

A47 North Tuddenham to Easton

Scheme Number: TR010038

Volume 9

9.40 Applicant's Response to the Secretary of State's Request for Comments

The Infrastructure Planning (Examination Procedure) Rules 2010
Rule 8(1)(c)

Planning Act 2008

June 2022

Infrastructure Planning

Planning Act 2008

**The Infrastructure Planning
(Examination Procedure) Rules 2010**

A47 North Tuddenham to Easton
Development Consent Order 202[x]

**9.40 APPLICANT'S RESPONSE TO THE SECRETARY OF STATE'S
REQUEST FOR COMMENTS**

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CONTENTS

1	Introduction	1
2	Key Abbreviations.....	1
3	Applicant's Responses to the Secretary of State's Request for Comments	2

1 INTRODUCTION

- 1.1.1 The Development Consent Order (DCO) application for the A47 North Tuddenham to Easton scheme was submitted on 15 March 2021 and accepted for examination on 12 April 2021.
- 1.1.2 The examination closed on 12 February 2022 and the Examining Authority submitted their recommendations to the Secretary of State on 12 May 2022.
- 1.1.3 This document sets out Highways England's (the Applicant) response to the Secretary of State's Request for Comments issued on 01 June 2022.

2 KEY ABBREVIATIONS

- 2.1.1 The following abbreviations may be used in the Applicant's responses:
- dDCO = draft Development Consent Order
 - DMRB = Design Manual for Roads and Bridges
 - ES = Environmental Statement
 - ExA = Examining Authority
 - NPSNN = National Policy Statement for National Networks 2014
 - NWL = Norwich Western Link
 - the Scheme = the A47 North Tuddenham to Easton dualling scheme

3 APPLICANT'S RESPONSES TO THE SECRETARY OF STATE'S REQUEST FOR COMMENTS

No.	Question To	ExA Question	Response
Q1	Natural England	The Secretary of State asks NE to confirm whether they have any concerns about the Proposed Development. In particular, please can NE confirm if they are content with the provisions of Requirement 7 (Protected Species) and Requirement 12 (Ecological Works) and whether all other proposed mitigation is adequate. Additionally, NE is asked to provide a copy of any letters confirming they see no impediment to the grant of the necessary species licences.	The Applicant notes that this question was posed directly to Natural England. The Applicant can confirm they have and are continuing to engage with Natural England on these matters and would be willing to provide the Secretary of State with an update to on these discussions if required.
Q2	Natural England	Berry Hall Estate Given Historic England's Deadline 6 response to the ExA's third written questions and requests for information, does NE have any concerns about the impact of the proposed development on the Land at Berry Hall?	The Applicant notes that this question was posed directly to Natural England. Depending on their response, the Applicant would like the opportunity to comment on any response to this request.
Q3	The Applicant	The Secretary of State notes the advice issued by DEFRA on 16 March 2022 in relation to nutrient pollution. The Secretary of State invites the Applicant to confirm if this changes any of the assessments carried out in relation to this application including the Applicant's Habitat Regulations Assessment report REP6-008 which the Secretary of State notes,	Nutrient pollution is largely associated with agricultural pollution and wastewater treatment works and is not commonly associated with road runoff. Comprehensive research and development into pollutants in road runoff, undertaken collaboratively by National Highways and the Environment Agency, did not identify nutrients as a pollutant of concern. Therefore, the risk of effects from nutrients is scoped out of water risk assessment in the Design Manual for Roads and Bridges (DMRB). However, Environmental Statement Chapter 13 'Road Drainage and the Water

