



**Kent Downs
National
Landscape**

Interested party Ref no: 20035310

**KENT DOWNS NATIONAL LANDSCAPE TEAM
RESPONSE TO
REQUEST FOR COMMENTS FROM ALL INTERESTED PARTIES DATED
26TH JULY 2024**

Amendment of section 85 of the Countryside and Rights of Way Act 2000

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.

The Kent Downs National Landscape Team welcomes the opportunity to comment on responses to the Secretary of State's consultation letter of the 09th July 2024 and the suggested draft provision for inclusion in the DCO that is provided without prejudice to any final decision on the matter should it be determined. For the avoidance of doubt, our comments below, including those on compensatory measures, are provided without prejudice to our fundamental objection in principle to the Project, given the acknowledged residual landscape harm to the Kent Downs National Landscape and lack of effective mitigation. It goes without saying that granting consent for a scheme which causes such an extent of residual harm to the National Landscape *prima facie* does not serve to further the purpose of conserving and enhancing the natural beauty of the National Landscape.

Accordingly, while the compensatory measures we suggest would, in our view, be a suitable way to demonstrate that the Applicant is 'seeking to further' the purpose of the protected landscape, it would not mean that the scheme furthers the conservation and enhancement of the Kent Downs National Landscape. It is important to note that the wording of section 85(A1) is directed solely at the conservation and enhancement of the National Landscape; no other interests are mentioned in that section. Accordingly, it is wrong to suggest that, when considering the mandatory, active duty imposed by section 85(A1), any other, wider benefits of the scheme can be considered. The focus must be solely on the impact of the scheme on the natural beauty of the National Landscape.

Bearing that in mind, we note that the Applicant continues to maintain its previous position that no further measures are required to be incorporated to ensure that the new duty is met. The Kent Downs National Landscape Team strongly disagrees with this view for the reasons provided in our previous responses and maintains our position that the proposal in its current form would not meet the requirements of the new duty to seek to further the purpose of the Kent Downs National Landscape (as advised in our response to the Secretary of State for Transport's letter dated 19th April 2024 and Final Position Statement) and we note that this is a view shared by Natural England, as set out in their response to the Secretary of State's letter of 9 July 2024 ([link](#)).

However, should it be determined that the Project is acceptable overall, we welcome the proposed requirement for additional measures to benefit the Kent Downs National Landscape in accordance with the Kent Downs National Landscape Management Plan. As previously advised by both ourselves and Natural England, given the scale of harm to the Kent Downs, and the consequent apparent significant non-compliance with the requirements of section 85(A1), in order to comply with the new duty, such measures would need to be of a substantial scale in order to meet the statutory requirement.

We are concerned that the wording currently proposed for inclusion in the draft DCO leaves too much ambiguity as to the scale of measures that might be expected in order to ensure compliance. Given the current difference in views on an appropriate scale of

measures required to comply with the new duty between the Applicant, Natural England and the Kent Downs National Landscape Team, it is our primary case that additional clarity on this should be provided at this stage. It is suggested that this additional detail could potentially be included in one of the Control Documents, such as the [Register of Environmental Actions and Commitments](#) (6.3 Environmental Statement Appendices Appendix 2.2) or the [Stakeholder Actions and Commitments Register](#).

There is broad agreement between the parties as to the nature and type of the appropriate measures for compensation, with National Highways at B.1.8 of their response to the SoS letter of 9 July 2024 advising that they agree funding could be used for the three schemes identified by the Kent Downs National Landscape Team. Natural England's submission also supports the nature of the measures proposed.

It is the value and not the nature of the measures which is the point of disagreement. With this in mind, the Kent Downs National Landscape Team have provided further details, in our Annex A, of the measures we suggested (and which we believe the Applicant and Natural England are in broad agreement with), the reasons for proposing them, and the costing we have prepared in the short period available to do so. This exercise enabled us to propose a value for the compensatory measures of £38M, based on the likely costs of implementing the proposed measures and the value ascribed to the residual landscape impact calculated by the Applicant.

At B.1.7 of their response ([link](#)), the Applicant has commented that they consider the £38M suggested funding value is '*disproportionate, excessive and not justifiable*'. They have also previously advised (in their response to the Kent Downs Final Position Statement, 9.216 Applicant's comments on Interested Parties submissions at D9 and D9A, page 38 [link](#)) that the indicative monetised residual landscape impact, as assessed in the Economic Appraisal Report ([APP-526](#)), using the DoTs [Value for Money Supplementary Guidance on Landscape](#) , is not intended to be used to justify mitigation/compensation. The Kent Downs National Landscape Team recognise that the DoT Guidance is not intended to provide a precise figure but one of its purposes is to provide a surrogate estimate of the scale of impact where those impacts are considered to be large or moderate and to provide an '*indication of the impact on public value resulting from the landscape changes of the scheme*'.

