

M3 Junction 9 Improvement

Scheme Number: TR010055

8.32 Applicant Response to Secretary of State Consultation Letter dated 8 March 2024

Planning Act 2008

**Infrastructure Planning (Applications: Prescribed Forms and
Procedure) Regulations 2009**

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Ref: TR010055

Transport Infrastructure Planning Unit
Great Minster House
33 Horseferry Road
SW1P 4DR

National Highways
Bridge House
1 Walnut Tree Close
Guildford
Surrey
GU1 4LZ

Direct Line: 0300 123 5000

Email:
M3Junction9Improvements@
nationalhighways.co.uk

15 March 2024

Dear Transport Infrastructure Planning Unit,

Application Ref: TR010055
Application by National Highways for an Order Granting Development Consent
for the M3 Junction 9 Improvement.

Applicant Response to Secretary of State Consultation Letter dated 8 March
2024

This letter has been prepared by the Applicant in response to the Secretary of State's Consultation Letter dated the 8 March 2024¹ for the M3 Junction 9 Improvement Scheme.

It has been prepared in response to the 6 items raised in the letter, and they are responded to sequentially below.

Yours sincerely,

Tom Beasley
National Highways

¹ <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010055/TR010055-001073-DfT%20Consultation%20Letter%20-%20M3%20Junction%209%20Improvements%20Scheme%20.pdf>

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1 Side Agreement with Hampshire County Council

- 1.1.1 A confidential side agreement has been completed between the Applicant and Hampshire County Council in respect of the local highway network. This is a private agreement between the Applicant and Hampshire County Council who do not intend to disclose the agreement. The agreement has no implications for the drafting of the proposed Order submitted at Deadline 8 of the Examination.
- 1.1.2 Hampshire County Council has confirmed to the Applicant that as the side agreement has now completed their representations, as summarised in the **Statement of Common Ground with Hampshire County Council (7.12.3, REP8-019)**, can be withdrawn with the exception of those representations relating to the Cart and Horses Junction. They have also confirmed that matters included in the **Statement of Common Ground with Hampshire County Council (7.12.3, REP8-019)**, submitted at Deadline 8 which contained a number of items which were “provisionally agreed” can now be regarded as being “agreed”. The only item in the **Statement of Common Ground with Hampshire County Council (7.12.3, REP8-019)** which is “not agreed” is that which relates to the Cart and Horses Junction.

2 Agreement with Natural England on the assessment of air quality effects on biodiversity

- 2.1.1 Agreement between the Applicant and Natural England on the assessment of air quality effects on biodiversity was reached on the 1 December 2023.
- 2.1.2 Natural England emailed the Examining Authority (ExA) on the 18 December 2023 to confirm that this matter was now agreed. A copy of this email is included in Appendix A of this letter.
- 2.1.3 Ahead of the close of Examination, the Applicant submitted a revised version of **Appendix 8.3 (Assessment of Operational Air Quality Impacts on Biodiversity)** for the **ES (6.3, Rev 2) ([REP8-038](#))** which is the latest version of this document.

3 The Levelling-Up and Regeneration Act (2023) (LURA)

3.1 Implications of changes to section 11A of the National Parks and Access to the Countryside Act 1949 pursuant to section 245 of LURA

- 3.1.1 National Highways has previously provided submissions in relation to section 11A of the National Parks and Access to the Countryside Act 1949 (the 1949 Act), including as follows:
- i) In its response dated 15 June 2023 to the Examining Authority’s First Written Questions (**Applicant’s Response to the Examining Authority’s First Written Questions (ExQ1) (8.5, REP2-051)**);

- ii) In its response dated 22 September 2023 to the Examining Authority's Second Written Questions with the plan in the accompanying Appendices depicting the existing Carriageway and Highways Boundary both within and outside the South Downs National Park in the context of the Application boundary (**Applicant Response to the Examining Authority's Second Written Questions (ExQ2) (8.17, REP5-026) and Applicant Response to the Examining Authority's Second Written Questions (ExQ2) Appendices (8.17.1, REP7-003)**); and
- iii) In its response dated 27 October 2023 to the Examining Authority's Third Written Questions (**Applicant Response to the Examining Authority's Third Written Questions (ExQ3) (8.22, REP6-023)**).

3.1.2 These confirmed that the Applicant, in preparing the Scheme, has had due regard to the requirements of section 5(1) of the 1949 Act and it considers that appropriate weight was given to the South Downs National Park throughout the design process.

3.1.3 In terms of the applicable changes pursuant to section 245 of LURA, (which came into force on 26 December 2023), the Applicant considers that it may be helpful for the Secretary of State to consider the following matters in relation to considering the application of the new duties.

National Parks

3.1.4 The duty in section 11A of the 1949 Act (as amended) applies when the Secretary of State performs a function "in relation to, or so as to affect, land in any National Park in England".

3.1.5 Where it applies, the section 11A duty is to "*seek to further the purposes specified in section 5(1)*" of the 1949 Act. Those purposes are:

- (a) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and
- (b) of promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public.