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		<p>identified potential effect pathways which could impact River Tud and River Wensum Special Area of Conservation.</p>	<p>Environment' (APP-052) has considered mobilisation of nutrients from the disturbance of soils during construction and any associated runoff that may reach the watercourse. This is discussed explicitly in Paragraph 13.9.7.</p> <p>Paragraph 13.9.26 also states the provision of operational drainage ponds will provide reduced nutrient inputs to watercourses as a betterment to the existing baseline. Riparian buffer zones next to watercourses (paragraph 13.9.41) as part of Water Framework Directive commitments would also reduce nutrient input to watercourses as a secondary effect.</p> <p>With regards the Report to Inform Habitats Regulations Assessment, Rev.1 (REP6-008), the above mitigation measures are driven by highway design and legal compliance to avoid pollution to watercourses, not specifically to mitigate effects on sites subject to Habitats Regulation Assessment; see the response to Secretary of State's Q4 below.</p> <p>Environmental Statement Chapter 13 concludes that the Scheme does not give rise to significant adverse residual effects during the construction or operational phases with the adoption of mitigation discussed in section 13.9. Therefore, DEFRA's advice in relation to nutrient pollution does not change any of the assessments carried out in relation to this application, including the Report to Inform Habitats Regulations Assessment, Rev.1.</p>
Q4	The Applicant	<p>Habitats Regulation Assessment</p> <p>Please can the Applicant provide a detailed explanation as to why the embedded design and construction elements relied on within the HRA Report REP6-008 do not constitute mitigation measures intended to avoid or reduce the harmful effects of a project, therefore requiring an Appropriate Assessment to be carried out.</p> <p>Otherwise, please can the Applicant provide an updated HRA Report and consideration</p>	<p>The HRA screening that was undertaken in 2017 concluded that there was the potential for significant effects on some of the qualifying species of the River Wensum SAC. Following consultation with Natural England, it was agreed that the 2017 Stage 1 screening was preliminary and that a screening exercise would be updated as the Scheme progressed and the required surveys were completed. The subsequent HRA screening assessment was undertaken in 2020/2021. The Report to Inform the Habitats Regulation Assessment, Rev.1 (REP6-008) included a section within the methodology chapter which referenced the case law that changed the approach regarding mitigation and its inclusion in HRA Screening Assessments. It stated:</p> <p><i>".... It is now not permissible to take account of measures intended to avoid or</i></p>

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		<p>of adverse effects on the integrity of River Wensum SAC.</p>	<p><i>reduce the harmful effects of the plan or project on a European Site at the screening stage. As a consequence, this Screening Report does not take into account mitigation measures, including aspects such as timing restrictions</i>.</p> <p>It is important to note that the guidance on the use of Habitats Regulations Assessment also provides further direction on this aspect (Appropriate assessment – GOV.UK (www.gov.uk) (key statements are highlighted in bold):</p> <p><i>“Features that are integral to the design or physical characteristics of the project that is being assessed, for example, the layout, timing and location of a scheme, may be considered at the screening stage. Whether or not something is integral to the project and not a mitigation measure will have to be determined on a case by case basis on its particular characteristics at the screening stage. Some features of a plan or project may be the product of other considerations, irrespective of any nature conservation issues, for example safety considerations”.</i></p> <p>The HRA Screening assessment considered effects upon the River Wensum SAC and the Paston Great Barn SAC. It considered the project and the likely significant effects upon both these designated sites. The references to embedded design and construction measures are listed below and clarification provided on the main purpose of these measures to demonstrate that their inclusion is irrespective of any need to protected these designated nature conservation sites.</p> <p>Therefore, the embedded design and construction elements relied on within the Report to Inform the Habitats Regulation Assessment, Rev.1 (REP6-008) are features of the Scheme that are the product of other considerations and do not constitute mitigation measures intended to avoid or reduce the harmful effects of the project on a European site. Therefore, the Applicant’s screening remains unchanged and an updated report does not need to be provided.</p> <p>Water Pollution – Embedded design and construction elements will be in place for the road drainage and water environment, and works will follow the Outline Water Management and Monitoring Plan (REP3-027) and ES Appendix 13.2</p>

