

M54 to M6 DCO Issue Specific Hearing and Compulsory Acquisition Hearing

Written Submissions of Oral Case on behalf of Allow Limited ('Allow')

Compulsory Acquisition Hearing 10 December 2020

1. Allow owns 11 plots of land which are presently required for the development of the scheme and its environmental mitigation.
2. Allow has taken an entirely reasonable stance and does not object to the acquisition of the land that will be directly affected by the road infrastructure itself. What Allow does take issue with, is the permanent acquisition of land to the west which is required for environmental mitigation.
3. To be even more precise, the biggest issue concerns plot 5/2, but there remain outstanding issues in respect of those plots within the 4/20 plot series.
4. Allow's representations dated 1 December 2020¹ summarise the issues in respect of those plots, and which I do not have the time to repeat here, but by way of example, a particular issue with 4/20 is that the applicant proposes to leave Allow with only an island of land within the wider plot, but with no apparent means of access. That is plainly inappropriate and unreasonable, and Allow is confident that the applicant will be keen to remedy that very obvious issue.
5. In respect of the environmental mitigation, which is planned for plot 5/2 there are greater concerns over the compulsory acquisition of that field. It is Allow's submission that neither the legal nor the policy tests are met in respect of that land for the following reasons:
 - (a) First, **it is not necessary** to acquire that land because Allow is offering land for environmental mitigation on the east which is within its ownership, available and is in fact preferable from an ecological perspective.
 - (b) Compulsory acquisition is **a measure of last resort** and would not have to be exercised in respect of land to east since Allow is willing and happy to agree to the use of that land for mitigation.
 - (c) For all the reasons set out by Mr Boulter and summarised below, land to the east is more appropriate in ecological terms than the land to the west of the new link road. There is therefore **a compelling case in public interest in securing land to the east for that mitigation, not the west.**
 - (d) There is scant justification for insisting on ecological mitigation to the west. **The applicant has failed to provide clear evidence to** support its case, as required by the guidance² (para. 13). It has not engaged sufficiently with this point to date.
 - (e) Further, **it is incumbent upon the applicants to properly assess alternatives;** not just for the scheme as a whole, as they have set out in chapter 3 of the Environmental

¹ Comments on Accepted Changes

² DCLG Guidance, Planning Act 2008 Guidance related to procedures for the compulsory acquisition of land

Statement, but also in respect of compulsory acquisition (see para 8 of the same guidance).

- (f) The offer made by Allow of land to the east is not only a valid alternative, but it is a better alternative. There is no evidence that the applicant has properly assessed that as an alternative.
 - (g) The Applicant's reply to all of this, is that Historic England would resist mitigation there, but with respect, that argument comes nowhere near reaching the high threshold that the Government has laid down in respect of compulsory acquisition. Just because Historic England take issue with planting to the east does not mean that the applicant has made a compelling case in the public interest to acquire land to the west – far from it:
 - (i) There is no evidence before the ExA that Historic England has expressed anything other than a preference for mitigation to be on the west side of the road. A preference does not equate to necessity or a compelling case.
 - (ii) Moreover, while Historic England are unconcerned with the ecological impact of the scheme, or the statutory tests relating to compulsory acquisition, the ExA will have to balance the competing issues in respect of the historic and the natural environment, and the rights of the landowner to peaceful enjoyment of the land. The ExA will have to decide where the balance falls.
 - (iii) It is Allow's case, that the Applicant has struck the wrong balance. The Applicant appears to consider that unarticulated harm to the historic landscape should outweigh not only a better solution in ecological terms, but the clear presumption in both statute and guidance that a landowner should not ordinarily be deprived of their land.
 - (iv) In fact, the applicant has provided no evidence at all to demonstrate that ecological mitigation is best placed on the west side of the scheme.
 - (v) The only evidence on the matter is from Allow's ecologist which confirms that the mitigation would be more appropriate on the eastern side of the road .
 - (vi) Conversely, neither the Applicant nor Historic England have provided any evidence or analysis that supports it position. It is not at all clear Historic England or the applicant say harm would arise from additional planting in a landscape which has undergone significant planting in any event, and where there is nothing to prevent Allow from planting new woodland if it so wished; and
 - (vii) Finally, Historic England has never been to site³ and so cannot offer a credible view.
6. Accordingly, compulsory acquisition of Allow's land is neither justified nor necessary. As the Court of Appeal has accepted, the need for the development alone cannot amount to a compelling case in the public interest to compulsorily acquire land⁴. The Applicant has to show that there is a compelling case that Allow's land should be acquired for the purpose indicated. It has not done so.
7. In the alternative, even if mitigation did have to go to the west of the road, then Allow's alternative submission is that it is not necessary for the land to be permanently acquired by the applicants.

