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Dear Mr Bartkowiak

## **A122 Lower Thames Crossing (Reference Number TR010032)**

### **1 Response to Secretary of State letter from 26 July 2024**

1.1 The Applicant is responding to the letter from the Secretary of State published on the 26 July 2024.

### **2 Amendment of section 85 of the Countryside and Rights of Way Act 2000**

2.1 The Secretary of State's letter of 26 July 2024 sets out that:

*1. Responses were provided by the Applicant, Natural England and the Kent Downs National Landscape Team in response to the Secretary of State's consultation letter of the 09 July 2024.*

*2. The proposal to provide funding to deliver enhancement measures to the Kent Downs National Landscape (formerly AONB) is noted, but the appropriate amount of funding or non-financial measures remains a point of disagreement. Without prejudice to any final decision on this matter, it is proposed that the following provision is included within the Schedule 2, Part 1, requirement 3 (detailed design) of the Development Consent Order:*

*(3) Prior to the commencement of the operation of the authorised development, the undertaker and Natural England must agree to a written proposal regarding measures, which may include a financial payment or other non-financial measures, for the benefit of the Kent Downs National Landscape having regard to the duty of section 85 of the Countryside and Rights of Way Act 2000. Projects to be supported financially or by nonfinancial measures will be in accordance with the principles of the Kent Downs AONB Management Plan or any superseding document, and will be agreed with the Kent Downs National Landscape team*

*(4) Any dispute under sub-paragraph (3) above as to the measure or measures to be agreed, including the quantum of any financial payment if included, shall be referred to an independent expert agreed by all parties in accordance with article 64 (arbitration).*

*3. All interested parties are invited to provide any comments they may have on the responses provided, as well as the proposed provision.*

- 2.2 The Applicant has considered this drafting carefully, and has specific comments on the following aspects of the drafting:
- a. the need to avoid creating a Grampian condition by setting the quantum of the financial payment at the point of DCO grant;
  - b. the route for arbitration;
  - c. suggested drafting amendments to the Secretary of State's proposals;
  - d. amendments to the Applicant's proposed drafting of the 23 July 2024, following consideration of the Secretary of State's proposal and discussions with Natural England on 6 August 2024.

- 2.3 In addition, the Applicant provides further information on the basis of the £3 million proposed fund, and consideration of the £38 million suggested by Kent Downs National Landscape team.

#### **Need to avoid creating a Grampian condition**

- 2.4 The Applicant wishes to express serious concerns regarding the Secretary of State's proposed amendment to Requirement 5.
- 2.5 First, the Applicant considers that all of the information necessary to discharge the duty under section 85 and determine the appropriate quantum is already before the Secretary of State. The Applicant, Natural England and the Kent Downs National Landscape Team have provided the Secretary of State with the evidence that would be required in making a determination on whether the duty has been discharged and all parties have attempted to resolve differences as requested by the Secretary of State. The information available, or the respective positions, is not a matter in respect of which further information could be produced.
- 2.6 Second, notwithstanding those discussions, agreement has not been reached. The Kent Downs National Landscape Team has, in the Applicant's view, suggested a quantum which is excessive and wholly unjustified for the reasons provided below. The difference in quantum between the parties is incapable of agreement. Accordingly, the provision as drafted would inevitably, or highly

likely, lead to a requirement for arbitration (discussed directly below). This, in turn, would delay the opening of the Project following construction.

- 2.7 Relatedly, the fact that all the information is before the Secretary of State in combination with the likelihood of protracted arbitration prior to the LTC being able to be opened militates towards a determination at this juncture. We note that Government policy is that the planning system for major infrastructure should be one which “will simplify the consenting process for major infrastructure projects” and “speed up delivery of critical infrastructure”.<sup>1</sup> The introduction of a further secondary approval in these circumstances conflicts with that approach.
- 2.8 Third, Natural England has communicated to the Applicant that whilst it may be able to comment on a package of measures, it will not advise on an appropriate quantum for the enhancement fund despite the information presented by the National Landscape Team, and the Applicant. The Applicant therefore considers the provision could not be discharged by Natural England, and would therefore increase the likelihood of the need for dispute resolution.