3.1.6 Section 11(1A) has been amended to provide that "*In exercising or performing any functions in relation to, or so as to affect, land in any National Park in England, a relevant authority... must seek to further the purposes specified in section 5(1) and if it appears that there is a conflict between those purposes, must attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park.*"

3.1.7 Section 11(2A) of the 1949 Act provides that: "*The Secretary of State may by regulations make provision about how a relevant authority is to comply with the duty under subsection (1A) (including provision about things that the authority may, must or must not do to comply with the duty).*"

- 3.1.8 A 'relevant authority' is defined as including a Minister of the Crown in section 11(3) of the 1949 Act (pursuant to the Ministers of the Crown Act 1975 this is the relevant Secretary of State). If the grant of a DCO would affect land (directly or indirectly) within a National Park, then the duty in section 11(1A) of the 1949 Act will be engaged in relation to determination of the application for the DCO. That is a duty to "*seek to further*" those purposes. It is not a duty to further those purposes.
- 3.1.9 The words "*seek to*" must be given some meaning. Those words mean that a Minister must try to further those purposes when determining an application for a DCO that would affect land (directly or indirectly) within a National Park. Accordingly, a Minister is not required to exercise his functions so as to achieve those purposes in every case, but he is required to exercise them so as to try to achieve them.
- 3.1.10 The amendments to section 11(2A) of the 1949 Act pursuant to section 245 of LURA envisage that regulations will be made to assist in the application of the duty. No regulations have been made or proposed to date. If any such regulations are made and published prior to determination of the DCO Application, the Applicant would be happy to make further representations as to their effect should the Secretary of State deem this to be necessary.
- 3.1.11 In the meantime, it can be discerned from the language of the wording in section 11(1A) of the 1949 Act that where it is concluded that a scheme will not conserve or enhance the natural beauty, wildlife and cultural heritage of a National Park, the Secretary of State in determining the DCO Application will need to consider whether there is anything further that could be done to avoid or mitigate any harm identified. If there is not, then he will have fulfilled his duty to seek to further those purposes.
- 3.1.12 In this case, the Applicant has designed the Scheme with these purposes in mind and has had due regard to the requirements of section 5(1) of the 1949 Act. As has been previously confirmed, measures to conserve and enhance the natural beauty, wildlife, and cultural heritage in response to the unique special qualities of the South Downs National Park have been incorporated into the scheme design, in tandem with measures to promote opportunities for understanding and enjoyment of the South Downs National Park, as per **table 7.1** of the **Case for the Scheme (7.1, Rev 1)**.
- 3.1.13 Furthermore, **section 4.2** of the **Design and Access Statement (7.9, APP-162)** outlines what the overarching design rationale of the Scheme has been driven by, which includes (bullet 2) seeking to conserve and enhance the South Downs National Park and promote access and understanding of its special qualities. **Paragraphs 5.3.9 – 5.3.20** within **section 5 (Design Narrative)** of the **Design and Access Statement (7.9, APP-162)** outlines in detail, the design changes made to conserve and enhance the special qualities of the South Downs National Park and measures that would also ensure high environmental standards are achieved. At each stage of the design process there has been a cognisance of the duty to have due regard to the purpose (5(1)) of the National Park and to achieve high environmental standards. The Scheme has evolved

over time to lessen the impacts on the South Downs National Park where possible, and to provide further enhancements where appropriate; it has balanced a number of different priorities, but the South Downs National Park and its special qualities has always been a key factor.

- 3.1.14 As the Applicant has previously explained, it considers that appropriate weight was given to the South Downs National Park throughout the design process, including at the early stages, and it is therefore consistent with the duties in section 11A and the purposes in section 5(1) of the 1949 Act, as well as paragraph 5.153 of the National Policy Statement for National Networks.
- 3.1.15 The Applicant's response to **ExAQ2 14.2.16** in **Applicant Response to the Examining Authority's Second Written Questions (ExQ2) (8.17, REP5-026)** outlines how the Secretary of State can be satisfied that the granting of consent for the scheme would be consistent with the duty imposed in relation to the statutory purpose 5(1) of the National Parks and Countryside Act 1949. Furthermore, the need and location of the proposed compound were set out in response to **ExAQ2 4.2.2** in **Applicant Response to the Examining Authority's Second Written Questions (ExQ2) (8.17, REP5-026)** and further stated in the response to **ExAQ3 4.3.4**.
- 3.1.16 In relation to the section 11A duty and the National Parks, the Applicant does not consider that there are further measures that could be required in accordance with paragraphs 4.9 or 4.10 of the National Policy Statement for National Networks (the 'NPSNN') i.e. which are necessary, relevant to planning, relevant to the development to be consented, enforceable, precise, and reasonable in all other respects or which are necessary to make the development acceptable in planning terms, directly related to the proposed development and fairly and reasonably related in scale and kind to the development.
- 3.1.17 Through the course of this Examination, the Applicant has demonstrated that the Scheme is justified and that its benefits cannot be delivered by any alternative route or means, per (amongst other documents) the **Case for the Scheme (7.1, Rev 1)**. The Scheme has been carefully appraised against both the 1949 Act and the requirements of NPSNN and there is no further mitigation that can be reasonably required to mitigate its effects on the National Park.
- 3.1.18 Accordingly, in light of the above, the Secretary of State can conclude that there is nothing more that the Applicant could reasonably do to avoid or mitigate for any harm identified. As a result, the Secretary of State can conclude that he can grant the application for the DCO on a basis which is entirely consistent with the duties in section 11(1A) of the 1949 Act. Furthermore, to grant the DCO Application would further the purposes specified in section 5(1) of the 1949 Act and fulfil the duty in section 11A of the 1949 Act.