³ Note that a site visit has since taken place between Historic England, the Applicant's representatives and Allow's Ecologist and Historic Landscape Consultant on 6 January 2021 post the ISH and CPO Hearings.

⁴ *R (FCC Environment (UK) Ltd) v Secretary of State for Energy and Climate Change* [2015] EWCA Civ 55 at [10]

Allow would be content for the applicant to acquire temporary rights over that land, but ownership should remain with the landowners, who would manage the ecological mitigation works in the long term.

Summary of Items Raised at Issue Specific Hearing 1 'Biodiversity and Cultural Heritage' 8th December 2020

Biodiversity

1. Background

1.1 Introduction

- (a) Aspect Ecology has been commissioned by Allow to review proposals associated with the compulsory purchase of their land for habitat creation purposes.
- (b) The habitat creation is being proposed by the Applicant to offset adverse effects associated with the construction of the M54 to M6 Link Road.
- (c) The 8th December 2020, Issue Specific Hearing 1 'Biodiversity and Cultural Heritage' discussed points raised by several Affected Parties regarding the appropriateness and need for certain ecological compensation measures associated with the scheme. Topics were linked to potential or perceived effects on important ecological features, namely:
 - (i) The Effect on Great Crested Newts and Associated Mitigation;
 - (ii) The Effect on Woodland; and
 - (iii) The Effect on Bats and Associated Mitigation.
- (d) This Technical Summary Note documents the oral evidence given at the hearing in relation to the points above. In summary, it is considered that ecological compensation, sited to the west of the proposed Link Road (especially on Plot 5/2) is sub-optimally located and will not deliver the ecological benefits stated in the Environmental Statement and will not maximise biodiversity opportunities.

1.2 Structure of this note

This note discusses each of the items above in the order they were covered at the Issue Specific Hearing 1. It presents the points raised, both scheme-wide and in relation to specific plots of land owned by Allow. It firstly summarises the key points raised by Allow, before documenting the evidence used to reach the conclusions discussed and any responses provided by the Applicant during the hearing.

2. The Effect on Great Crested Newts

2.1 It is acknowledged that none of the habitats created on Allow's land are for the sole/express purpose of Great Crested Newt (GCN) conservation. However, as the approach taken by the Applicant affects the scheme as a whole and the quantum of land required for habitat creation, it was still considered relevant to raise points regarding:

- (a) The appropriate distance for surveys, and need for mitigation; and
- (b) The proposed location for mitigation.

2.2 The Appropriate Distance for Surveys

- (a) A screening distance for GCN surveys of some 500m appears to have been utilised (see Section 3.1.5 of Appendix 8.11) whereas 250m is appropriate. Indeed, the distance of 250m was selected for standard sampling surveys.
- (b) Guidance set out within Natural England's Method Statement template⁵, to be used when applying for a Great Crested Newt development licence, states that surveys of ponds within 500m of the site boundary are only required when '(a) data indicates that the pond(s) has potential to support a large Great Crested Newt population, (b) the footprint contains particularly favourable habitat, (c) the development would have a substantial negative effect on that habitat and (d) there is an absence of dispersal barriers.' Given that in this instance, none of the four points listed above are applicable to the project, as it crosses large tracts of arable and improved land with few confirmed records of GCN, it is considered that survey of ponds within 250m of the site boundary would have been more appropriate than the 500m used by the Applicant.
- (c) This increased screening distance could have led to over-inflated requirements for GCN compensation and habitat creation. This is because six ponds, with 'assumed' presence of GCN (an overly precautionary approach in itself, as discussed in the hearing) are located within 250-500m and are likely to require habitat creation/compensation as part of the European Protected Species licence for the scheme. The Applicant has agreed to provide the Method Statement associated with this application, so that areas identified for GCN compensation can be confirmed.⁶
- (d) The 2020 GCN survey report (Appendix 8.15) lists:
 - (i) Three ponds with confirmed GCN presence across the entire scheme (ponds 34, 52 and 128); and
 - (ii) Twelve ponds with 'assumed' GCN presence. This assumption is still considered overly precautionary based on the (negative) survey results obtained across the scheme. Furthermore, six of these ponds (9, 76, 106, 107, 108 and 114) are between 250-500m of the scheme. Only one of these ponds (108) had a Habitat Suitability Index calculated. This was 'below average'. As such, in terms of point 'a' in paragraph 2.1.3 above, none of the ponds have been identified as having the potential to support a large GCN population. As such, the use of a 500m survey area is not required and indeed is inappropriate.
- (e) Although no specific measures for GCN on Allow's land have been proposed by the Applicant, pond 34 on Allow's land does support GCN ('Metapopulation 6' on Figure 8.35). As the majority of land within 500m of this pond is owned by Allow, a review of the draft licence Method Statement is required to determine where compensation for habitats used by Metapopulation 6 will be sited (if not on Allow's land, yet still assumed to benefit the population affected as detailed in Section 3.5.6 of the Applicant's Environmental Mitigation Approach (November 2020)).