### The route for arbitration

- 2.9 The Applicant also wishes to express concerns in relation to the potential and, in the Applicant’s view, inevitable use of an arbitrator under the Secretary of State’s proposed drafting. Under the Secretary of State’s proposed drafting, an arbitration would be carried out under article 64 of the dDCO. Where an arbitrator cannot be agreed under that provision, one would be selected by the President of the Institution of Civil Engineers. The Applicant considers there are two fundamental issues with this approach being used in this context.
- 2.10 First, adjudicating a dispute over the quantum in connection with the enhanced duty under section 85 of the Countryside and Rights of Way Act 2000 is likely to be a novel exercise which would have wide-ranging policy ramifications for infrastructure delivery in the country and also have potentially significant implications on the use of taxpayers’ money. Any such person would not be accountable to Parliament, notwithstanding the potentially wide-ranging political and financial consequences of their decision.
- 2.11 Second, the Applicant would anticipate that finding an appropriate individual to adjudicate any dispute would be impractical, if not impossible. With respect, the Applicant also considers that the President of Institution of Civil Engineers is

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<sup>1</sup> <https://www.gov.uk/government/consultations/proposed-reforms-to-the-national-planning-policy-framework-and-other-changes-to-the-planning-system/proposed-reforms-to-the-national-planning-policy-framework-and-other-changes-to-the-planning-system>

unlikely to be an appropriate person to elect such an arbitrator for those same reasons.

- 2.12 Accordingly, the Applicant considers that the most appropriate person to discharge that function is the Secretary of State who would not be subject to these fundamental issues.

### **Suggested drafting amendments to the Secretary of State's proposals**

- 2.13 For the avoidance of doubt, the Applicant's primary position remains that the proposals for the Lower Thames Crossing already comply with the enhanced duty under section 85 of the Countryside and Rights of Way Act 2000, *absent* any additional financial contribution from the Applicant to support initiatives for the Kent Downs National Landscape / AONB. The reasons for that compliance were set out in full in the Applicant's [submission](#) dated 23 May 2024 in response to the Secretary of State's consultation [letter](#) dated 10 May 2024.
- 2.14 Provision by the Applicant of additional enhancement / conservation funding in the sum £3 million, as particularised in the Applicant's [submission](#) dated 23 July 2024 in response to the Secretary of State's [letter](#) dated 9 July 2024, remains a measure put forward *without prejudice* to the Applicant's primary position that such a fund is not necessary.
- 2.15 Should the Secretary of State reject that primary position, the Applicant remains of the view that any such commitment is best and most appropriately secured via the Stakeholder Actions and Commitments Register (SACR), and not as a Requirement in Schedule 2 to the DCO. The Applicant emphasises that commitments in the SACR are legally secured by the DCO, and the mechanism for securing a contribution in this way was endorsed by the Kent Downs National Landscape Team in their [letter](#) dated 23 July 2024.
- 2.16 The Applicant considers that a DCO Requirement should not be the preferred way of securing the commitment in any event. The Applicant notes in this context that the National Networks NPS is clear that the Planning Practice Guidance (PPG) should be adhered to in this context (see paragraph 4.9 which states "*Guidance on the use of planning conditions or any successor to it should be taken into account where requirements are proposed.*"). The PPG in turn sets out "*No payment of money or other consideration can be positively required when granting planning permission*" and that "*Conditions which place unjustifiable and disproportionate financial burdens on an applicant will fail the test of reasonableness*". The use of a Requirement would potentially fail to meet these tests, particularly where the sum was not determined. By contrast, the SAC-R is secured under article 61 (not a requirement or condition), and its inclusion is underpinned by section 120(3) of the Planning Act 2008.
- 2.17 Recognising that the Secretary of State may nevertheless consider a Requirement to be appropriate, and without prejudice to the Applicant's argument above that the SACR is the appropriate securing mechanism, the

Applicant considers that the Secretary of State's drafting in the [letter](#) dated 26 July 2024 should be amended as follows:

~~(3) Prior to the commencement of the operation of the authorised development tunnels being open for traffic, the undertaker and Natural England must agree in writing to a written proposal regarding measures, which may include a financial contribution payment or other non-financial measures, to be made available by the Applicant for the benefit of the Kent Downs National Landscape having regard to the duty of section 85 of the Countryside and Rights of Way Act 2000.~~

~~(4) Projects to be supported by the financial contribution referred to in sub-paragraph (3) financially or by nonfinancial measures will must be in accordance with the principles of the Kent Downs AONB Management Plan or any superseding document, and will be agreed with the Kent Downs National Landscape team.~~

~~(4)(5) Any dispute under sub-paragraph (3) above as to the measure or measures to be agreed, including the quantum of any the financial contribution payment if included, shall be referred to the Secretary of State for determination an independent expert agreed by all parties in accordance with article 64 (arbitration).~~

