

THAMES CROSSING ACTION GROUP

Lower Thames Crossing TR010032

Response to Secretary of State Consultation Letter of 19th April 2024

Thames Crossing Action Group

Unique Reference: 20035660

DEADLINE: 23:59 2nd May 2024/ Submitted 2nd May 2024

Introduction

1. Thames Crossing Action Group (TCAG) is a community action group who represent those that are opposed to the proposed Lower Thames Crossing (LTC).
2. We have and continue to present evidence that shows that the proposed LTC would be hugely destructive and harmful, fails to meet scheme objectives, is not fit for purpose, and would be a waste of taxpayers' money.
3. We acknowledge the Secretary of State's further post examination consultation letters.
4. We remain strongly and completely opposed to the proposed £10bn+ Lower Thames Crossing.
5. Please accept this and the accompanying Appendices as Thames Crossing Action Group's official response for the 2nd May 2024 deadline.

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Comments on 11th April deadline submissions

LURA duty

6. TCAG's response in regard to the LURA duty has been prepared for us by Anne Robinson, and can be found in the Appendices that we have submitted.

Additional comments on 11th April deadline submissions

7. We are concerned to read about the lack of meaningful engagement, or indeed in some cases no engagement between National Highways and other parties.
8. We are particularly concerned that National Highways are taking decisions to disregard guidance and cease engagement with interested parties on the basis that engagement is not a "good use of public funds". Like the Port of London Authority, we question whether NH should be allowed to override any requirements to engage with third parties solely with the justification that, in its view, such engagement is not a "good" use of public funds?
9. In regard to "good" use of public funds evidence shows that the proposed £10bn+ LTC fails to meet scheme objectives, and is not good value for money, so the whole project should be scrapped.
10. With respect we are also concerned that to date, in regard to Secretary of State consultation, there has been no request for further information in regard to the outstanding issues between the Emergency Services and Partners Steering Group and National Highways, since there were a number of outstanding matters of concern in REP9A-080¹ at Deadline 9A. Surely this must be of particular importance, not only because it is in relation to safety, but also since one of the scheme objectives is to 'improve safety', something which clearly isn't the case anyway due to the forecast increase of 2,147 additional accidents over 60 years, including 26 fatalities, 220 serious injuries and 3,122 slight injuries if the LTC goes ahead.

New Evidence

11. The info below has come to light since the LTC DCO Examination ended, but we feel it relevant for it to be considered during the decision-making process.

Government target of 75% growth for rail freight by 2050

12. On the 20th December 2023 (the day the LTC DCO examination ended) it was announced that Government had set a target to grow rail freight by at least 75% by 2050².

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13. It has been stated that this will boost economic growth and lead to significant environmental benefits by taking lorries off our roads, cutting emissions and congestion in the process.
14. 70% of goods in and out of the Port of Dover alone use the Dartford Crossing. 42% of vehicles using the Dartford Crossing are goods vehicles. Why in this day and age, at a time of climate emergency is the Port of Dover not connected by rail?
15. We have long been saying that rail improvements would be a better, more affordable, and more sustainable alternative to the proposed LTC³.
16. Such rail improvements would not only serve the ports in the South East, but could also serve a much larger area, thus reducing road freight on a much greater scale, and also improving passenger rail at the same time.
17. The £10bn+ that the proposed LTC would cost, if it is granted permission, would be far better invested in rail improvements.

Additional road associated costs

18. We have learnt that National Highways have agreed to pay Cambridgeshire County Council almost £25m towards the old A14 detrunking associated costs for management/maintenance⁴.
19. Yet throughout the LTC DCO Examination there was discussion about the additional funding that would be needed to cover the cost of impacts to the existing road network as a direct result of the proposed LTC, particularly where the existing road network was being utilized in order for the LTC project to operate. National Highways stated that highways authorities would need to go to Government for such additional funding. In ours and others opinions this funding should be part of the LTC project as it would be to deal with direct impacts of the LTC, if it goes ahead. It should also be taken into account in the Benefit Cost Ratio assessments, which would further reduce the already low adjusted BCR.
20. The increase in traffic using the existing road network due to the induced demand from the LTC would also have an impact at a time when highways authorities are already struggling to fund and repair an already ageing road network.
21. The Annual Local Authority Road Maintenance (Alarm) survey report that was published on 19th March puts the cost of tackling the backlog of carriageway repairs and bringing the road network up to a standard from which it can be maintained efficiently and cost effectively at £16.3bn⁵.

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22. Also, that 53% of roads in England and Wales have less than 15 years' structural life remaining. This is local authority/highways roads, not the Strategic Road Network, which is also in need of maintenance.
23. Whilst £8.2bn over 11 years has been announced from the Network North funding (which was supposed to be being spent in the North) in England, that is only enough to resurface 2.5% of the network. With 11% of local roads already in poor condition and likely to require maintenance in the next 12 months alone.
24. The proposed LTC is about creating another route from the ports in the South East through to the Midlands and beyond, meaning that a great number of roads managed and maintained by local highways authorities, as well as NH, would be impacted by the additional traffic created by the proposed LTC.
25. Much of the port traffic is heavy HGVs, but other traffic of course creates wear and tear on our roads. With cars getting larger and heavier this will only worsen.
26. Rather than investing in projects that create more traffic leading to the need for more funding for maintenance, and with our nation's roads in such bad shape now, it is time to look at instead investing in better, more sustainable, more affordable alternatives such as rail improvements that would negate the need for the LTC, and free up funds that could be invested in road repairs and/or public transport.

Questionable cost and BCR

27. We have previously raised concerns that the estimated cost for the proposed LTC is not an accurate and up to date reflection of the true cost, should the project go ahead.
28. A leading industry publication has recently reported⁶ that in regard to the M25 junction 10 NH scheme the formal appraisal significantly understated the impact and cost of delays during construction. We would question, if standard practice is carried out on these matters by NH across all schemes, whether they have similarly understated in regard to the proposed LTC.
29. In February 2024 the Infrastructure and Projects Authority published their Analysis of the National Infrastructure and Construction Pipeline 2023 report⁷, which highlights that construction material prices are over 40% higher than in January 2020. Since the current estimated cost for the proposed LTC is as at August 2020, this suggests that the estimates are likely to be inaccurate.
30. It also shows how right the LTC DCO Examiner was in the Issue Specific Hearing 1 continuation hearing⁸ was when she stated that the 4.10% inflation rate for 2022 that had been used by NH in their assessments was very much underestimated and wildly

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out of touch.

31. That is of course on top of the fact that such an estimate was also working on an estimated start date of 2024, which has been rephased by 2 years following the Government announcement in March 2023. Not only does this affect the estimated cost, but also the already low BCR.

Tilbury – Gravesend Ferry ceased service / Active Travel / Public transport

32. On numerous occasions over the years National Highways have stated that there is no need to attempt to incorporate active/public transport into the proposed LTC in an adequate manner. When questioned about provision for cyclists to use the proposed LTC we have been told that they can cross on the Tilbury to Gravesend Ferry. The ferry ceased service at the end of March 2024⁹, so there is no such service now.
33. Sustrans the UK-based walking, wheeling and cycling charity who are also the custodian of the National Cycle Network have reported that their recent survey showed 56% of people support shifting investment from road-building schemes to more sustainable alternatives, such as funding walking, wheeling (using wheeled mobility aids), cycling and public transport, with just 17% opposing the shift.
34. This again highlights the need for further consideration of the better, more affordable, and more sustainable alternatives to the proposed LTC.
35. Recent research and surveys¹⁰ have shown that people want to use public transport more, and that 56% want money for building roads to be shifted to options for walking, cycling and public transport.