2.3 The Proposed Location for Mitigation

- (a) Figures 8.28 and 8.29 of the ES, plus the results obtained through the 2020 survey (Figure 8.35), show that historic, and current, known presence of Great Crested Newt is greatest to the east of the proposed scheme. However, compensatory 'ecological ponds' will be created to the west of the scheme.

⁵ <https://www.gov.uk/government/publications/great-crested-newts-apply-for-a-mitigation-licence>

⁶ The ExA is referred to the CAH submissions in particular paragraph 5 of the CAH written submissions above.

- (b) Based on the known local distribution of GCN being to the east of the scheme, the locations of the proposed 'ecological ponds', and their potential to maximise ecological benefits/opportunities, is questionable. When the Applicant is aware of known populations of a European Protected Species to the east of the scheme, measures known to benefit such a species (e.g. ponds), would also be best located to the east of the scheme. This is the case even if the scheme does not directly affect ponds supporting GCN.
- (c) It is still recommended that the siting of mitigation is re-visited and re-located to the east of the scheme. This is especially relevant for ecological ponds EP05 and EP06 on Plot 5/2. They will be isolated from known GCN populations by the Link Road. As there is a known GCN population in pond 34 (to the east of the scheme on Allow's land), siting ecological ponds to the west, where they are unlikely to benefit the species being affected around Lower Pool (e.g. bats and GCN) needs review.

3. The Effect on Woodland

- 3.1 Two points were raised regarding the perceived/potential effects on woodland and how this contributes to calculations regarding the amount of woodland creation (across the scheme) required in compensation:
 - (a) The perceived effects on Ancient Woodland; and
 - (b) A 5m buffer within retained woodland used to calculate additional woodland planting requirements.
- 3.2 As mentioned in the Applicant's report Environmental Mitigation Approach (8.11, November 2020), effects on land within 15m of Ancient Woodland are being compensated for on a 7:1 planting ratio and compensation planting is required for Nitrogen deposition impacts on a 1:1 ratio.
- 3.3 Regarding the latter point, Natural England in their Statement of Common Ground (8.8 P(B)) state *"Natural England is not aware of any set mitigation for nitrogen deposition impacts on ancient woodlands. We would advise that compensatory planting along with management improvements would be appropriate compensation in the circumstances. What ratio should be used should be considered in relation to the potential impact both alone and cumulatively, whether the site is currently exceeding nitrogen deposition levels and evidence of whether the woodland is already being impacted by nitrogen deposition"*
- 3.4 As raised in the Representation for Deadline 2 (17th November 2020), we would seek confirmation/clarification regarding impacts relating to Nitrogen deposition, and the need to compensate for these, given the Ancient Woodlands' proximity to existing motorways; with Whitgreave's wood being c. 20m from the M54 and the Ancient Woodland at Brookfield Farm being c.100m from the M6. At present it appears that the calculations have not accounted for the facts that the scheme comprises a Link Road between two existing motorways, not a new road in the area, plus it has been designed to reduce congestion, meaning fewer cars will be sat idle and releasing exhaust fumes. Accordingly, the calculations should be updated to define the net increase in Nitrogen that will be experienced by the woodlands and the ecological effects (if any) that would be anticipated.
- 3.5 We also seek clarification that activities within 15m of Ancient Woodland involve construction activities or habitat creation works. As there is no loss of Ancient Woodland and plans largely indicate only habitat creation within 15m of the edge of the woodlands, it is unclear what impacts (if any) are actually being experienced and if compensation is actually required.
- 3.6 The Applicant is also using a novel technique when assessing impacts on retained woodland. Although we appreciate that newly-exposed woodland edges will experience some changes (e.g.