2.18 The justification for the amendments above is as follows:

- a. For precision, and given that elements of the authorised development may open at different times, the commitment should “bite” on the opening of the tunnels (as defined by article 2 of the draft DCO).
- b. As part of discharging its duties under amended section 85 of the Countryside and Rights of Way Act 2000, the Applicant has already considered and adopted all feasible and reasonable non-financial measures – see further the Applicant's [submission](#) of 23 May 2024 which explains this in detail. Accordingly, for precision and to avoid the commitment being unnecessarily onerous, the commitment should be limited to a financial contribution only.
- c. It is unnecessary and beyond the Applicant's remit to agree the projects in respect of which funding is allocated. That is the function of the Kent Downs National Landscape team. The Applicant's legal obligation should be limited to making funding available. The take-up and use of that funding is not within the Applicant's control, and so it is not appropriate to embed that as a legal commitment in the DCO.
- d. For the reasons cited earlier in this letter, any dispute on this matter is not suitable for arbitration. Any disputes should be referred to and determined by the Secretary of State.



## Amendments to the Applicant's proposed "without prejudice" SACR drafting

- 2.19 As noted above, and without prejudice to the primary position that no commitment is required or justified, the Applicant considers that any commitment would best be contained in the SACR as the most suitable way to secure the fund.
- 2.20 Natural England in its Response to Secretary of State's letter of 9 July 2024 noted that it would "*recommend a similar governance arrangement for the fund to that proposed for the compensatory enhancement fund*". In line with Natural England's recommendation, the Applicant has amended the without prejudice commitment to provide for the fund to be administered by the same process as that used for the AONB Compensatory Enhancement Fund. This is shown at the end of column 4 of the table appended as Annex A to this letter.

## Further consideration of the fund value

- 2.21 Within their [submission](#) of 9 July 2024, as well as in previous submissions, Kent Downs National Landscape team make reference to the landscape valuation reported in the Economic Appraisal Report, Appendix D of the Combined Modelling and Appraisal Report [[APP-526](#)]. The Kent Downs National Landscape team cite the calculated landscape disbenefits of £93.5M as being material to the value of the compensatory enhancement fund.
- 2.22 The Applicant's [response](#) to the Secretary of State dated 23 July 2024, at Annex A, at paragraph A1.6(h), highlighted that the position proposed by Natural England, to fully mitigate a significant effect before looking to create benefits, could be considered to be a requirement to achieve environmental net gain, which is a markedly different requirement to what the amended section 85 duty actually says. The Applicant considers that the use of the monetised landscape impacts as the basis for determining the value of an enhancement fund is similarly an approach that differs markedly from the wording and intent set out in the legislation.
- 2.23 Notwithstanding this, the Applicant also makes the following comments on the basis of the £93.5M, to demonstrate why it is an entirely inappropriate comparator when assessing the quantum of a fund to support compliance with the enhanced duty under section 85. Three key issues need to be considered in the context of a proposed enhancement fund:
- a. **Extent of impact** – the monetised landscape valuation covers the entire above ground length of the project, leading to a 'before mitigation' valuation of £149.78M, at 2010 prices and values. Noting that the extent of the Kent Downs AONB is limited to the areas marked as S5 and S6 within Figure 10.2 of the Economic Appraisal Report, the valuation that applies to the natural and semi-natural land, and urban fringe (forested land) that applies

to Kent Downs AONB constitutes approximately 51% of the total impact. Of that impact, the fraction of the length of each categorisation within the Kent Downs AONB as compared to the entire project assessment is as follows:

- i. Natural and semi natural land – 64% of the length reported in Table 10.5 sits within the Kent AONB.
  - ii. Urban fringe (forested land) – 39% of the length reported in Table 10.5 sits within the Kent AONB.
- b. **Extent of mitigation** – the monetised landscape valuation, developed using the Department for Transport’s Supplementary Guidance on Landscape, limits the extent of the assessments and the applicable mitigation to the area located within 500m of the route. As stated in paragraph 10.6.2 of the Economic Appraisal Report, the nitrogen deposition compensation areas, over 64ha of which are located within the Kent Downs AONB, are excluded from the calculation. In addition, the AONB Compensatory Enhancement Fund, already secured through the unilateral undertaking with Kent County Council [[REP9-268](#)], is not included in the calculation.
- c. **Basis of calculation** – the impact valuation methodology provides a net present value, comprising a summation of the impacts across a 100 year period. This is not an appropriate value to directly contrast against a series of individual cash investments taking place over a limited duration of time

The Applicant notes that the National Landscape’s response asserts this appraisal value is material in determining the quantum of the fund. However, in summary, the use of the total post-mitigation sum from the Economic Appraisal is inappropriate for assessing or determining a fund. This is because that sum reflects the impacts outside of the National Landscape, and excludes the compensatory land provided for Nitrogen Deposition impacts and the separate fund already secured. Furthermore, the sum represents a 100-year appraisal which is not a methodology relevant to determining the quantum of an enhancement fund (or which can be used on a comparable basis). The economic appraisal methodologies are prepared for the specific purpose of supporting investment decision making and not for other uses.