Food security priorities

36. On the 25th March 2024 Government announced new measures to limit the amount of land farmers can take out of productive actions under the Sustainable Farming Incentive (SFI).
37. This is one measure government have put in place to protect food security and ensure we continue to produce at least 60% of the food we consume here in the UK.
38. We agree there is an urgent and important need for food security, and in the same way as Government is limiting the amount of food production land that is lost under the SFI, food production land should be protected from being lost and adversely impacted by projects like the proposed LTC.
39. It is not just the obvious loss of land due to the proposed LTC road, but also for the associated environmental mitigation and compensation. Not to mention the

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severance of land parcels from other land and the impacts that has on our farmers and their ability to continue farming, and staying in business due to such pressures.

40. Additionally, the adverse impacts the proposed LTC would bring in regard to pollution of air, water and soil that is used in food production.
41. Sustainable farming to ensure our food security now and in the future for our nation, with a healthier more sustainable future, is most definitely in the public interest and essential for our existence, the proposed LTC is not.

Flooding and resilience

42. We have commented on our concerns about the risk of flooding both on and off the proposed LTC, if it goes ahead. The proposed route passes under the river and through areas of marsh, fens, and flood plains.
43. It has been reported¹¹ in April 2024 that workers have had to pump more than 50 million litres of rainwater off a section of the A14 that has been continually flooded during the last couple of months, and has been causing much disruption.
44. We believe this goes to show how the risk of flooding is very real, and that flood and other resilience needs to be better considered in regard to any proposed project. It is not a case of if climate change is going to happen, it is happening now, and what is currently being described as unprecedented is likely to become more and more frequent, unless we start taking climate change seriously.
45. In the instance on the A14 the flooding occurred in a dip in the landscape, with the LTC being proposed to run at a low level, and going through a tunnel and under other roads, through marshes, fens and flood plains this is something that needs to be better considered than it has been to date.
46. Adding to this concern is the fact that the Public Accounts Committee's Resilience to flooding report¹², following on from the National Audit Office's report in December concluded that there is no effective strategy in place to make the UK resilient against extreme weather.
47. Climate change is real and it is here now. It is not purely a case of creating resilience, but also in actions to ensure climate change is sustainably reversed, or at very least not worsened. Hugely destructive and harmful projects like the proposed LTC would only worsen things.
48. It wouldn't be just the road that is at risk from such flooding either, but also agricultural land, at a time when flooding is already causing issues with our food supply, as well as homes, businesses, and our natural environment.

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Toxic road runoff

49. Additionally, on the topic of water and soil pollution from roads, there is new information coming out about toxic road runoff. Water pollution is clearly a serious issue already in our country, and this is water that we drink and that waters the soil we grow our food in, not to mention hydrates the natural environment as a whole.
50. Recent evidence highlights that there is not adequate monitoring of toxic road runoff¹³, which offers no reassurance that such pollution would be reduced or monitored if the proposed LTC goes ahead. This is clearly not a problem that NH are taking seriously which is a real concern when it is such a serious risk to our health and that of the natural environment. The proposed LTC runs near and through watercourses and agricultural land (including grade 1 listed land), we cannot afford the level of pollution the proposed LTC would create.

Tunneling Risks

51. In Feb 2024 LTC tunnels technical director Keith Bowers was quoted in New Civil Engineer¹⁴ as saying, *"There's rough ground and a number of historic landfill sites which create lots of issues around that which we don't know with certainty what's in it. It's a potential pollution source right where our portable structures will be."*
52. The risk of pollution from the toxic historic landfill sites is something that we have raised serious concerns about over the years, which NH have always attempted to play down to us.
53. Not only is it a concern in regard to what they disturb during construction, if LTC goes ahead, but also the fact that the proposed Tilbury Fields 'park' is in this same area. It is not just construction which increases the risk, but also the proposed change to the land in this area with tunneling and land forms that would change the natural current flow of flood waters and ground water that could release further pollution via the waterways and natural environment, as risk to both humans and nature.

Sink Hole Risks

54. We have previously voiced concerns of the risk of sink holes should the proposed LTC go ahead. We wish to reiterate those concerns in light of more evidence of further sink holes in regard to the tunneling for HS2, which came to light in February 2024¹⁵.
55. We feel this particularly relevant since HS2 tunnels through chalky areas similar to the areas that the proposed LTC would pass. It is apparent that HS2 did not adequately assess and predict the sink hole issues they have experienced, and that does nothing to reassure us that National Highways have assessed the risk any better than HS2, nor that they say they are learning from HS2¹⁶.

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Importance of trees

56. In light of new laser scanning techniques¹⁷, we question how NH have assessed carbon sequestration from the trees that would be destroyed if the proposed LTC goes ahead.
57. With this new technique revealing that old forests weigh about twice as much as previously calculated – meaning they lock away approximately double the already prodigious volumes of carbon estimated, this is something that needs to be adequately assessed in regard to the proposed LTC.
58. There is also new and growing consensus in healthcare of the importance of trees and the natural environment to our health and wellbeing, and how it can reduce financial burden to the NHS¹⁸. Destroying and impacting our existing woodlands, trees, and natural environment is not beneficial to our health and wellbeing, the economy, or a sustainable future for us all.

Hedgerows

59. We also note about new hedgerow protections¹⁹ and question whether it is right that hedgerows on agricultural land would be lost and adversely impacted if the proposed LTC goes ahead, but that Government are proposing new hedgerow protections. Hedgerows are an important part of our natural environment, many have been around for a very long time. More importance should therefore also be placed on the value of and protections needed for all hedgerows in our country, including those under threat from the proposed LTC.

Government Environmental Ambitions

60. In January 2024 the Office of Environmental Protection (OEP) published their annual progress report²⁰, which stated that Government remains largely off track to meet its environmental ambitions and must speed up and scale up its efforts in order to achieve them.
61. As we have stated for years, evidence shows that the proposed LTC would be hugely destructive and harmful, and is not in keeping with Government ambitions in regard to the Environment. This is just further evidence that the proposed LTC should not go ahead.

'Smart' motorway by stealth

62. In April 2024 the Sunday Times reported that deaths on 'smart' motorways have hit a record high. According to data from the national road accidents database, there were 24 deaths on smart motorways during 2022 - the last year for which full figures are available. There were also 12 deaths in the first half of last year according to the

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provisional data. This compares with 15 deaths on smart motorways in 2021, based on figures from National Highways.

63. Panorama reported that, according to data obtained under Freedom of Information laws, there were 397 incidents between June 2022 and Feb 2024 when 'smart' motorways lost power. It was also reported that in 2022, there were 2331 faults on stopped vehicle detection radar systems, for an average of more than 5 days.
64. A National Highways traffic officer who works on 'smart' motorways told the programme that he no longer trusts the radar because he has seen it fail too often.
65. One in four stopped vehicle detection (SVD) installations on smart motorways still failed to meet National Highways' core performance requirements when re-tested in 2023²¹. National Highways have also refused to disclose 'smart' motorway Stopped Vehicle Detection status²². Reports appear to have been manipulated to make the results better, with failure for SVD to identify a stopped vehicle not being included within the data that represents whether SVD identified a stopped vehicle within 20 seconds.
66. These are yet more extremely worrying examples of the failures and dangers of 'smart' motorways.
67. We still believe that evidence shows that the proposed LTC would be a 'smart' motorway. It would predominantly carry motorway traffic as it connects at either end to motorways. It would not have a hard shoulder, and would use 'smart' technology. Regardless of whether you agree with the proposed LTC being a 'smart' motorway by stealth or not, it would still be using the 'smart' technology that is failing, thus increasing the risks to users. This also adds to the evidence that it would fail against the scheme objective to improve safety.