The assessed landscape disbenefit calculated using the DoT Supplementary Guidance on Landscape for the Lower Thames Crossing project calculated a residual value of harm to the landscape of £93M and so arguably the financial scale requested by the Kent Downs National Landscape is disproportionately low. While we recognise that the £93M applies to the whole scheme, the part of the scheme south of the River Thames passes through the most sensitive and highly valued landscape (National Landscape) and its immediate setting and comprises a large proportion of the assessed £93M costed residual harm, due to the higher values associated with the affected landscape here. The scale of any compensatory package needs to reflect both the scale of this harm and the scale of the project itself, as one of the largest road schemes in decades.

The costings the Kent Downs National Landscape Team provided in our response to the SoS letter dated 09 July 2024 ([link](#)) and financial scale (value) of the compensation package, are, we believe, proportionate and fairly and reasonably related in scale and kind to the development, given the calculated monetised residual impact and total anticipated £9Bn cost of the Project. The measures are also directly related to the development and necessary to make the development acceptable in planning terms. Further detail is provided in Annex A. By contrast, the fund offered by the Applicant is paltry in comparison to the harm caused and does not appear to be objectively justified in any way.

The proposed provision in the DCO requires agreement to be reached between the Applicant and Natural England on proposed measures to meet the requirements of the new duty and should agreement not be reached, the decision to be passed to an 'independent expert'.

In the first instance, as set out above, we consider a decision on the appropriate compensatory measures required to meet the new duty should be made by the Secretary of State, given that the amended Duty is placed on the Secretary of State (as well as National Highways), rather than a third party. This is particularly the case given the current absence of any official Guidance on interpretation of the new Duty and in view of the newness of the legislation, any precedence or case law to assist in determining this. It may be appropriate for the Secretary of State to seek advice and guidance on this from an independent arbitrator, or possibly Defra officials, in the event of agreement not being reached, but a final decision should rest with the Secretary of State.

In addition it is considered that:

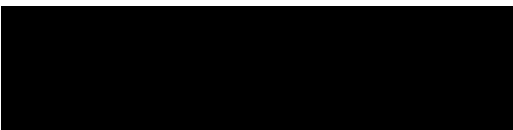
- a. It is imperative that compensatory landscape measures begin as early as possible in the process, and accordingly, that the agreement envisaged by the proposed new provision in the DCO is arrived at as early as possible. This is particularly the case as much of the harm to the National Landscape will be caused in the construction phase. Accordingly, the trigger point for the agreement of measures ought to be at the commencement of development (including preparatory works), rather than the commencement of operation, as currently drafted. This is in line with the approach contained in the Unilateral Undertaking (Schedule 3) for the AONB Compensatory Enhancement ([link](#)).
- b. The requirement for additional measures to be agreed (or, in default, be decided by arbitration) is, correctly, a recognition that the existing measures are inadequate. We accordingly suggest this is reflected by the replacement of "may include" with "must include".
- c. The Kent Downs National Landscape Team should be included as an organisation with whom agreement on the measures must be reached, given that we will be implementing any measures.

- d. Should it be necessary to refer any dispute to an independent expert or arbitrator, it is considered essential that it is specified that the appointment of the arbitrator is agreed by the Kent Downs National Landscape Team in addition to Natural England and National Highways, given that the Kent Downs National Landscape Team would be delivering the measures.

As currently drafted, under article 64 (arbitration) of the draft DCO, where agreement on an appropriate arbitrator is not reached between the parties, the decision on an arbitrator falls to the President of the Institution of Civil Engineers. The Kent Downs National Landscape Team believe this wholly inappropriate given the nature of the issues involved (Protected Landscape management) and required specialist knowledge of landscape matters. The Kent Downs National Landscape Team therefore suggest that should agreement on an appropriate arbitrator not be reached, the decision on the appointment of any arbitrator should be made by Defra or the SoS following an open and transparent recruitment process agreed by the parties (National Highways, Natural England and the Kent Downs National Landscape Team).

Should an arbitrator be appointed to decide on the measures and/or the costs, the Kent Downs National Landscape Team request that the Secretary of State recognise the imbalance in available resources for making a justified case to an arbitrator; the Kent Downs National Landscape Team is a small team with very limited resources and capacity, whereas the applicant has significant resources and funding to secure additional advice. There is a systemic imbalance in the representation available for a Nationally Protected Landscape when considering a NSIP. To ensure equity in any arbitration proceedings, it is considered that the Applicant should be expected to cover the reasonable costs of the other parties in making their case to the arbitrator, or Secretary of State; this could include the appointment of additional advice to support the National Landscape team if deemed necessary.