increased light penetrating and exposure to wind), the need to compensate for this, and the amount of compensation required, has not been justified. The Applicant appears to be stating that 5m has been used as the distance over which deleterious effects will be experienced. As such, the linear measurement of exposed edges of retained woodlands has been multiplied by 5m to determine the amount of 'compensatory' planting required. Reports from the Applicant indicate that this method appears to be based on BS5837⁷ and in the use of Root Protection Areas (RPAs). However, RPAs are just that, zones to protect roots from construction activities (which can largely be managed through an appropriate Construction Environmental Management Plan). They are not to be used as a blanket approach to calculate the quantum of compensatory planting required. The Applicant has not provided figures to show the areas of newly-exposed, retained woodland, nor justification for the method applied. As such, the need and appropriateness of this undertaking should be reviewed as it has implications for the amount of woodland planting required across the entire scheme (and could affect the amount of woodland planting at EW08 on Plot 5/2).

- 3.7 It should be noted that the zones identified for planting around the Ancient Woodland sites, to act as buffers/protection, are nonetheless ecologically desirable. As such, these areas could/should still be planted, as these will deliver ecological benefits, but these areas of planting could/should be seen to relate to general woodland impacts along the scheme, not compensating for effects on Ancient Woodland that may not necessarily require compensating.

4. The Effect on Bats and Associated Mitigation

- 4.1 Based on a review of the evidence provided by the Applicant, and as discussed in previous representations, it is considered that proposed habitat creation measures on Plot 5/2 of the scheme are inappropriately located. Furthermore, they will:

- (a) not deliver the ecological benefits reported in the Environmental Statement
- (b) not benefit the species/individuals being affected by the scheme (for which they are proposed)
- (c) not maximise biodiversity opportunities in line with the National Policy Statement for National Networks.

4.2 Key Points

- (a) 39.6% of Lower Pool Site of Biological Importance (SBI) will be lost to the scheme. The SBI supports bat roosts (Figure 8.17 of the Environmental Statement) and areas of High and Moderate levels of bat activity (Figure 8.18). Measures to compensate for impacts on bats include habitat creation on Plot 5/2;
- (b) Woodland EW08 on Plot 5/2 is being proposed with '*a primary purpose of nature conservation and biodiversity*' (paragraph 3.9.4 of 8.11 Environmental Mitigation Approach, November 2020). This, and associated Ecological Ponds EP05 and EP06, are to compensate for habitat loss within Lower Pool and are to be '*provided as close as possible to the location where effects have occurred and benefit the same habitats and species as those affected*'. However, this compensatory habitat will be disconnected from the SBI by the proposed Link Road which will act as a major barrier for bats;
- (c) The Applicant is providing supplementary planting to Hilton Road overbridge, stating that this will allow bats to access compensatory habitats on the other side of the Link Road;

⁷ British Standard 5837: Trees in relation to design, demolition and construction. 2012

- (d) However, the area which will become Hilton Lane overbridge has already been shown through baseline surveys not to be a significant commuting route for bats (Crossing Point survey location C on Figure 8.15 of the Environmental Statement). This is key as bats are faithful to existing foraging routes and hence are unlikely to readily adopt a new route;
- (e) Furthermore, baseline Bat activity was Low/Absent in Plot 5/2, as shown on Figure 8.18 of the Environmental Statement, indicating that it is not an area currently used by bats to any significant degree;
- (f) Drawing Number TR010054/APP/2.10 of the Environmental Statement, plus information provided by the Applicant in the hearing, indicates that the Hilton Lane overbridge will be a non-vegetated 'hop-over' (spanning the Link Road, a dual carriageway). The definition for a 'hop-over' in the Defra research report WC1060⁸, cited by the Applicant in the hearing and in the bat appendix of the Environmental Statement, is one where '*mature trees overhang the road so that their crowns bridge the gap above the road*' (Section 6.3, page 51). It has not been demonstrated how this would be achieved for a dual carriageway. The example cited in WC1060 is for '*narrower roads*' and even then it was considered '*untested and unlikely to be suitable for species that fly below the tree canopy*' (such as those recorded during baseline surveys for the Link Road).
- (g) WC1060 also concluded that an unvegetated overbridge, as indicated on drawing TR010054/APP/2.10, was not effective in guiding bats safely over the road in the study (Section 6.3, page 50). Furthermore, the only overbridge structure considered effective was a relatively wide (30m) green bridge, which is far-removed from the design provided by the Applicant.
- (h) Evidence has not been provided by the applicant that such a non-vegetated structure, not sited on a significant commuting route, will safely facilitate access between bats in retained portions of Lower Pool SBI to the east of the scheme and compensatory planting/habitat to the west of the scheme;
- (i) Best practice principles (Section 7.2, page 56) arising from report WC1060 include:
 - (i) Crossing structures should be placed on the exact location of existing crossing routes: **it is our opinion that this has not been demonstrated by the Applicant.**
 - (ii) Over-the-road-structures such as green bridges should be planted with vegetation: **it is our opinion that this has not been demonstrated by the Applicant.**
 - (iii) Green bridges should be of sufficient width: **it is our opinion that this has not been demonstrated by the Applicant.**
- (j) Based on the information provided by the Applicant in the Environmental Statement and at the hearing, there is no evidence to suggest that bats will use Hilton Lane overbridge to safely access compensatory habitats on Plot 5/2. As such, compensation in its current form is not sufficient to offset effects experienced by the local bat population. Bats are