Climate, carbon, and EVs

68. It has been suggested that EVs would lead to a reduction in emissions. We have already detailed in our examination representations that EVs are not zero emissions, but in regard to tail pipe emissions, we now raise the new analysis from the RAC that suggests the Government has not hit its target of having six or more rapid or ultra-rapid electric vehicle chargers at every motorway service area in England by the end of 2023²³.
69. With this in mind we highlight that it should not be assumed that there will be the uptake of EVs that have been predicted in the time frame predicted, nor that there will be facilities and enough clean green energy to supply any EVs.
70. Also, that during the consultation period NH made a big deal over the need for a Rest and Service Area within the LTC route on safety grounds as per industry guidelines. The Rest and Service Area was removed from the project, so yet again this does not support the scheme objective of improving safety. The fact that the last we heard it

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was still being progressed as a standalone project also highlights a false economy in it not being part of the LTC scheme cost, despite NH's previous claims that it was needed for safety.

71. In February 2024 former chair of the Climate Change Committee, Lord Deben gave evidence²⁴ at the High Court in support of Friends of the Earth's legal challenge against the government's climate strategy.
72. He said, *"The Government is relying on everything going to plan with no delays or unforeseen circumstances, and on technologies which have either not been tested or indeed on which testing has not even started. From what I have seen of the evidence provided to the court, the Secretary of State was not given enough detail on the level of risk associated with the policies in the plan. This meant that he could not see how many of them were likely to fail to achieve their end. When you see that evidence, to me it's clear that the present programme does not provide the necessary assurance that we can meet our statutory duty to reach net zero by 2050, I know of no other government policy which is premised on everything going exactly right."*
73. As we have commented on during the LTC DCO Examination some of NH claims of carbon emission reductions have been purely speculative and based on technology that has not been tested or is not there. With such claims about LTC carbon emissions being made, how can government be sure that such reductions would be met? What do government propose could/would be done if such reductions were not attained, should permission for LTC be granted? NH failed to provide details of what the penalty would be for such failure. If such reductions are not attained, carbon emissions cannot just be quickly and easily dealt with, at that point it is too late, and any financial penalties to contractors would not assist in such an important and harmful situation.
74. Green Alliance's 'Net zero policy tracker: March 2024 update' it was highlighted that transport accounts for 70% (97MtCO₂e) of the overall policy gap. They state that "Managing road mileage through measures like reviewing road building, redirecting spending into public transport and reducing emissions from HGVs would help to close the policy gap in transport". We have to agree and add that modal shift from road freight to rail freight would also be another way to close the policy gap, again highlighting the importance of rail improvements as a better, more sustainable, and more affordable alternative to the proposed LTC.

Staffing shortage

75. We have voiced concerns about whether there would be enough trained and experienced staff to meet the staffing needed for such a huge project as the proposed LTC. It has recently been reported that construction, property and engineering recruitment company Randstad UK have warned that construction skills shortages are about to get worse. This would not only be an impact on the proposed LTC, but also if LTC were to go ahead it would increase the pressure on other construction projects too. This could result in adverse impacts on productivity and

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cost, and thus also BCR. NH stating that the proposed LTC would result in so many jobs should not automatically be considered a pro, if ultimately there are not the staff to carry out the work.

Failings

76. In January 2024 it was reported²⁵ that residents near the £78 million M6 junction 10 roundabout in Walsall have voiced concerns that the works had made no difference and that the outcome is not what residents were promised.
77. We have continually voiced concerns and provided evidence that the proposed £10bn+ LTC would not meet scheme objectives, would not solve the problems associated with the Dartford Crossing, it would be hugely destructive and harmful. There are better, more sustainable, more affordable alternatives, such as rail improvements to support modal shift from road freight to more sustainable rail. It is not in the public interest to keep spending money on a project that is simply not fit for purpose and would be a waste of taxpayers' money.
78. Another major concern is that a Full Business Case is not produced until after the decision on whether to grant the DCO or not has been made. This is akin to signing a blank cheque for a project. Government should learn from projects like HS2, and ensure that a full and adequate costing has been carried out prior to any decision being made. You wouldn't give the go ahead to a developer to do work on your house based on a rough ball park figure, you'd want a proper and accurate quote, why should huge projects like the proposed LTC be any different? So much has changed since the current estimated cost bracket for LTC, including the two year rephasing, but there is no evidence of any assessment of the cost implications, of this and other aspects that would see the cost rise further, and by default the BCR drop further.
79. It has been reported in the Financial Times²⁶ that Juliano Denicol, director of the major infrastructure delivery MBS programme at University College London has said that 6007 academic studies were reviewed on why megaprojects around the world exceeded deadline and budgets. He found the UK model resulted in work being pushed further down the supply chain to contractors, subcontractors and sub-sub-contractors, some of which were on low margins. This constrained investment in innovation and management, sometimes leading to higher costs later.
80. Throughout the process to date NH have stated time and time again about various aspects that would be left for contractors and sub-contractors to decide. This has given us no confidence, left us feeling that too much is being left to chance; and concerned that decisions would be made to progress things in a way that would lead to the highest profit for those companies rather than what is best for the impacted communities and project.
81. Based the conclusions of Denicol's review it also shows that there is potential for it to result in higher costs to the project.

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82. This is also a problem with the construction carbon plan (CEMP) for LTC. Financially constrained companies at the end of the supply chain are unlikely to prioritise meeting carbon targets.

Transport Select Committee NNNPS Inquiry

83. In March 2024 the Department for Transport (DfT) responded to the Transport Select Committee's National Networks National Policy Statement (NNNPS) inquiry.
84. We note that one of the recommendations the DfT accepted from the Transport Select Committee was the clause, "*The secretary of state should ensure that the applicant's proposals to mitigate the harmful aspects of the development and, where possible, to ensure the conservation and enhancement of the site's biodiversity or geological interest, are acceptable*". We would ask that the secretary of state to take note of the strong evidence presented by many that the level of destruction and harm caused by the proposed LTC, if it goes ahead, is not in the public interest, and is not in keeping with Government ambitions in regard to the environment and nature.
85. We would call on Government to reconsider the decision not to review road building in England. This was an important recommendation from the Climate Change Committee (CCC), and in light of legal challenges in regard to the Government's failing in regard to climate change, and the investigation by the ORR into National Highways it most definitely would be in the public interest to review road building. This would be beneficial not only in regard to environmental targets, but also in regard to ensuring projects are fit for purpose and value for money.
86. We were also very concerned that the debate in Parliament on the NNNPS was rushed as a final debate before Easter break. Also that Caroline Lucas was treated the way she was in the debate, with no response to the points she raised, and that the Minister did not give way to her for further question/comment, despite there being plenty of the time allocated for the debate to be heard remaining.
87. The NNNPS is clearly outdated and not fit for purpose, rushing a new policy statement through that is no better than the one it would replace is unacceptable. We also believe that there should be a pause in decision making on all project judged against the NNNPS until such time as an adequate review and update has been made. Particularly with projects as huge, complex, and costly as the proposed LTC, to keep pushing ahead is not in the public interest.

Transport Select Committee Strategic Transport Objectives Inquiry

88. The Transport Select Committee's Strategic Transport Objectives Inquiry, which is inquiring into how the Government sets its strategic objectives and how these objectives do – or should – influence investment in, and cross-government planning of, services, networks and infrastructure is still ongoing.

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89. We are concerned that in March 2024 the Transport Select Committee reported that the Government rejected their calls for more transparency over how it decides whether to proceed with major rail and road projects. We most definitely believe that there needs to be more transparency, and that it is in the public interest, particularly as public money is being used to fund these huge complex projects.
90. The latest oral evidence hearing that took place on 1st May 2024 clearly shows that at very least there should be a pause on decision making on projects like the proposed LTC, until this inquiry has concluded.

ORR investigation of National Highways

91. In Feb 2024 it was announced that the Office of Rail & Road are investigating National Highways' performance.²⁷ Surely with such an investigation happening any decisions regarding National Highways projects should be paused whilst the investigation is completed. Additionally, and as already highlighted above, we would suggest that all National Highways projects should be reviewed too. We also believe that it would be beneficial for there to be an investigation into National Highways where others, aside from the ORR, can present evidence, as we and many others have serious concerns and much evidence to show their failings.