I hope the above is helpful and would be happy to provide further clarification if required.



Nick Johannsen FLI

Director, Kent Downs National Landscape Team

7 August 2024

ANNEX A

Proposed Compensatory Measures.

The Kent Downs National Landscape Team believe that there is broad agreement in the nature and type of the proposed compensatory measures, it is the value and not the nature of the measures which is the point of disagreement. With this in mind the Kent Downs National Landscape Team has provided a more detailed description of the measures we have proposed, the reasons they are proposed and the estimated costs. It is the view of the Kent Downs National Landscape Team that both compensatory measures proposed should be supported. While we previously suggested these as three distinct measures, we have incorporated the previously proposed third measure, access improvements, into the second measure, the conservation and enhancement grant scheme.

Proposed compensatory measure 1

Compensatory payments to fund the delivery of substantial, sustainable nature resilience and recovery and landscape scale enhancements in the North Kent Woods and Downs super National Nature Reserve (sNNR). Investments would be as defined, timetabled, described and costed in the sNNR Delivery Framework and Implementation Plan. Investments would deliver and fulfil the full, costed sNNR Delivery Framework and Implementation Plan in the time period from LTC approval to scheme opening plus 3 years and would target the core, affiliate and connected areas of the sNNR. This work will be delivered in line with the Kent Downs National Landscape Management Plan and its subsequent revisions, the statutory purpose of the Protected Landscape and other National Landscape policy and targets related to the purpose of the Protected Landscape.

The North Kent Woods and Downs sNNR Delivery Framework and Implementation Plan is being prepared by independent experts and is a partnership project between National Highways, Natural England and the Kent Downs National Landscape Team and has been funded and supported by National Highways Designated Funds.

Reasons.

- The North Kent Woods and Downs sNNR is contained almost in its entirety within the Kent Downs National Landscape. It immediately surrounds the proposed LTC scheme and includes sites of national and international importance for their nature and landscape and which will be most affected by the scheme construction and implementation. A map is provided below at Figure 1 that shows the extent of the sNNR.
- A detailed survey, management and costed implementation planning process is being prepared by independent experts on behalf of National Highways, Natural England and the Kent Downs National Landscape, its preparation is ongoing and will be completed by spring 2025. This work includes providing the evidence base and documentation to secure National Nature Reserve status for the area creating a landscape scale approach to nature recovery and access in the area of

the Kent Downs National Landscape most negatively affected by the Lower Thames Crossing construction and subsequent operation.

- The sNNR will provide significant benefit to nearby communities (those most affected by the LTC) by enhancing the quality of nature and the landscape and making important improvements to access.

Costing.

- The costing provided by the Kent Downs National Landscape Team in our previous submission was an estimate developed from previous experience and from advice gained from countryside site managers in the area taking into account the work so far completed on the sNNR Delivery Framework and Implementation Plan. This plan is expected to be fully completed in spring 2025.
- **Estimated Cost £20m** for the period from commencement of the Lower Thames Crossing Scheme to 3 years after scheme opening.