⁸ Defra Report WC1060 Development of a cost-effective method for monitoring the effectiveness of mitigation for bats crossing linear transport infrastructure. Final Report 2015

likely to either not access/use Plot 5/2, or risk collision with vehicles by crossing the Link Road at other areas other than the overbridge⁹

- (k) As discussed in previous representations (e.g. Written Representation by Allow by Deadline 1), compensatory planting to the west of the scheme is not considered appropriate and will not deliver all the ecological benefits predicted in the Environmental Statement. Conversely, habitat creation to the east of the scheme would maximise biodiversity opportunities (in line with paragraph 5.33 of the National Policy Statement for National Networks) for bats and other species (by creating coherent ecological networks in combination with the retained portion of Lower Pool SBI and the woodland fragments to the east of the scheme). In terms of bats, and the success of any proposed compensation, all known roosts are to the east of the scheme (Figure 8.17 of the Environmental Statement), with none identified to the west, plus bat activity levels are greater to the east of the proposed scheme, within Lower Pool Site of Biological Importance (Figure 8.18).
- (l) Therefore, compensatory planting and habitat creation to the east of the scheme has a greater probability of positively benefitting the local bat population, offsetting effects experienced by the scheme and maintaining the Favourable Conservation Status of the bat populations affected, whilst removing additional risks (and collision related mortality) associated with bats having to cross the scheme to access compensatory planting.
- (m) Indeed, in the absence of the provision of these measures, it has not been demonstrated that the Favourable Conservation status of bats will be maintained, as required by the Conservation of Habitats and Species Regulations¹⁰.

4.3 Further discussion

- (a) The key points above are expanded on below as part of a further discussion.
- (b) Baseline surveys for the Environmental Statement confirmed bat roosts, and areas of High and Moderate bat activity, in Lower Pool (SBI). This area will be to the east of the proposed scheme once constructed. The Applicant is proposing to compensate for this loss of habitat (~40% of the SBI) by creating ponds, woodland and grassland on Plot 5/2, to the west of the proposed scheme. Whilst being '*as close as possible to the location where effects have occurred*', it is considered unlikely that habitat creation, isolated to the west of the scheme, by the scheme itself, will '*benefit the same habitats and species as those affected*' (as reported by the Applicant).
- (c) Bats are identified as a key recipient of the habitat creation measures. However, baseline surveys did not identify any significant levels of bat activity on Plot 5/2. Discussions around bat activity in the general area mention the findings of 'Transect 5' (shown on Figure 8.16 of the Environmental Statement). However, this transect incorporates Lower Pools SBI as well as Plot 5/2. As such, differentiating between activity recorded in lower Pools and on Plot 5/2 is difficult given the data provided. Furthermore, Figure 8.15 shows that no static/automated detector was deployed on Plot 5/2, which would have provided better information about bat use in this specific area. Given Plot 5/2's proximity to the SBI, where bat activity would have been predicted during survey design, plus the potential for Plot 5/2

⁹ Abbott, I.M., Butler, F., Harrison, S. (2012). When flyways meet highways – The relative permeability of different motorway crossing structures to functionally diverse bat species. *Landscape and Urban Planning* 106: 293-302

¹⁰ Conservation of Habitats and Species Regulations 2017. Regulation 9(3) "Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions"

to be used as a site for future habitat creation, the absence of standalone transects or static/automated detectors on Plot 5/2 is considered a methodological flaw.