Conclusion

92. We still very much believe there is extensive evidence from ourselves and others as to why the proposed Lower Thames Crossing should not be granted permission. It would be hugely destructive and harmful, fails to meet scheme objectives, would not solve the problems at the Dartford Crossing, is not fit for purpose and would be a waste of public money. It is not in the public interest to grant the proposed LTC permission. There are better, more sustainable, more affordable alternatives. We need and deserve better.

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End Notes

¹ [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010032/TR010032-006118-National%20Highways%20-%20Other%209.28%20SoCG%20between%20\(1\)%20National%20Highways%20and%20\(2\)%20Emergency%20Services%20and%20Safety%20Partnership%20Steering%20Group%20\(ESSP%20SG\)_v3.0_clean.pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010032/TR010032-006118-National%20Highways%20-%20Other%209.28%20SoCG%20between%20(1)%20National%20Highways%20and%20(2)%20Emergency%20Services%20and%20Safety%20Partnership%20Steering%20Group%20(ESSP%20SG)_v3.0_clean.pdf)

² <https://www.gov.uk/government/news/government-sets-ambitious-target-to-grow-rail-freight-by-at-least-75>

³ <https://www.thamescrossingactiongroup.com/rail-and-tram-alternatives/>

⁴ [Redacted]

[Redacted]

[Redacted]

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[Redacted]

[Redacted]

⁷ https://assets.publishing.service.gov.uk/media/65bb845421f73f000de0ba66/CCS0723973198-002_PN7393387_IPA_National_Infrastructure_and_Construction_Pipeline_Web_Accessible_converted.pdf

⁸⁸ <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010032/TR010032-002349-ISH1%20Part2.html>

⁹ <https://www.thurrock.gov.uk/ferry-services/tilbury-to-gravesend>

¹⁰ [Redacted]

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²⁷ <https://www.orr.gov.uk/search-news/orr-undertake-investigation-national-highways-performance>

Appendix 1
TR010032: Proposed Lower Thames Crossing Scheme (LTC)

Thames Crossing Action Group
Unique Reference: 20035660

Response to the applicant's comments on the implications of the amendment of section 85 of the Countryside and Rights of Way Act, in relation to Areas of Outstanding Natural Beauty by the Levelling Up and Regeneration Act 2023

1. The Secretary of State's (SoS) letter of 28th March invited the applicant to provide comments on the implications of the amendment of section 85 of the Countryside and Rights of Way Act (CROW), in relation to Areas of Outstanding Natural Beauty (AONB) by the Levelling Up and Regeneration Act 2023 (LURA). In particular, whether and if so, why it considers the SoS 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.
2. In summary, the applicant has failed to show that all necessary steps have been taken to seek to further the AONB statutory purpose. The scheme was developed before the amendment became law under the less onerous duty 'to have regard to' this purpose. Hence, the applicant's attempts to meet the more onerous new duty are retrospective and not proactive. There is also substantial evidence to show the applicant failed to recognise the significance and importance of the AONB designation and purpose. This creates a problem for the decision maker. More evidence is required before the SoS can demonstrate that he has sought to further the statutory purpose of the Kent Downs AONB.

LEVELLING UP AND REGENERATION ACT DUTY

3. An AONB has a primary single statutory purpose to **conserve and enhance natural beauty**. The CROW section 85 places a general duty on statutory undertakers to have regard to that purpose when coming to decisions or carrying out their activities relating to or affecting land within the AONB. The LURA, Part 12, 245 (6) (a) (A1) amends this to: *'In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty in England, a relevant authority other than a devolved Welsh authority **must seek to further the purpose** of conserving and enhancing the natural beauty of the area of outstanding natural beauty'*. (emphasis added)
4. Natural England's statutory advice [REP9A-122, para 2.13] states:
'The new duty underlines the importance of avoiding harm to the statutory purposes of protected landscapes but also to seek to further the conservation and enhancement of a

protected landscape. That goes beyond mitigation and like for like measures and replacement. A relevant authority must be able to demonstrate with reasoned evidence what measures can be taken to further the statutory purpose.'

5. *'The proposed measures to further the statutory purposes of a protected landscape, should explore what is possible in addition to avoiding and mitigating the effects of the development, and should be appropriate, proportionate to the type and scale of the development and its implications for the area and effectively secured. Natural England's view is that the proposed measures should align with and help to deliver the aims and objectives of the designated landscape's statutory management plan. The relevant protected landscape team/body should be consulted.'*
6. In January 2024 Campaign for National Parks sought a legal opinion from Alex Shattock at Landmark Chambers, which was submitted in response to the application of the new duty with respect to the A66 Northern Trans-Pennines Project (TR010062). It is attached with this submission. The amending clauses are considered to impose a more onerous duty on public bodies than existed previously. The duty is now pro-active, not an afterthought. It is not enough to not conflict with those purposes. The decision maker must seek to further the statutory purposes of designated landscapes through an **outcome based** approach. Parliament should not be assumed to legislate in vain. The change in duty is clearly a material change.

IMPACTS ON THE KENT DOWNS AONB

7. The Project falls within the Kent Downs AONB and would result in severe direct and indirect permanent harm to the AONB and its setting, from the following:
 - Widening of the A2 corridor from 8 to 14 lanes over a length of 2km to produce an unbroken expanse of highway infrastructure, severing the northern tip of the AONB from the rest of it. Two new connector lanes on either side of the aligned A2 would further increase highway width.
 - Removal of existing screening vegetation within the central reservation of the A2 and beside the A2 and HS1. Replacement planting is limited due to relocation of utilities.
 - A large scale multilevel junction outside the boundary of the Downs coupled with the loss of the adjacent mature Gravel Hill Wood.
 - Permanent loss of nearly 8ha of ancient woodland at Ashenbank Wood and Shorne Woods SSSIs, further isolation of Shorne Woods from Cobham Country Park and Ashenbank Wood, and loss or deterioration of 12 veteran trees.
 - Relocation of access to Harlex Haulage Depot encroaching on undeveloped areas of the AONB.
 - Loss of tranquillity along the existing A2 within the West Kent Downs Local Landscape Character Area due to increased noise and lighting; and increase in scale of structures - taller lighting columns, higher bridges, wider gantries and 23 massive retaining walls.

- Nocturnal effects on landscape receptors resulting in a ‘perceived change’ to the West Kent Downs.
- Impacts on biodiversity rich habitats within the AONB due to nitrogen deposition.
- Traffic displacement onto roads elsewhere in the AONB, e.g. onto the A229 Blue Bell Hill, leading to further pressure for an increase in their capacity [REP1-241].
- Adverse visual amenity for those recreating in the AONB including in Shorne Woods Country Park and on the public rights of way network and long distance paths.

FAILURE TO SEEK TO FURTHER THE AONB STATUTORY PURPOSE

8. The applicant claims that the SoS can be satisfied that the LURA duty has been met, as the project complies with the National Policy Statement for National Networks 2014 (NPSNN) and by extension with section 85 of the CRoW as amended. It does not. The evidence shows that the project is not compliant with the NPSNN or with the duty to ‘seek to further’ the AONB statutory purpose.

NPSNN 5.150

9. **Great weight should be given to conserving landscape and scenic beauty in nationally designated areas. National Parks, the Broads and Areas of Outstanding Natural Beauty have the highest status of protection in relation to landscape and scenic beauty.** The applicant failed to give great weight to conserving the scenic beauty of the Kent Downs AONB for the following reasons.

Failure to understand the integrity of the AONB designation

10. The applicant claims that the integrity of the AONB is not compromised as the scheme would take only 1.61km² or 0.18% of the AONB [APP-501]. This quantitative reduction of impact to a unit of measurement of land area shows a complete lack of understanding of the designation and its purpose. It fails to acknowledge the three dimensional wider impacts such as from the proposed multilevel junction on the AONB setting and increased traffic on other roads within the AONB or the qualitative impacts that would be imposed on landscape, visual amenity and habitats. The single designation applies to all parts of the AONB which are of equal value and equally subject to the statutory duty.