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			<p>Drainage Strategy (APP-126 and APP-127) that will be in place.</p> <p>The design measures, monitoring and drainage strategy are standard requirements for any road project and are in place to ensure that there is appropriate water management systems in place to ensure that current UK laws are met for pollution prevention and water management. These measures are also in place to prevent increased flood risk to people and property elsewhere, and to manage pollution risks most commonly associated with increased sediment loading. The inclusion of these design measures as features of the Scheme are the product of other considerations, so would be included as part of the Scheme irrespective of any nature conservation issues.</p> <p>Light Disturbance – Construction will predominantly take place during daytime, minimising the need for further lighting requirements. Night-time working would be undertaken only when required. New operational lighting is only proposed on the two new junctions (Wood Lane and Norwich Road) with the approach and exit roads being lit to provide approximately five seconds of driving at the expected traffic speed; the lighting extent would be localised around the Wood lane and Norwich Road junctions as illustrated in Appendix 1 of the Environmental Statement Appendix 7.7 'Lighting Assessment' (APP-095).</p> <p>Daytime working during construction is preferable as it reduces health and safety risks, disturbance to local residents and costs for out of hours working. However, where lighting is required, the Scheme would adhere to best practice as outlined in Table 3 of the Environmental Management Plan (REP7-035), secured under Requirement 4 of the dDCO. For example, action BD4 present best practice mitigation such as: <i>"Night lighting during construction will be directed away from sensitive biodiversity resources (EMP Ref G2), as identified in the LEMP. Where possible, lighting will be designed with backlight shields and LED bulbs, directional, and positioned sympathetically, to minimise light spill and disturbance for sensitive receptors including notable habitats."</i> Operational lighting design is a standard requirement for any road project and is in place to meet various safety design standards for drivers and tends to be balanced with reducing the amount of lighting installed, light spill and associated energy use. The inclusion of these features of the Scheme are the product of other considerations and are</p>

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			<p>irrespective of any nature conservation issues.</p> <p>Invasive Non-Native Species (INNS) – It is a legal offence to cause the spread of any INNS, and therefore during construction an INNS Management Plan will be implemented to ensure no INNS are spread; this is standard National Highways best practice and forms Annex B.10 of the Environmental Management Plan (REP7-035), secured under Requirement 4 of the dDCO.</p> <p>The INNS Management Plan is required to ensure that all legal requirements are met with regards to INNS across the scheme and ensure prevention of spread both within and beyond the DCO boundaries; the inclusion of this statement is irrespective of the presence internationally designated sites. Therefore, it is considered that no likely significant effects will occur on the SACs or the qualifying features during construction or operation due to spread of INNS by the Scheme.</p>
Q5	The Applicant & Anglian Water Services Limits (AWSL)	<p>AWSL protective provisions</p> <p>The Secretary of State notes at the close of the examination no agreement had been reached between the Applicant and AWSL on matters relating to Protected Provisions reference 35, 42(5) and 44. Please could the Applicant and AWSL is asked to confirm the status of the agreement mentioned above?</p>	<p>The Applicant and Anglian Water have not reached agreement on all the points between them. However, we have made significant progress in resolving two of the issues, namely paragraphs 35 and 44. Subject to the amendments set out below, it is therefore understood that Anglian Water's concerns are now limited to paragraph 42(5).</p> <p><u>Amendments</u></p> <p>The Applicant and Anglian Water have agreed the following change to the protective provisions in favour of Anglian Water:</p> <ol style="list-style-type: none"> Amend paragraph 82 of Schedule 9 of the DCO to insert "(1)" after the paragraph number, so that the sentence now reads: <p><i>"82.(1) For the protection of Anglian Water, the following provisions have effect, unless otherwise agreed in writing between the undertaker and Anglian Water."</i></p> After the new paragraph 82(1) insert the following new paragraphs: <p><i>"(2) Before commencement of any work set out in Schedule 1 to divert any</i></p>

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			<p><i>apparatus the undertaker will provide Anglian Water with a schedule of apparatus which will be diverted as part of the authorised development setting out for each piece of apparatus whether those works are to be undertaken under this Schedule or under the 1991 Act and, where a diversion is to be carried out partly under this Schedule and partly under the 1991 Act, details of which part of the diversion is to be carried out under which power.</i></p> <p><i>(3) The undertaker may from time to time provide to Anglian Water amendments to the schedule referred to in paragraph (2).</i></p> <p><i>(4) No amendment may be submitted under paragraph (3) in respect of apparatus which is to be diverted as part of a work set out in Schedule 1, or which comprises such a work, after that work has commenced."</i></p> <p><u>Paragraph 42(5)</u> Subject to the above amendment, the Applicant understands that the only issue between the parties relates to the inclusion of paragraph 42(5).</p> <p><u>Conclusion</u> Despite extensive negotiations, the Applicant does not consider that there is a reasonable prospect of reaching an agreement with AWSL on matters relating to paragraph 42(5), as referred to in the Statement of Common Ground between the parties (REP9-029).</p> <p>In these circumstances we would respectfully request that the Secretary of State proceeds to make a decision as to whether there will be serious detriment to AWSL if the order is made in the form submitted by the Applicant and including paragraph 42(5).</p> <p>In doing so, the Secretary of State should have regard to the arguments of each party raised by each part in the Statement of Common Ground. The Applicant does not intend to repeat in full those arguments, however in summary:</p>