- (d) Although the bat activity data, as presented, are difficult to distinguish between Plot 5/2 and Lower Pools SBI, Figure 8.18 shows High and Moderate levels of bat activity in Lower Pools SBI and an apparent area of Low bat activity in the south-eastern corner of Plot 5/2. This would imply that no other bat activity was recorded around Plot 5/2, indicating the absence of bat activity over the majority of Plot 5/2. The area of low bat activity at the southern end of Plot 5/2 is possibly due to the proximity of Lower Pool SBI and the fact that trees from the SBI overhang Dark Lane (a narrow country lane). As such, bats can access it easily using existing features.
- (e) Crossing Point studies (Figure 8.15 and Paragraph 5.2.26 of Appendix 8.7) have shown that Hilton Lane is not a significant commuting route for bats. No Crossing Point surveys were undertaken at the southern end of Plot 5/2, despite low levels of bat activity being recorded. As such, it is not known if bats are crossing further south, from Lower Pools into the south-eastern corner of Plot 5/2. This has two implications for the scheme:
 - (i) Firstly, the only way for bats to access compensatory planting on Plot 5/2 is to use the proposed Hilton Lane overbridge (as discussed by the Applicant). It has been shown that this crossing structure is not on a known, significant commuting route for bats. As such, this goes against the principles in Defra report WC1060 and the Applicant has not provided any evidence that this overbridge will safely facilitate access.
 - (ii) Secondly, if bats are crossing into Plot 5/2 further south, they may continue to use this route once the scheme is operational, putting them at risk of collision with vehicles. Continued use of such routes was demonstrated by Abbott *et al* (2012).
- (f) The Applicant is providing supplementary planting to the Hilton Lane overbridge. However, the overbridge itself appears to be an unvegetated structure, described by the Applicant in the hearing as a 'hop-over'. This goes against best practice principles for bat mitigation design, as set out in Defra report WC1060. There has been no evidence provided that an unvegetated structure, over a dual carriageway, not on a significant commuting route for bats will safely facilitate access across the Link Road. As such, there is no evidence to suggest that bats will be able to access the proposed habitats on Plot 5/2 and benefit from them. As such, if ~40% of the habitat within Lower Pools SBI is being lost, and bats cannot access the habitats on Plot 5/2, how can the Applicant demonstrate that there will be no significant impacts on the local bat population due to the scheme?
- (g) Planting to the east of the scheme, in areas with known bat roosts and existing levels of High bat activity, removing the need to cross the Link Road, would directly benefit those animals specifically affected by the scheme, whilst reducing adverse effects and removing risks associated with vehicle collisions.

4.4 Letter of No Impediment - Bats

- (a) It is acknowledged that Natural England has reviewed a draft licence Method Statement for the scheme and issued a Letter of No Impediment (LONI) regarding bats. Whilst respecting that this review is not the same as a formal licence determination, there were still substantial amounts of data available to guide the Method Statement at the time of writing and, as such, to be reviewed.

- (b) Natural England has published advice on how it applies the 'Three Tests' to licence applications¹¹ for European Protected Species such as bats. Under Part 5 of the Conservation of Habitats and Species Regulations (2017), licences can be issued if they demonstrate that '*there is no satisfactory alternative*' and '*that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range*'.
- (c) When considering 'satisfactory alternatives', although normally relating to the action/development itself, Natural England does state that 'Natural England also expects the applicant to demonstrate that they have taken reasonable steps to minimise the impacts of a development on a European Protected Species. These steps or measures might include (for example) alternative timing of actions, development designs and layouts, and sites' (paragraph 29 of Natural England's guidance on the Three Tests). Given that the Applicant is proposing to use an unvegetated structure, not sited on a significant commuting route, we would strongly suggest that other 'suitable alternatives' (certainly in terms of development designs and layouts) exist which would reduce impacts on the European Protected Species (bats) in Lower Pool SBI. Furthermore, suitable alternatives in terms of 'sites' for habitat creation exist to the east of the scheme, which would provide benefits to bats above those potentially delivered by habitat creation to the west of the scheme.
- (d) The scale at which Favourable Conservation Status is reviewed/discussed is still debated (with some suggesting it is at the Member State level). However, to be meaningful at the licence application stage, one must review the effects on the population affected by the action/development. Indeed, in the Natural England advice on the Three Tests, the first paragraph in the Annex states '*Natural England generally applies the Favourable Conservation Test (FCS) at a local level and licensed mitigation will be expected to attain at least a minimum of maintaining the local population levels of the species concerned*'. Given that ~40% of the habitat used by bats in Lower Pools will be lost, and that compensatory planting is unlikely to be used by bats based on the evidence provided to date, there are serious doubts whether the Applicant can argue (and Natural England conclude) that the Favourable Conservation Status of the several bat species within Lower Pool SBI will be maintained.
- (e) As agreed in the hearing, the Applicant should provide the Method Statement submitted to Natural England as part of the LONI process. Based on the evidence received and reviewed to date, we question, even when applying proportionality and acknowledging that 'reasonable' steps should be taken, how two of the Three (licensing) Tests in respect of bats could have been satisfied. Especially when suitable alternative sites for compensatory planting are present to the east of the scheme, which would not require the bats to cross the Link Road to access it (and be exposed to collision related mortality – a key risk which has not been addressed by effective mitigation in the form of the provision of a green bridge or similar).

