through the MoD land and therefore away from the village would have little effect on the AONB.*
- 4.9.8. *The ExA recognised the need to seek clarification on the matter and subsequently asked a question at ISH1 [EV-002] and invited discussion on the cited effect of the Proposed Development on the AONB at ISH2 [EV-003].*
- 4.9.9. *Following the Hearings, the Applicant confirmed its position in writing [REP1-007], stating that the preferred route was arrived at following an optioneering exercise that identified which route would result in limited incursion into the AONB and Ministry of Defence (MoD) land, leading to less of an influence on landscape, character and setting. In their RRs, NE welcomed the selected route over any alternative route that would take the road further into the AONB [RR-180] notwithstanding its current condition.*
- 4.9.10. *Whilst the ExA notes that by the close of the Examination some IPs still held a preference for an alternative northern route through the AONB, the ExA considers that the Proposed Development routing was arrived at following engagement with statutory bodies and other parties and, in regard to landscape harm, overall, it presents the least direct impact and physical encroachment into the AONB itself. The ExA was also minded that MoD land is Crown land and therefore cannot be subject to compulsory acquisition. In addition, the Proposed Development routing was also deemed to be acceptable by the North Pennines AONB Partnership, as per the signed SoCG with the Applicant [REP8-019].*
- 4.9.11 *The ExA is satisfied that the landscape mitigation proposed by the Applicant would reduce the impact of the Proposed Development on the AONB to an acceptable degree. The ExA's position in this regard was reinforced by the final signed SoCG with NE [REP8-027] and NE's final PADSS [REP7-180].*

The situation with Lower Thames Crossing is, therefore, very different to the A66 case as a matter of fact and degree, in that with the former, both Natural England and the Kent Downs National Landscapes Unit are both of the opinion that there is significant residual unmitigated landscape harm as a result of the Project and that the scheme is reasonably capable of further modification to address this.

On this basis, it is highly questionable whether the Applicant has been sufficiently proactive regarding the revised duty under Section 85 to seek to further the purposes of AONB designation.

In other words, irrespective of the interpretation and meaning of the revised duty, the Applicant does not appear to have passed its own tests.

Concluding comments

The revised duty clearly raises the issue of whether ‘reasonable alternatives’ need to be revisited in this instance. What constitutes a ‘reasonable alternative’ stands to be determined on the basis of the stated scheme objectives. These comprise:

Economic	<ul style="list-style-type: none"> • To support sustainable local development and regional economic growth in the medium to long-term. • To be affordable to Government and users • To achieve value for money
Community and environment	<ul style="list-style-type: none"> • To minimize adverse impacts on health and the environment.
Transport	<ul style="list-style-type: none"> • To relieve the congested Dartford Crossing and approach roads and improve their performance by providing free-flowing north-south capacity. • To improve the resilience of the Thames crossings and the major road network. • To improve safety.

Gravesham does not wish to rehearse the case set out by numerous parties at the examination that the Project, as submitted, does not perform well in relation to the above scheme objectives. In particular, because it does not provide a long-term solution at the Dartford Crossing, whilst the actual extent to which it would provide additional network resilience remained unproven at examination.

In terms of reasonable alternatives, the SoS’s attention is drawn to the fact that the indicative scheme consulted on in 2016, prior to the preferred route choice, did not include the substantial works on the A2 corridor through the AONB between Thong Lane and M2 junction 1 (see drawings from 2016 consultation [here](#)). It was only the following year that the SoS made the preferred route announcement. Subsequently, the scheme expanded to include the works to the east along the A2 corridor through the AONB (see drawings from the 2018 statutory consultation [here](#)).

This begs the question as to whether the SoS would have made the same choice of preferred option had the revised statutory duty under Section 85 applied and, given the change, what weight should be given under [NPSNN 2014](#) paragraph 4.27 that alternatives were considered through the Road Investment Strategy process.

Given it was argued at Examination that it was likely improvements would be required on the A229 Bluebell Hill as a result of the Project, the SoS may wish to consider whether any harm to the National Landscape in that area is material to the determination of this application given their potential association. This is separate from any debate as to how those works stand to be funded or future evaluation through the planning/EIA process.

Finally, it is noted that to address unmitigated landscape harm, the Applicant has submitted a Unilateral Undertaking ([REP10-014](#)) with Kent County Council, offering a sum of £4.24m by way of an AONB Compensatory Enhancement Fund. There is, however, a significant discrepancy to the preamble to the Unilateral Undertaking in that paragraph 1.1.7(f) at page 3 refers to an additional sum to meet the costs of administering the fund, whereas Schedule 3, paragraph 1.1 of the Unilateral Undertaking says that the £4.24m includes this – see below:

1.1.7 (f) A payment of £4.24M for an AONB Compensatory Enhancement Fund to fund measures and projects that meet a funding criterion that primarily conserves and enhances the natural beauty and special qualities of the Kent Downs AONB and its setting. An additional sum is included to meet the costs in managing and administering the fund.

- 1.1. Upon the Council confirming in writing to National Highways that the Council will comply in full to the terms set out in paragraphs 2, 3,4,5,6,7 and 8 of this Schedule, National Highways covenants on or before the Commencement Date to pay to the Council a total of £4,240,000 for an AONB Compensatory Enhancement Fund to fund measures and projects that meet the funding criteria set out in paragraph 4.2 of this Schedule (the "Fund") which includes £600,000 to manage and administer the Fund (together being "the AONB Contribution").

Whether or not the compensatory fund is adequate also stands to be considered in the context of the revised duty under Section 85. If it is too low, after having regard to embedded mitigation, it is arguable that the Applicant has failed to seek to further the purpose of conserving and enhancing the natural beauty of the National Landscape.

Stating that there would be an additional sum to meet the costs of managing and administering the fund and then including £600,000 in the £4.24m in the Unilateral Undertaking implies that there would be a shortfall in interventions on the ground and that the Applicant is not doing all it reasonably can to meet the requirements of the revised duty.

The point raised by the Kent Downs National Landscape Unit in its Final Position Statement ([REP9A-133](#)) in relation to the Applicant's own assessment of the monetised cost of unmitigated landscape harm for the whole Project, post embedded mitigation, is also noted.

The Applicant's monetised assessment is contained in Submission Doc 7.7 Combined Modelling and Appraisal Report, Appendix D - Economic Appraisal Report: Economic Appraisal Package ([APP-526](#) at 10.6). Whilst this followed TAG guidance, it was not included in the Project's Benefit Cost Ratio but was taken into account in the value for money assessment. The outcome of the appraisal was that the Project resulted in a landscape disbenefit of -£93.5m, after making an allowance for embedded mitigation and ecosystem services.

Whilst this figure relates to the whole project, all those works to the south of the River Thames either fall within the AONB itself or its immediate setting. Given the sensitivity of the National Landscape and the contribution made by its setting, this clearly raises a pertinent question as to whether the £4.25m is adequate in terms of a compensatory fund, given National Highway's own landscape disbenefit calculation suggests the figure should be considerably higher.

The SoS is therefore asked to consider this in relation to the revised duty under Section 85 of the Countryside and Rights of Way Act 2000.

Gravesham remains unconvinced whether the Applicant has properly considered reasonable alternatives against the revised statutory duty, whether more could be done to mitigate significant harm to the National Landscape that would occur both within the AONB or its setting, and whether the compensatory fund agreed to thus far is sufficient. The conflicting issue of the £600,000 to administer the fund and whether it is or is not included in the £4.24m also needs to be resolved.



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