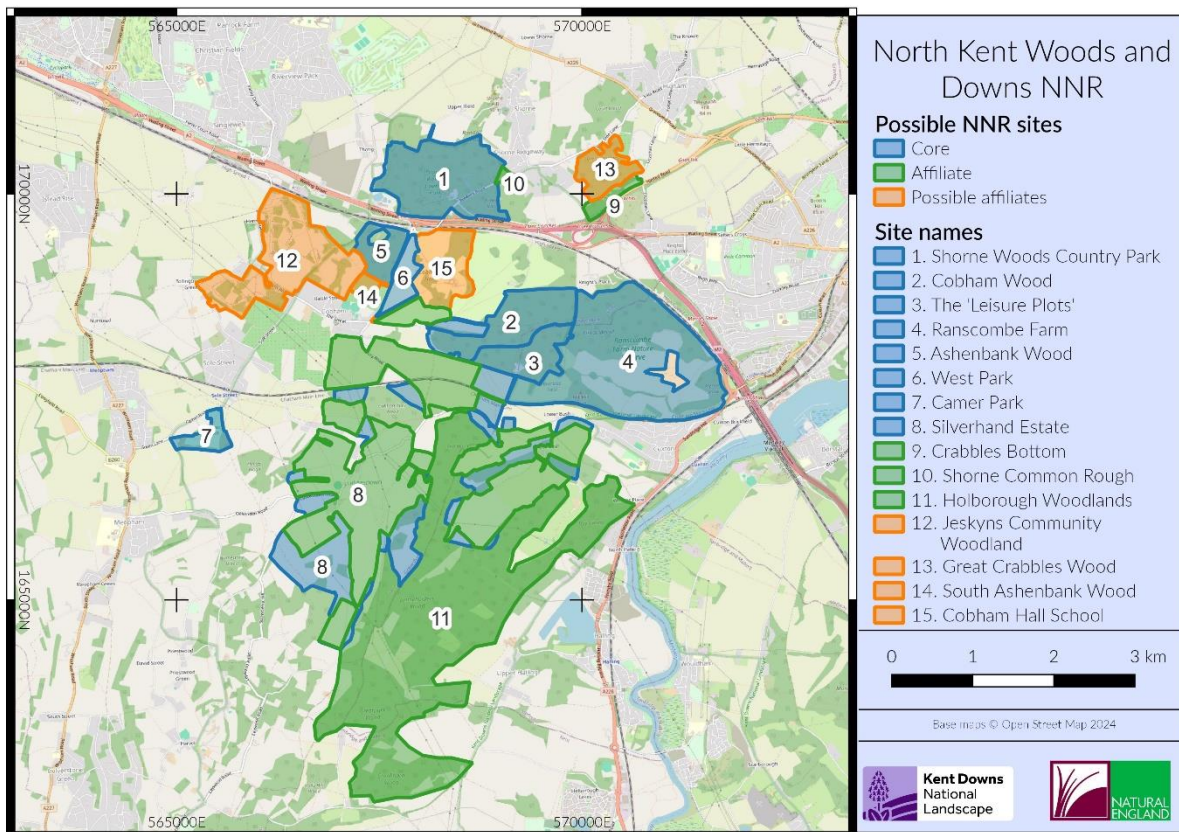


Figure 1 Proposed North Kent Woods and Downs sNNR

Proposed compensatory measure 2

- Deliver a comprehensive compensatory landscape conservation and enhancement grant scheme across the Kent Downs National Landscape to at least match the financial scale and delivery model of the successful, established Defra funded Kent Downs Farming in Protected Landscapes scheme. This

Scheme should include sufficient funds to also deliver access enhancements that were suggested by the Lower Thames Crossing Team and supported by the Kent Downs National Landscape Team. Grants would be prioritised closest to the impact of the Lower Thames Crossing but also available across the entire Kent Downs National Landscape. Grant conditions will ensure the conservation and enhancement of the landscape (which is the target of the amended Duty) and support projects and programmes in accordance with the Kent Downs National Landscape Management Plan and its subsequent revisions. Grants would be available for the construction period to scheme opening plus 3 years, in line with the AONB Compensatory Enhancement Funding.

Reasons.

- The Lower Thames Crossing will have a substantial and in perpetuity harmful effect on the Kent Downs National Landscape character and qualities that will not be wholly mitigated. The effect will be felt most near the scheme both during construction and operation, but effects will be felt elsewhere in the Protected Landscape.

Costing.

- The costing is based on the funding provided by Defra and successfully distributed by the Kent Downs National Landscape Team through the existing schemes (Farming in Protected Landscapes and Access enhancements), with a grant scheme to run for the period from commencement of the Lower Thames Crossing Scheme to 3 years after scheme opening.
- **Estimated cost £18M** (£2M per year).

The Secretary of State is requested to recognise that the suggested compensatory enhancement figure (£38m) is based on two criteria; one being the **value** of the indicative monetised residual landscape impact of the scheme (£93M), the other is a **cost** estimation of appropriate schemes to seek to conserve and enhance the natural beauty of the landscape; both should be taken into account when deciding on a compensatory figure.

Compensatory payments and Green Book compliance.

The DoT Value for Money Supplementary Guidance on landscape suggests that to comply with the Green Book an increase of value should be applied: '*The original landscape values assumed a 3% rate of increase to annual per hectare values, composed of an income growth parameter of 2.5% per annum and an income elasticity of 1.2 – allowing for landscape values to increase faster than income. However, both parameter assumptions pre-dated and differed from default values in the HMT Green Book and have been revised accordingly.*' The Kent Downs National Landscape Team suggests that the compensatory payments for landscape harm should be adjusted in a similar way.

Both schemes are costed to include sufficient resources to pay for staff and appropriate support to properly and transparently implement them using best practice and the employment and procurement approach of Kent County Council which is the Host Authority of the Kent Downs National Landscape Team.