¹¹ WML-G24 (01/11) European Protected Species and the Planning Process: Natural England's Application of the 'Three Tests' to Licence Applications

M54 TO M6 DCO Issue Specific Hearing 1 Biodiversity and Cultural Heritage

Cultural Heritage

1. RPS have been instructed by Allow to review proposals for the compulsory acquisition of its land including the alternative land offered to the Applicant owner by Allow to the ease over the permanent acquisition of land in Allow's ownership to the west.
2. The agenda items for the Issue Specific Hearing 1 are set out below together with a written summary of the oral representations made by Mick Rawlings, Technical Director, Historic Environment, RPS ('Allow's Heritage Consultant').

Item 7: The need or otherwise for trial trenching to inform conclusions on the effect on buried remains

1. Is there evidence to challenge conclusions and demonstrate need for further pre decision evaluation over and above the desk top study, trial pits, bore holes and geophysical survey evidence presented in the ES?

- (a) There is no evidence to challenge the conclusions, but it is good practice to carry out trial trenching at the pre-decision stage wherever possible in order to ground-truth the results of the desk-based work and the geophysical surveys.
- (b) The geophysical surveys on Allow's land on the western side of the scheme are inconclusive – this is discussed in more detail in paragraphs 2.48 – 2.56 of the RPS report and also Survey Areas 3 and 6 in the Geophysical Survey Report which is Appendix 6.3 of the ES.
- (c) Allow's heritage consultant is working on a current DCO application where the geophysical survey was carried out at PEIR stage and is now undertaking trial trenching to inform the ES for full submission.
- (d) He is also involved with another DCO application (for the Thurrock Flexible Generating Plant in Essex - DCO Examination Ref. ENO10092) where the ExA has paused the Examination until the applicant has carried out the trial trenching that had been requested by the statutory consultees.
- (e) The Applicant considers that the assessment of effects on archaeological remains is robust and the strategy has been agreed with the County Archaeologist for Staffordshire. All known archaeological remains within the scheme boundary are of low value and it is unlikely that any remains of high value are present. Allow's Heritage Consultant disagrees with the conclusion that the assessment is robust. The trial trenching which is now planned for the early part of 2021 could and should have been undertaken prior to the assessment presented in the ES.

2. Consequences of the effect of lack of trial trenching at this stage.

Potential consequences should remains be discovered in later stages and effect on other mitigation proposals.

- (a) The main consequence is that the presence/absence of significant buried archaeological remains within the scheme has not been established to an appropriate level of confidence.

- (b) The worst-case scenario is that buried archaeological remains are found and are of such significance that they are required to be preserved in situ. This would necessitate changes to the scheme design that could impact for example on the proposed environmental mitigation areas or on buildability. This could affect the proposed mitigation planting and borrow pit on Allow's land.
- (c) Whilst it is possible to preserve archaeological remains in situ beneath a road embankment, this is unlikely to be an option for areas of woodland planting and certainly not in areas of cutting for construction or for borrow pits.
- (d) The Applicant has maintained that changes could be made to the scheme at detailed design stage if preservation in situ of archaeological remains is required – this could include importation of material if a borrow pit could not be excavated.
- (e) The point here is that if the trial trenching had already been done pre-submission then there would be no need for further design changes in respect of archaeology.