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			<ol style="list-style-type: none"> 1. There is very strong precedent for deferment of renewal to be included in protective provisions and it is generally accepted by statutory undertakers. Recent examples of highway DCOs including deferment of renewal provisions are as follows: <ul style="list-style-type: none"> • The M54 to M6 Link Road Development Consent Order 2022 • M25 Junction 28 Development Consent Order 2022 • The M25 Junction 10/A3 Wisley Interchange Development Consent Order 2022 2. The provision has firm roots in primary legislation. 3. The methodology is well understood by statutory undertakers and is the subject of the Highway Authorities and Utilities Committee (HAUC) Code of Practice and online calculator, which sets out the rates which would apply. <p>The Applicant's case is that the protective provisions in favour of AWSL currently contained in the Applicant's latest draft order provide a reasonable level of protection to AWSL and that making the Order in this form will not lead to AWSL suffering serious detriment.</p>
Q6	The Applicant & Norfolk County Council (NCC)	<p>The Secretary of State notes, as of 12 May 2022, no agreement had been reached between the Applicant and NCC on matters relating to the future maintenance of assets to be transferred to NCC upon the satisfactory completion of the Proposed Development. The Secretary of State invites the Applicant and NCC to confirm whether an agreement has now been reached.</p> <p>The Secretary of State notes that NCC stated, at Deadline 8, that they were minded to submit Protective Provisions (REP8-017) and did so at Deadline 9 (REP9-042). The</p>	<p>The Applicant understands that Norfolk County Council (NCC) have confirmed that NCC and the Applicant have reached agreement and that the request for protective provisions by Norfolk County Council is hereby withdrawn, including those provisions in relation to the Norwich Western Link spur. The parties confirm that all outstanding matters have now been resolved and NCC is satisfied on matters relating to the future maintenance of assets to be transferred to NCC on satisfactory completion of the Scheme construction.</p>

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		<p>Secretary of State also notes the Applicant's comments in respect of them REP9-036 and REP10-001.</p> <p>If no agreement has been reached, the Secretary of State invites the Applicant and NCC to make any further comments in respect of the Protective Provisions submitted by NCC at Deadline 9 (REP9-042).</p>	
Q7	The Applicant	<p>The Secretary of State is aware of the discussion between the ExA and the Applicant in respect of Article 7 (Planning Permission). In the light of that discussion, the Secretary of State seeks the Applicant's comments on the deletion of that Article.</p>	<p>The Applicant is of the strong opinion that Article 7 should be retained. It is important to include this provision to ensure it is clear that where it or any third party with retained land (this is particularly relevant to land required for temporary possession) needs to obtain any other planning permission within the Order Limits, the implementation of that planning permission will not constitute a breach of the terms of this Order.</p> <p>It is the Applicant's view that this Article is vitally important to ensure third parties who retain land within the Order Limits are able to apply for and carry out other types of development which do not constitute a NSIP or part of a NSIP without inadvertently causing a breach of the DCO.</p> <p>This Article has become standard for recently consented Development Consent Orders (DCOs) (see, for example Article 11 of the M42 Junction 6 Development Consent Order 2020, Article 6 of the A1 Birtley to Coal House Development Consent Order 2021, Article 10 of the M25 Junction 10/A3 Wisely Interchange Development Consent Order 2022 and Article 6 of the M25 Junction 28 Development Consent Order 2022). On the basis there are no distinguishing factors for this scheme which would make this Article unacceptable for this application in contrast to the other DCOs listed above, the Applicant respectfully requests that Article 7 is retained.</p>