Options appraisal failed to fully consider the harm to the AONB

11. The route selection process failed to consider the harm to the nationally protected AONB, as required by NPSNN 150-152 [see below and REP9A-010].

Scale of impact on the AONB underestimated by applicant

12. The existence of a major 8-lane highway and traffic crossing the northern tip of the Kent Downs is the baseline from which the applicant had to seek to further the conservation and enhancement of the AONB’s natural beauty. Instead the applicant pursued a scheme that would impose severe direct and indirect permanent harm to the natural beauty of

the Kent Downs AONB and its setting, thereby worsening the existing situation. The scale of the impacts of the LTC on the AONB have been underestimated, as considered by both Natural England [REP1-262] and the Kent Downs AONB Unit [REP1-378]. Their and TCAG concerns have not been addressed [REP9A-014, REP9A-010, REP8-191].

Scale of impacts reduced by applicant

13. The scale of adverse impacts has been significantly reduced from that presented in the Environmental Statement (ES) accompanying the 2020 DCO submission, despite (a) there having been no change in mitigation that would justify such an assessment [REP9A-010 & REP9A-014]; and (b) the design changes between the two DCO submissions not significantly reducing the level of harm. In the 2020 withdrawn ES, all Local Landscape Character Areas within the Kent Downs AONB were assessed as being of 'Very High' susceptibility. In the ES accompanying the current DCO their susceptibility is judged to be either 'Medium' or 'High', with 'Medium Susceptibility' defined as the 'Ability to accommodate some change (relating to landscapes of local or regional recognition of importance)'. Such an assessment is totally at odds with the statutory purpose of the AONB to conserve and enhance natural beauty. The AONB is a national designation, not a local or regional designation, which confers by default 'Very High' susceptibility.
14. The Appraisal Summary Table (AST) mirrors this reductive change. The October 2020 AST recorded the impact on the Kent Downs as 'large adverse'¹. The AST submitted with the 2022 DCO [APP-524] recorded the impact as only 'moderate adverse'.

Incorrect assessment by applicant

15. The assessment of landscape and visual effects within the ES are incorrect. The boundaries of some of the Local Landscape Character Areas within the Kent Downs AONB was incorrectly transposed within the ES. The ES shows incorrect boundaries for the contiguous West Kent Downs (sub area Cobham) and West Kent Downs (sub area Shorne) Local Character Areas. The Cobham sub area boundary largely follows the northern boundary of the existing A2/High Speed 1 Rail Line alignment whereas the ES shows the same Character Area boundary running to the south of the A2/High Speed 1 Rail Line. The incorrect transposition of the boundaries for these two Character Areas is likely to mean that landscape and visual effects are incorrect. This error has not been corrected and both Natural England and the Kent Downs AONB partnership maintain their objection to the change in boundary according to both their final Statement of Common Ground (SoCG) [REP9A-014 & REP9A-010]. This means the SoS cannot rely on the ES to make a decision.

¹ Fol request through 'what do they know'

Limited and overstated mitigation effects

16. The proposed mitigation impacts are overstated in the Planning Statement Appendix F [APP-501] and fall far short of what is required to adequately modify the harm to the AONB [REP9-225]. Natural England (the Government's statutory landscape adviser) recommended that the applicant should be obligated to provide a more comprehensive and greater mitigation package [REP1-262]. This recommendation has not been followed as the final SoCG between Natural England and the applicant shows [REP9A-014].
17. The attempt to mitigate the severance of the AONB landscape by using green bridges fails. Their widths - 11.5m and 21.5m with only a 1.5m strip of vegetation - far fall short of the Landscape Institute's recommendation that in order to reconnect the landscape green bridges need to be 50m-80m wide [REP4-330]. This best practice must be followed if the applicant is to show it has sought to further the AONB purpose. It may cost more but there are no other reasons why this should not be followed.
18. The wider impacts of the scheme on the AONB have not been addressed. For example, increased traffic on the A229 Blue Bell Hill would increase pressure for capacity enhancements which would impact negatively and directly on the AONB. The A229 is the shortest link between the M20 and the M2 and cuts through the escarpment of the North Downs. Both junctions with the motorway at either end of this road are already over capacity at peak times, and upgrading both the junctions, as well as widening the route itself, would have a significant adverse impact on the AONB.
19. The applicant's reductive assessment, coupled with the failure to appraise alternatives that would avoid the Downs, the underestimation and diminution of the harm that would be imposed on the Downs and the failure to provide mitigation as advised demonstrate that the applicant has failed to give great weight to conserving the scenic beauty of the Downs, and by extension to meet the LURA duty. Instead it shows little regard or understanding for seeking to further the purpose of the AONB.

NPSNN 5.151

20. **The Secretary of State should refuse development consent in these areas except in exceptional circumstances and where it can be demonstrated that it is in the public interest. Consideration of such applications should include an assessment of:**
 - **the need for the development, including in terms of any national considerations, and the impact of consenting, or not consenting it, upon the local economy;**
21. The need for the development has not been justified as alternatives have not been fully appraised (see below). In terms of national considerations the LTC would worsen the climate emergency by emitting 1.73MtCO₂e from construction and 4.833MtCO₂e from its operation. It would also increase air pollution emissions of NO₂ and PM_{2.5}, lead to

direct loss and deterioration of nationally significant habitats and SSSIs, take Green Belt and valuable agricultural land and destroy highly valued cultural heritage. The claimed journey time improvements would be short lived due to induced traffic and the economic benefits according to the AST are poor value for money. In this context the scheme cannot be justified.

22. The impact on the local economy has not been fully assessed. Gravesham is the only borough south of the Thames that is directly impacted by the LTC. The Council is concerned about impacts on its local economy including on heritage, agricultural land take and its unique tourist offer which includes the AONB [REP1-228]. Land take would be profound and the scheme would lead to congestion and rat running on particularly the A227. The Council's concerns are valid e.g. the claimed alleviation of the Dartford Crossing congestion would not occur, as evidenced by Thurrock Council and there would be a 50% increase in cross river traffic, from induced demand, if the proposed LTC is consented. These impacts have not been addressed in the relevant economic appraisal documents [APP-518, APP-525, APP-527].

- **the cost of, and scope for, developing elsewhere, outside the designated area, or meeting the need for it in some other way;**

23. This has not been demonstrated. Only the cost of the scheme is available. The cost and scope of rail freight and of alternative routes which would avoid the impacts on the AONB, and potentially enhance the AONB, have not been appraised. The assessment of alternatives for developments in National Parks, the Broads and Areas of Outstanding Natural Beauty (AONBs) is required by NPSNN 4.26. For national road schemes, NPSNN 4.27 notes that **'proportionate option consideration of alternatives will have been undertaken as part of the investment decision making process. It is not necessary for the Examining Authority and the decision maker to reconsider this process, but they should be satisfied that this assessment has been undertaken'**. Given there is a strong presumption against road building or widening in the AONB (NPSNN 5.152, see below) a 'proportionate option consideration of alternatives' in this case requires a rigorous assessment of options. The SoS must reconsider the options appraisal.

24. The initial 2009 DfT study dismissed cross-river rail connections options after which rail was not considered again (APP-141). The applicant's 2016 Pre-Consultation Scheme Assessment Report is concerned only with route options. A package of sustainable options, preferred by a majority of respondents, was ignored by the applicant who promoted the LTC in its current form and did not consider sustainable options to reduce car dependency or modal shift of long distance road freight to rail. Alternative routes that avoided AONB impacts were discounted before the impacts on the AONB were known. AONB impacts only became apparent once the route choice was finalised with the need to increase the capacity of the A2 and relocate utilities adjacent to it, requiring

the widening of a 2 km section of the A2 through the AONB with associated loss of Ancient Woodland and SSSI habitat. Alternatives were therefore dismissed too soon and without adequate information and have not been developed or costed as a least intrusive option for comparison with the LTC. If the SoS is to demonstrate proactively that he has sought to further the purpose of the AONB, he must now cost and scope (a) the alternative routes that were dismissed and (b) rail freight.