Item 8: Has the significance of Hilton Park been correctly identified

3. What is the association with Humphry Repton and whether he influenced the design of the park.

- (a) The association with Humphry Repton remains unclear. It is acknowledged in the DCO application but never clarified and there does not appear to have been any attempt by the applicant to find out more on this issue.
- (b) A more detailed appraisal is presented in paragraphs 2.6 – 2.16 of the RPS report. Information provided by the Applicant includes Appendix 6.5 of the ES which is entitled 'Further information on Hilton Hall, including photos from Hilton Hall' but is actually all about Hilton Park and not really anything to do with the Hall.
- (c) Key points are:
 - (i) The illustration of Hilton Hall by Repton which appears in the 1796 edition of *Peacock's Polite Repository*
 - (ii) A reference to a Repton Red Book held by the Vernon family (former owners of Hilton Hall) – this appears in the work of the renowned garden historian Cherry Ann Knott.
- (d) No attempt has been made by the Applicant to review the papers held by the Vernon family, or the Vernon papers held at the Staffordshire Record Office, or any archive material held at Hilton Hall, or any contact with Cherry Ann Knott or the Garden History Society. Consequently the Applicant's research into the history of the park and the association with Repton is very weak given the extent of the impact here.

4. What is the likely date for the construction of Lower Pool and associated planting and is there any evidence that this could be associated with Repton.

How would a change in the view of the significance of Hilton Park affect the overall assessment of the effect of the scheme and the overall conclusion in the ES

- (a) Lower Pool and the associated planting (The Shrubbery etc) were established in the period 1796 – 1816. Repton had produced an engraving of Hilton Hall which was published in 1796, showing that he had visited the park before or during that year. The

1816 OSD clearly shows Lower Pool and the associated planting, also the perimeter tree belts around the park. Repton died in 1818, so this puts the establishment of Lower Pool and the associated planting within the time at which he was designing landscape gardens for numerous wealthy landowners. The pool and the planting fits with the style for which Repton is most renowned.

- (b) This map is not included within the review of the park presented in Appendix 6.5 of the ES and chapter 6 of the ES. In the assessment of the 20th century development of the park within Appendix 6.5, it is stated that the Lower Pool is '*first depicted on the 1842 Tithe Map*' – paragraph 4.1.1 of Appendix 6.5. This statement is clearly incorrect - the Lower Pool is actually clearly depicted on the 1816 OSD.
- (c) A confirmed Repton landscape scheme would increase the significance of the park.
- (d) The Applicant has not provided any explanation of the absence of the 1816 OSD from their baseline review of Hilton Park, nor have they queried the importance of this in the understanding of the potential link to Repton.
- (e) With regard to the assessment of impacts and effects at Hilton Park, this is further discussed in paragraphs 2.24 – 2.40 of the RPS report. Chapter 6 of the ES appears to present an assessment of the impacts and effects of the new road but does not then go on to include the additional impacts (on the park) arising from the mitigation planting. These impacts include the coalescence of the western perimeter tree belt with the new planting. The assessment presented within Chapter 6 does not include any mention of the impact arising from the severance of the former principal (western) access road from Lower Lodge etc and indeed this issue is not mentioned in Chapter 6 of the ES.
- (f) Responding to oral evidence presented in the session on biodiversity – Mr Oakley (AECOM) claimed that after consultation with Historic England it was '*not possible*' to move the mitigation planting from the west side of the road to the east, and Amy Jones (AECOM) stated that mitigation planting on the east side would result in '*far worse impacts*' on not only the historic park but also the hall and the conservatory, both of which are Grade I listed buildings.
- (g) There is no evidence in the submission to support those comments – reference is to the draft SoCG with Historic England – '*Historic England would look for retention of form of features within retained historic park such as the historic boundary of Lower Pool/The Shrubbery, and they would prefer not to extend the woodland into the open parkland between The Shrubbery and the Hall*'. With regard to the first part of this sentence, the outer perimeter tree belts are also features of the retained historic park, thus Historic England would support retention of these features. With reference to the second part of the sentence, Historic England has expressed a 'preference' for the planting to go on the west side of the road – but nothing here says that planting on the east side is 'not possible' or 'would lead to far worse impacts'.
- (h) There has been change within the historic park on the east side of Lower Pool since the mid-20th century – this has included the establishment of Middle Pool and Upper Pool and additional planting such that the character of the former open parkland has changed. As recently as the mid-1950s there was clear visibility of the hall from the bridge over Lower Pool but this is no longer the case. Allow could plant trees in this land at any time if they wished to do so.