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Q8	The Applicant	<p>The Secretary of State notes at the close of the Examination a late representation was received from Climate Emergency Policy and Planning (CEPP) Annex A.</p> <p>The Secretary of State would like to invite comments from the Applicant on the information provided.</p>	<p>In response to the joint letter from interested parties relating to carbon emissions dated 10th May to the ExA, the Applicant has broken down its reply using the three sub-headings set out within the interested parties' letter, as follows:</p> <ol style="list-style-type: none"> 1) Issues with the application / environmental statement 2) Legal claim against the Government's Net Zero Strategy 3) Decision letter on M54-M6 Scheme <p>Issues with Application /Environmental Statement</p> <p>In the Applicant's Response to the Rule 17 Request (REP10-005), the Applicant set out responses to assist the ExA with regards to the matter of Climate Change. The response shows that the assessment does account for the cumulative effects of GHG emissions, demonstrates that the appropriate geographical scale has been used to quantify GHG emissions, clarifies how the assessment complies with carbon budgets and carbon policies, how the Scheme is assessed against likely significance, and how the assessment complies with EIA regulations.</p> <p>On these matters the Applicant is satisfied with the approach taken and has nothing further to comment.</p> <p>With regards to the interested parties' comments on IEMA guidance, the latest guidance on assessing GHG emissions issued by IEMA (28th February 2022) was published after Deadline 10 (12th February 2022) for the Scheme had passed. However, with regards to the comment on local and regional budgets, as described in the Applicant's Response to the Rule 17 Request (REP10-005) at Sections 3.4 and 3.6, there is no reasonable basis upon which the Applicant can assess the carbon emissions impact of the Scheme at a local or regional level and it is not required to do so by law or pursuant to the NPS NN.</p> <p>Legal claim against the Government's Net Zero Strategy</p> <p>There are a number of potential outcomes of the full hearing into the three applications for judicial review of the Government's Net Zero Strategy, which may</p>

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			<p>or not then be the subject of an appeal. It is not clear how any of those outcomes would directly impact the determination of the acceptability of the proposed scheme. In accordance with section 104(3) of the Planning Act 2008, the Secretary of State must determine the application in accordance with the NPS NN, except to the extent that one or more of subsections (4) – (8) applies. The Applicant has addressed this test in in Annex D of the Applicant's Written Summary of Oral Submissions at ISH2 (REP4-015).</p> <p>The Net Zero Strategy was laid before Parliament pursuant to section 14 of the Climate Change Act 2008. It is a report setting out proposals and policies for meeting the carbon budgets for the current and future budgetary periods. It refers to the commitments set out in the Department for Transport publication "Decarbonising Transport: A Better, Greener Britain". As noted by the Applicant in the Applicant's Written Summary of Oral Submissions at ISH2 (REP4-015), in Annex D, the Climate Change Committee has undertaken an independent analysis of the net zero strategy, including the transport decarbonisation plan within it. The overall assessment of the independent analysis undertaken found that "... <i>..it is an ambitious and comprehensive strategy that marks a significant step forward for UK climate policy setting a globally leading benchmark to take to COP 26</i>". It also recognised that "<i>Further steps will need to follow quickly to implement the policies and proposals mapped out in the net zero strategy if it is to be a success</i>". REP4-015 (Agenda item 5: Climate Change ref. 3) also refers to the publication by the Applicant of "NET ZERO HIGHWAYS Our 2030/2040/2050" in July 2021, which sets out the key role of the Strategic Road Network (SRN) in net zero Britain. The Net Zero Strategy is Government policy and that will remain the case unless and until Government changes it. The planning system could not operate efficiently if decision-making had to be suspended pending the outcome of any applications for judicial review. Further, the merits of each of the three applications for judicial review are not within the scope of the examination into the acceptability of the Scheme.</p> <p>Decision Letter on M54-M6 Scheme In Annex D of the Applicant's Written Summary of Oral Submissions at ISH2</p>

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			<p>(REP4-015) the Applicant set out the way that the Secretary of State is required to approach the assessment of carbon emissions in the determination of the DCO Application in accordance with section 104 of the Planning Act 2008. In its response to the Examining Authority's Rule 17 Request, February 2022 (REP10-005, Sections 3.4 and 3.6) the Applicant reaffirmed the decision-making framework in respect of climate change and explained how that is required to be applied to the Scheme.</p> <p>The approach set out by the Applicant is that which has been followed by the Secretary of State in considering climate matters at paragraphs 22 – 54 of the decision letter in respect of the application for the M54 – M6 DCO, which was made on 21 April 2022.</p>