- **any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated.**
25. Both Natural England and the Kent Downs AONB partnership have emphasised the detrimental effect of the scheme on the environment, the landscape and recreational opportunities. They have shown the harm cannot be moderated sufficiently to allow the scheme to progress as a route through the AONB.
26. Thus there are no exceptional circumstances which would allow the SoS to consent the DCO. Solutions that would avoid the AONB have either not been sufficiently assessed or not assessed at all. The scheme is not in the public interest as the harm inflicted on the Kent Downs AONB is unacceptable and cannot be mitigated; the wider adverse impacts of the scheme are counter to sustainable national considerations. The public interest would be served by reducing the impact of existing traffic on the AONB.

NPSNN 5.152

27. **There is a strong presumption against any significant road widening or the building of new roads and strategic rail freight interchanges in a National Park, the Broads and Areas of Outstanding Natural Beauty, unless it can be shown there are compelling reasons for the new or enhanced capacity and with any benefits outweighing the costs very significantly. Planning of the Strategic Road Network should encourage routes that avoid National Parks, the Broads and Areas of Outstanding Natural Beauty.**
28. The applicant has not worked from a strong presumption against significant road widening in the AONB. The failure to examine a rail freight option and the superficial assessment and dismissal of route options outside the AONB before the final route was chosen undermines the claimed compelling reasons for the new capacity. Furthermore, at an estimated cost of £9bn and with an initial BCR of 0.48, the benefits of the LTC do not outweigh costs 'very significantly'.

NPSNN 5.32

29. **The Secretary of State should not grant development consent for any development that would result in the loss or deterioration of irreplaceable habitats including ancient woodland and the loss of aged or veteran trees found outside ancient woodland,**

unless the national need for and benefits of the development, in that location, clearly outweigh the loss.

30. The loss of 8ha of ancient woodland and of veteran trees, the special characteristics and qualities of which are irreplaceable, is in direct contravention to NPSNN 5.32. Woodland planting proposed as mitigation is no compensation for this loss. Ancient woodland is a key component of the wooded landscape of the Kent Downs in this area and contributes to both the AONB's statutory purpose and the public's enjoyment of its amenities. As the transport problems could be solved in other ways there is no justification for the very severe harm that the loss of these ancient woods and veteran trees would impose.
31. All of the evidence presented above demonstrates that the Applicant has failed to meet the policy requirements of NPSNN as applied to the AONB. This means the SoS, if minded to consent the DCO, cannot comply with NPSNN 5.153. **Where consent is given in these areas, the Secretary of State should be satisfied that the Applicant has ensured that the project will be carried out to high environmental standards and where possible includes measures to enhance other aspects of the environment. Where necessary, the Secretary of State should consider the imposition of appropriate requirements to ensure these standards are delivered.**
32. The project has not been planned to meet the highest environmental standards and would severely harm the special qualities and environment of the Kent Downs AONB. The applicant has failed to provide reasonable justification for not pursuing measures that could 'seek to further' the AONB purpose.

CONCLUSION

33. The Examination documents supply no evidence that the duty incumbent on the SoS to seek to further the AONB purpose would be met. The applicant was not working towards meeting the new LURA duty when developing the scheme and has dismissed the need to do anything different as a result of it. All its claims are an afterthought and reactive in an attempt to address the new duty retrospectively. The new duty requires a fundamentally different approach which must be (a) embedded from the outset when developing a scheme that would impact on a nationally designated landscape and its setting; and (b) based on outcomes that seek to further the statutory purposes of that designated landscape.
34. Therefore, contrary to what the applicant says the new duty does have an impact on the decision-making for this DCO. There is much more the applicant could reasonably do to seek to further the purpose of the AONB. Therefore the SoS cannot rely on the applicant's evidence in order to demonstrate he has met the LURA duty. A fresh assessment is required to show where and how the proposed DCO could seek to further

that purpose. This requires personal attention from the SoS as decision maker. He must himself apply the new LURA duty to the LTC project and, if he decides to consent the DCO, demonstrate how he has met that duty.

Prepared for TCAG by Anne Robinson

By email to: A66Dualling@planninginspectorate.gov.uk

31 January 2024

Dear Secretary of State

TR010062: A66 Northern Trans-Pennine Project

Registration identification number - 20031994

I am writing with regard to your letter of 24 January 2024 requesting further information from National Highways on the impact of section 245 of the Levelling-Up and Regeneration Act 2023 which came into force on 26 December 2023. We are aware that interested parties are not being invited to submit views at this point, but we have some important new information that we wanted to make sure that you are aware of when considering National Highways' response.

Campaign for National Parks was extremely concerned by National Highways' previous response on this topic, as set out in their letter of 20 December 2023 responding to your request for information dated 7 December 2023. In this response, National Highways effectively dismissed the need to do anything different as a result of this new statutory requirement, arguing that it did not have any impact on the decision-making on this Development Consent Order.

In our view, National Highways adopted an unreasonably limited interpretation of the effect that this change was intended to have. We have now taken legal advice on the implications of this piece of legislation which confirms this and I have attached the legal opinion we received from Alex Shattock at Landmark Chambers. This makes it very clear that National Highways must now take a much more pro-active and thorough approach to demonstrating how it has addressed the new requirement to "seek to further" the statutory purposes of the North Pennines National Landscape (AONB) and the Lake District National Park.

Our legal advice states that "relevant authorities should ensure, with evidence, that their decisions do all they reasonably can to further the statutory purposes, including going beyond merely mitigating harm.... if there is an obvious alternative approach that better furthers the statutory purposes and the relevant authority cannot evidence (1) why it cannot reasonably adopt that approach or (2) that its chosen approach also seeks to further the statutory purposes, the decision will be open to legal challenge."

This means that National Highways must now provide the evidence to demonstrate why it has ruled out alternatives to dualling which would do more to further the purposes, such as introducing demand management measures to reduce traffic on the A66, investing in public transport or addressing road safety concerns by reducing speed limits. In the absence of

Campaign for National Parks
7 - 14 Great Dover Street, London SE1 4YR
020 3096 7714



[REDACTED]

such evidence, it is impossible for the Secretary of State to demonstrate that their decision on this scheme complies with the new duty to seek to further the statutory purposes.

Yours sincerely

Ruth Bradshaw
Policy and Research Manager
Campaign for National Parks

Attachment: re. s245 LURA 2023 (Opinion 29.1.24). pdf

O P I N I O N

Introduction

1. I am instructed by the Campaign for National Parks to advise in relation to the duties imposed on relevant authorities by s.245 of the Levelling-up and Regeneration Act 2023 (“LURA 2023”) which relate to National Parks, areas of outstanding natural beauty/ national landscapes (“AONBs”) and the Norfolk and Suffolk Broads.
2. In summary, my views are as follows:
 - a) Section 245 creates a series of important, pro-active duties which require relevant authorities (which include all public bodies, statutory undertakers and government departments) to “seek to further” the statutory purposes of National Parks, AONBs and the Broads. The duties are in force now, and must be complied with as part of any decision or course of action that has implications for these protected areas.
 - b) The duties are comparable in nature to the public sector equality duty in s.149 of the Equality Act 2010, for which the courts have provided a great deal of useful guidance. However, in my view, these new duties are clearly more prescriptive than the s.149 duty.
 - c) Considering the wording of the new duties, and drawing in particular on the long-established case law relating to the public sector equality duty, I suggest some broad principles below which, if applied by relevant authorities as part

of their decision-making, may assist with ensuring compliance with these new duties.