4 Disapplication of Sections 28E and 28H of the Wildlife and Countryside Act 1981

- 4.1.1 Section 120(5) of the Planning Act 2008 provides that a DCO may disapply statutory provisions, subject to the other provisions in Chapter 1 of Part 7 of that Act. Section 150 allows for the removal of a requirement for prescribed consent or authorisation only if the relevant body has consented to the inclusion of the provision within the DCO. The prescribed consents in England are set out in Paragraph 1 of Schedule 2 to the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015.
- 4.1.2 Where a consent or authorisation is not prescribed for the purposes of section 150, the relevant statutory provisions can be disapplied without consent from the relevant regulatory body (pursuant to section 120). There is no other restriction within the relevant chapter of the Planning Act 2008 (i.e. Chapter 1 of Part 7) which otherwise restricts the application of section 120.
- 4.1.3 Sections 28E, 28H of the Act are not consents or authorisations prescribed for the purposes of s.150 of the Planning Act 2008. Consent from Natural England to disapply these sections is therefore not required. Those provisions can be disapplied by virtue of section 120 of the Planning Act 2008.
- 4.1.4 It is noted that Natural England raised no specific concerns in their submissions to the Examination with respect to the disapplication of Sections 28E and 28H.

5 Requirement 6

- 5.1.1 The Applicant does not have an in-principle objection to the inclusion of sub-paragraph 4 and welcomes the clarity it provides in respect of the planned management of the landscaping scheme.
- 5.1.2 However, the Applicant requests that the landscaping elements which can be removed as part of planned management and maintenance replicate the elements in sub paragraph 3. This is because all landscaping elements require management to facilitate their establishment and ongoing success.
- 5.1.3 In respect of the elements to be included in sub paragraphs 3 and 4 the Applicant would request that the words “or other element” are deleted. The inclusion of these words were proposed by the South Downs National Park Authority to incorporate the chalk grassland areas located within the National Park. As the wording “or other element” is imprecise and unclear the Applicant proposed that the wording was amended to specifically reference the chalk grassland. This remains the Applicant’s preferred approach.
- 5.1.4 However, if the Secretary of State is minded to retain the words “or other element” the Applicant requests that it is repeated in sub paragraph (4) so that these other elements of the landscaping plan can be properly managed and maintained in the same way as any other landscaping element.

6 Protective Provisions

6.1.1 The Applicant can confirm that agreements have been completed with Southern Gas Networks and Southern Water Services Ltd. The Applicant confirms that as per the correspondence of Southern Gas Networks plc sent 6 and 7 December 2023 and Southern Water Services Ltd correspondence of 29 January 2024 that the protective provisions included in the **draft Development Consent Order (3.1, Rev 6)** at Deadline 8 are correct and up to date. As such, no further changes are required to the **draft Development Consent Order (3.1, Rev 6)** in respect of these statutory undertakers.

**Appendix A Email from Natural England Email to the
Examining Authority (ExA) dated the 18 December 2023**

Buckle, Julian

From: Bell, Mary [REDACTED]@naturalengland.org.uk>
Sent: 18 December 2023 12:14
To: M3Junction9
Cc: Daniel, Ellie
Subject: M3J9 Statement of Common Ground - NE's position

Dear Planning Inspectorate Team,

M3 Junction 9 Improvements

I am writing with regards to the Statement of Common Ground (SoCG) between National Highways and Natural England for the above NSIP scheme. In the submitted SoCG dated 10th November ([REP8-021](#)), the following points were 'provisionally agreed':

- 2.17 Residual effects and conclusions
- 4.1 Habitats Regulation Assessment

These were provisionally agreed subject to minor amendments, as set out in applicant's cover letter dated 16th November ([8.31 Cover letter ahead of the close of Examination](#)).

I am writing to confirm that these minor amendments have since been made, we have no further comment on these aspects. Therefore these items on the statement of common ground can now be considered 'agreed'.

If this raises any questions please do not hesitate to contact me.

Best wishes,

Mary Bell
Sustainable Development Senior Adviser
Thames Solent Team
4th Floor Eastleigh House
Upper Market Street
Eastleigh, SO50 9YN, [REDACTED]

<http://www.gov.uk/natural-england>



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