2.24 By contrast, as explained in the Applicant’s [submission](#) dated 23 July 2024 in response to the Secretary of State’s [letter](#) dated 9 July 2024, the Applicant’s proposal of £3m is based on benchmarking against existing enhancement and conservation projects in the National Landscape. Projects on that scale, supported by the proposed £3m funding, would plainly provide further enhancements (in addition to the mitigation and enhancement already secured)

to the National Landscape. The Applicant considers a £3m fund is “substantial” (which is the phrase used in the advice provided by Natural England).

### **3 Review of Gravesham Borough Council’s submission on the Gravesend to Tilbury Ferry**

- 3.1 The Applicant has reviewed the submission by Gravesham Borough Council on the cessation of service of the Gravesend to Tilbury Ferry and would like to provide clarifying comments with regard to the impact on the Framework Control Travel Plan.
- 3.2 The construction scenario presented in the Transport Assessment [[REP4-148](#), [REP4-150](#) and [REP4-152](#)] did not assume that the workforce would make use of the ferry service, or that there would be any Project specific provision.
- 3.3 The Framework Construction Travel Plan [[REP9-233](#)] did not provide any commitment to the Project using the ferry service, other than a shuttle bus which would serve each of the ferry piers.
- 3.4 The Framework Construction Travel Plan is an outline document, and it makes clear that “The hub locations and details of the shuttle buses would be refined by the Contractors in producing the SSTPs.” Requirement 11 secures that the subsequent travel plans will be subject to approval, following consultation, and must be substantially in accordance with on the Framework Construction Travel Plan. Accordingly, the Requirement secures appropriate provision of shuttle busses, and the cessation of the ferry service does not require the amendment of that outline Plan at this stage noting the flexibility and controls in Requirement 11 which would allow the developed Site Specific Travel Plans to reflect the circumstances at the time of preparation.

Yours sincerely

Dr Tim Wright

Head of Consents – Lower Thames Crossing



## Annex A – Proposed addition to the Stakeholders Actions and Commitments Register

Topic	SAC-R ref no.	Location	Commitment	Party Responsible	Beneficiary	Time Period
Countryside and Rights of Way Act 2000 Section 85	SACR-0XX	Kent Downs National Landscape	Having regard to the duty of Section 85 of the Countryside and Rights of Way Act 2000 (as mended), to seek to further the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty, National Highways will make funding available for appropriate projects to be undertaken within the Kent Downs National Landscape. A total of £3 million will therefore be made available to the Kent Downs National Landscape team to fund measures and projects that meet a funding criterion that primarily conserves and enhances the natural beauty of the Kent Downs National Landscape. Projects to be funded will be in accordance with the principles of the Kent Downs AONB Management Plan or any superseding document, and will be agreed with the Kent Downs National Landscape team. <b><u>The fund shall be administered by adopting the same process as is set out in paragraphs 1.1 to 8.2 of Schedule 3 to the unilateral undertaking entered into by National Highways dated 12</u></b>	National Highways	Kent Downs National Landscape	From commencement and up to three years following opening

			<p><b><u>December 2023 in relation to the Kent Downs AONB Compensatory Enhancement Fund [REP9-268], subject to the following modifications:</u></b></p> <p><b><u>(a) in paragraph 1.1 for</u></b></p> <p><b><u>“£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”)”</u></b></p> <p><b><u>substitute</u></b></p> <p><b><u>“£3,000,000 (“the AONB Enhancement Contribution”) for an AONB Enhancement Fund to fund measures and projects that meet the funding criteria set out in paragraph 4.2 of this Schedule (the “Fund”)”;</u></b></p> <p><b><u>(b) in paragraph 3.1 for</u></b></p> <p><b><u>“AONB Compensatory Enhancement Fund Awards Panel”</u></b></p>			
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			<p><b><u>substitute</u></b></p> <p><b><u>“AONB Enhancement Fund Awards Panel”;</u></b></p> <p><b>(c) <u>in paragraph 4.1 for</u></b></p> <p><b><u>“ During the Construction Period and for three years thereafter”</u></b></p> <p><b><u>substitute</u></b></p> <p><b><u>“From Commencement and for up to three years following the opening of the Authorised Development”.</u></b></p>			
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