Section 245 LURA 2023

3. Section 245 of LURA 2023 is entitled “Protected landscapes.” It amends the National Parks and Access to the Countryside Act 1949, the Environment Act 1995, the Countryside and Rights of Way Act 2000 and the Norfolk and Suffolk Broads Act 1988.

4. In particular, s.245 makes the following amendments (collectively: “the duties”):

a) Section 85 of the Countryside and Rights of Way Act 2000 is amended as follows (emphasis added):

“(A1) In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty in England, a relevant authority other than a devolved Welsh authority must seek to further the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty.

(A2) In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty in England, a devolved Welsh authority must have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty.”

b) Section 11A of the National Parks and Access to the Countryside Act 1949 is amended as follows (emphasis added):

“(1A) In exercising or performing any functions in relation to, or so as to affect, land in any National Park in England, a relevant authority other than a devolved Welsh authority must seek to further the purposes specified in section 5(1)¹ and if it

¹ Section 5: (1) The provisions of this Part of this Act shall have effect for the purpose— (a) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and (b) of promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public.

(2) The said areas are those extensive tracts of country in England as to which it appears to Natural England that by reason of— (a) their natural beauty, and (b) the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population, it is especially desirable that the necessary measures shall be taken for the purposes mentioned in the last foregoing subsection.

appears that there is a conflict between those purposes, must attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park.

”

- c) Section 17A of The Norfolk and Suffolk Broads Act 1988 is amended as follows (emphasis added):

“In exercising or performing any functions in relation to, or so as to affect, land in the Broads, a relevant authority must seek to further the purposes of—

(a) conserving and enhancing the natural beauty, wildlife and cultural heritage of the Broads;

(b) promoting opportunities for the understanding and enjoyment of the special qualities of the Broads by the public; and

(c) protecting the interests of navigation.”

5. In all three cases, the amended provision provides that the Secretary of State may by regulations make provision about how a relevant authority is to comply with the duties (including provision about things that the authority may, must or must not do to comply with the duties).

Interpretation of section 245

The Explanatory Notes

6. Section 245 was inserted by the House of Lords as the Bill made its way through Parliament. The Government’s Explanatory Notes on the Lords Amendments to the Bill for this Act provide that (emphasis added) *“The clause strengthens the duty on certain public authorities when carrying out functions in relation to these landscapes to seek to further the statutory purposes and confers a power to make provision as to how they should do this.”* The duties are therefore clearly intended

...

(3) The said areas, as for the time being designated by order made by Natural England and submitted to and confirmed by the Minister, shall be as known as, and are hereinafter referred to as, National Parks.

to impose new and more onerous requirements with respect to the statutory purposes than existed before.

General principles of interpretation

7. The primary indication of legislative intention is the legislative text, read in context and having regard to its purpose: *Bennion, Bailey and Norbury on Statutory Interpretation*, 11.1. The text is the starting point, and the centre of the interpreter's attention from then on.

“Seek to further” and comparable duties

8. The words “seek” and “further” are common and do not appear in the leading legal dictionaries as terms with specific legal meaning.² The Oxford English Dictionary defines “further” as “*to help forward, assist (usually things; less frequently persons); to promote, favour (an action or movement).*”
9. The precise term “seek to further” has not appeared on the statute book before, other than in the Scottish statutory instrument the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012/162, regulation 4 of which provides that an authority in Scotland must publish reasons if its equality outcomes do not “seek to further” the needs mentioned in s.149 of the Equality Act 2010 (the public sector equality duty). There is no useful reported case law on the regulation 4 duty.
10. Notwithstanding the fact that the precise wording “seek to further” does not appear elsewhere in statute, the following similar duties seem to me to be broadly comparable and helpful to consider:

² Jowitt’s Dictionary of English Law; Stroud’s Judicial Dictionary of Words and Phrases; Osborn’s Concise Law Dictionary. “Furtherance” was discussed in *R. v Tearse* (Rawling) [1945] K.B. 1, but that discussion has limited relevance here (it was a case about whether acts done before an illegal strike amounted to the criminal offence of committing acts in furtherance of that strike).

- a) Section 6 of the Environment (Wales) Act 2016 provides that a public authority in Wales must, “in the exercise of its functions”, “seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales.”
 - b) Section 149 of the Equality Act 2010 provides that a public authority, “in the exercise of its functions”, must have due regard to the need to “advance” equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. That includes having regard to the need to “take steps to meet the needs of persons who share a relevant protected characteristic” and “encourage persons who share a relevant protected characteristic to participate in public life” (emphasis added).
 - c) Schedule B1 of the Insolvency Act 1986 provides that the administrator of an insolvent company “must perform his or her functions with the objectives of” rescuing the company, achieving results for creditors or realising property.
 - d) The Civil Procedure Rules provide that the courts must “seek to” give effect to the overriding objective when exercising their powers or interpreting rules (CPR 1.2); and that parties are required to help the court to “further” the overriding objective (CPR 1.3).
11. As with the new duties in s.245, these are all positive duties which must be furthered by the subject of the duty in the exercise of their functions.

Relevant case law

12. I turn now to relevant case law concerning these comparable duties. Unfortunately, there is no useful reported case law concerning section 6 of the Environment (Wales) Act 2016. While there is case law on the CPR duties regarding the overriding objective, much of it is too high level to be helpful. However, there is case law relating to the Equality Act 2010 and, to a lesser extent,

the Insolvency Act 1986. I consider that this case law provides useful guidance to help understand how the new duties imposed by s.245 should be applied.

13. *In re Lehman Bros Europe Ltd (in administration) (No 9) and another* [2018] Bus. L.R. 439, Hildyard J considered the meaning of the administrator duties in the Insolvency Act 1986. His analysis was as follows (emphasis added):

“on a plain reading of paragraph 3(1) of Schedule B1, any such function must be performed with the objective of the administration's statutory purpose. That provision does not, as the Administrators at one point seemed to contend, permit an administrator to perform any of his functions so long as doing so does not conflict with the statutory purpose of the administration. If it had been Parliament's intention to so provide, it could easily have done so. Rather, the statute is clear that any performance of an administrator's function must be performed for, and only for, the administration's purpose.”

14. As to the Equality Act 2010, there is a wealth of case law on the s.149 public sector equality duty. *R. (on the application of Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 remains the leading case. In particular, I note the following established principles [25]:

- a) An important evidential element in the demonstration of the discharge of the s.149 duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements.
- b) A public authority must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a “rearguard action”, following a concluded decision.
- c) The s.149 duty must be “exercised in substance, with rigour, and with an open mind”. It is not a question of “ticking boxes”; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument.

- d) The s.149 duty is non-delegable and continuing.
- e) General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.

Natural England's advice

15. I have seen brief advice dated 19 January 2024 from Natural England which states as follows (emphasis in original):

- *the duty to 'seek to further' is an active duty, not a passive one. Any relevant authority must take all reasonable steps to explore how the statutory purposes of the protected landscape (A National Park, the Broads, or an AONB) can be furthered;*
- *The new duty underlines the importance of avoiding harm to the statutory purposes of protected landscapes but also to seek to further the conservation and enhancement of a protected landscape. That goes beyond mitigation and like for like measures and replacement. A relevant authority must be able to demonstrate with reasoned evidence what measures can be taken to further the statutory purpose.*
- *The proposed measures to further the statutory purposes of a protected landscape, should explore what is possible in addition to avoiding and mitigating the effects of the development, and should be appropriate, proportionate to the type and scale of the development and its implications for the area and effectively secured. **Natural England's view is that the proposed measures should align with and help to deliver the aims and objectives of the designated landscape's statutory management plan. The relevant protected landscape team/body should be consulted.***

Analysis

Interpretation of the duty: the words in their context

16. I turn first to the words used in their context:

- a) In all three cases, a relevant authority is defined by the respective section as any Minister of the Crown, “any public body,”³ any statutory undertaker, and any person holding public office.
- b) The duties apply to the exercise of “any functions in relation to, or so as to affect, land in” an area of outstanding natural beauty, national park or the Broads. This wording is very wide in scope.
- c) The relevant authority “must seek to further” the various stated purposes. “Seek” and “further” both imply demonstrable action in the form of assistance and promotion of those purposes. I agree with Natural England’s advice in that regard (and indeed I would endorse it more generally). As with the *Lehman Bros* case, it is not enough that a decision simply does not conflict with these purposes: it must seek to further it.
- d) This seems to me to be a more onerous duty than the public sector equality duty in s.149 of the Equality Act 2010, which only requires “due regard” to be given to the stated objectives. Here, by contrast, the relevant authority must go further than simply having “due regard” to the various purposes: it is required to actively further them. I note in particular that the previous wording in the three acts was “shall have regard to the purposes” rather than “must seek to further”. The amendment therefore evidences a deliberate intention to strengthen the previous duty: if “have regard to” was the same as “seek to further”, then there would be no need for the amendment.
- e) The Secretary of State may by regulations make provision about how a relevant authority is to comply with the duties (including provision about things that

³ I note that a “public body” is one, whether elected or created by statute, which functions and performs its duties for the benefit of the public, as opposed to private gain: *R. v Joy and Emmony* (1975) 60 Cr. App. R. 132. This would include publicly funded companies delivering services for the benefit of the public, and arm’s length bodies such as executive agencies: see <https://www.gov.uk/guidance/public-bodies-reform>.

the authority may, must or must not do to comply with the duties). It is clear that the scope of the duties is intended to be heavily guided by those regulations when they come into effect. However, I note that the duties apply now, i.e. before those regulations have been made. As things currently stand, it would be an error of law for a relevant authority to ignore the duties on the basis that regulations which may never be made have not yet been made.

Principles to help ensure compliance with the duties

17. In the absence of those regulations, it seems to me that the following principles, drawn from the wording of the statute and the comparable case law cited above, could usefully be applied by public bodies and government departments seeking to comply with the new duties:
 - a) The new duties are very broad in scope, applying to “any functions” in relation to, or so as to affect, land in the protected areas. Relevant authorities would do well to assume that if their decision touches in any way upon an AONB, National Park or the Broads, the relevant duty is engaged.
 - b) The duties are pro-active, and not merely an afterthought: the authority must “seek to further” the stated purposes in the exercise of their functions. That means that the duties should be pro-actively considered as part of any decision to which the duty applies. A failure to consider those duties, or a failure to understand their pro-active and mandatory nature, would be an error of law.
 - c) As with the (less onerous) public sector equality duty, an authority must factor in the relevant duty before the adoption of a proposed policy and not merely as a “rearguard action”, following a concluded decision.
 - d) Again, as with the public sector equality duty, it will be important for relevant authorities to record the steps taken by the decision maker in seeking to meet

the statutory requirements and demonstrate how the decision complies with the duty.

- e) While there is no obvious requirement to expressly reference the new duties in every decision, they are not merely a box-ticking exercise, and they must be rigorously applied as part of any relevant decision.
- f) General regard to the benefit of protecting these landscapes is not the same as having specific regard to the statutory purposes, by way of conscious approach to the statutory criteria.
- g) Unlike the public sector equality duty, these duties are outcome-based: they do not simply require “due regard” to be had to them. If, having considered the implications of a decision, an authority reaches the view that the decision does not “seek to further” the applicable legislative purpose, it would be hard to argue that the decision would in fact be open to the relevant authority: because it would appear to be in breach of the applicable duty. In those circumstances, the decision would need to either be withdrawn or modified such that the relevant authority could confidently say that it did seek to further the relevant purpose.
- h) To be clear, however, this does not mean that the duty precludes decisions that are “net harmful” to an AONB, National Park of the Broads: if that were so, the duty would be to “further the purpose” rather than to “seek to further the purpose.” But what is required is positive evidence that the relevant authority has, in all the circumstances, sought to further the purpose: not merely through mitigation of harm but by taking all reasonable steps to further the purpose.
- i) As to whether a decision or course of action *in fact* seeks to further the relevant purpose, I consider that this is a question for the relevant authority in the first

instance, subject to challenge on *Wednesbury* principles. But a positive conclusion that the decision or course of action does seek to further that purpose is clearly required.

18. The above principles are of course subject to any guidance provided by the proposed regulations and/or the courts, which will no doubt be forthcoming. But it seems to me that, if a relevant authority applies these principles conscientiously, it will be less open to a judicial review challenge on the basis of an alleged breach of the new duties.

Questions a relevant authority should ask itself when considering whether it has complied with the duties

19. Applying these principles more practically, when making a decision that is within the scope of one or more of the new duties, it may assist a relevant authority to ask itself the following questions:
 - i. What are the required statutory purposes my decision must seek to further?
 - ii. Does my decision in fact pro-actively seek to further those purposes? If so-how does it do so? If not, how can my decision be modified so that I can confidently conclude that it does seek to further the relevant purposes?
 - iii. As a matter of best practice, have I recorded how I have concluded that my decision seeks to further the required purposes, which I can produce in the event of a subsequent legal challenge?

The duties in practice

20. The most obvious implications for the new duties relate to planning decisions. I do not think that as a matter of law the new duties require the refusal of planning

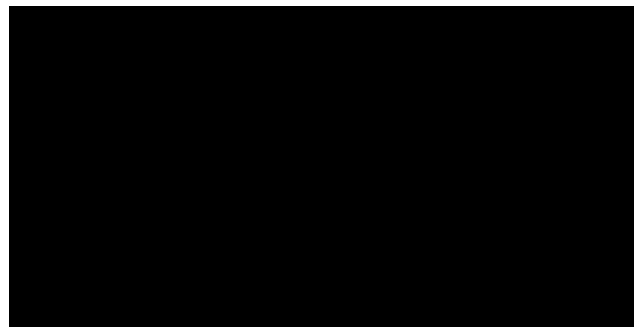
permission for any proposal that would have a net negative impact on the relevant protected spaces. In some circumstances, the duties might come into conflict e.g. where there is a proposal that benefits access to a National Park but harms an AONB: decision-making would be impossible if furtherance of both purposes was mandatory. But in any event, a duty which requires refusal in circumstances where there is net harm would be a duty to “further the purpose” rather than to “seek to further the purpose.”

21. Nevertheless, the clear intention of the amendment is to strengthen the previous duties to “have regard to” the purposes. This is also what the new wording clearly does. Planning decision-makers would be well-advised not treat the new duties as “business as usual” and to consider the pro-active duties now placed on them to seek to further the purposes of AONBs, National Parks and the Broads. I agree with Natural England that this means that relevant authorities should ensure, with evidence, that their decisions do all they reasonably can to further the statutory purposes, including going beyond merely mitigating harm. This could include, for example, delivering enhancements to the natural beauty of the area, or creating new opportunities for the understanding and enjoyment of the special qualities of national parks by the public (rather than merely maintaining or supporting existing opportunities). Moreover, if there is an obvious alternative approach that better furthers the statutory purposes and the relevant authority cannot evidence (1) why it cannot reasonably adopt that approach or (2) that its chosen approach also seeks to further the statutory purposes, the decision will be open to legal challenge.
22. It is important however to highlight that the principles I have suggested above extend beyond merely the planning sphere: all public bodies and government departments and all kinds of decisions are in scope. If a relevant authority makes a decision that engages the duties and it cannot demonstrate that it has done all

it reasonably can to further the statutory purposes as part of the decision, that decision will also be open to legal challenge.

Conclusion

23. I advise accordingly: a summary of my conclusions is set out in the introductory section to this opinion. Do not hesitate to contact me with any further queries.



ALEX SHATTOCK
Landmark Chambers

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