

A417 Missing Link
TR010056

8.17 Summary of Applicant's Oral
Submissions at Issue Specific
Hearing 1 (ISH1)

Planning Act 2008

APFP Regulation
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Procedure) Regulations 2009

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Planning Act 2008

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

A417 Missing Link

Development Consent Order 202[x]

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1 Introduction

- 1.1.1 This note summarises the submissions made by National Highways ("the Applicant") at the Issue Specific Hearing 1 on the draft Development Consent Order held on 25 January 2022 ("the Hearing") in relation to the Applicant's application for development consent for the A417 Missing Link ("the Scheme").
- 1.1.2 Where the Examining Authority ("the ExA") requested further information from the Applicant on particular matters, or the Applicant undertook to provide further information during the hearing, the Applicant's response is set out in this document. This document does not purport to summarise the oral submissions of parties other than the Applicant, and summaries of submissions made by other parties are only included where necessary in order to give context to the Applicant's submissions in response, or where the Applicant agreed with the submissions of another party and so made no further submissions itself (this document notes where that is the case).
- 1.1.3 The structure of this document follows the order of items published by the ExA on 10 January 2022 ("the Agenda"). Numbered agenda items referred to are references to the numbered items in the Agenda. The Applicant's substantive oral submissions commenced at item 5 of the agenda, therefore this note does not cover items 1 to 4 in the agenda.

2 Appearances

- 2.1.1 Julian Boswall of Burges Salmon LLP confirmed that he represents the Applicant. He also introduced Alex Minhinick of Burges Salmon LLP, and Jessica Postance (Environment lead), Jason Prosser (Solutions lead) and David Brown (DCO lead) of Arup.

3 ITEM 3 – draft DCO articles and schedules

3.1 Agenda Item 3.1

- 3.1.1 **The ExA asked the Applicant to briefly explain the general structure of the draft Development Consent Order (dDCO), the purpose of each of the Parts 1 to 7 of the dDCO and the general thrust of the Articles within each.**
- 3.1.2 Mr Boswall, on behalf of the Applicant, confirmed that the draft Development Consent Order (dDCO) (Document Reference 3.1 Rev 1, REP1-003) is based on well-established precedent and follows conventions in relation to the language and format of statutory instruments.
- 3.1.3 Mr Boswall provided a brief description of each part of the dDCO, including:
- a. The Preamble and operative Articles;
 - b. Each of the Requirements and Schedules; and
 - c. Any other relevant matters.

3.2 Agenda Item 3.2

- 3.2.1 **The ExA asked the Applicant to highlight any significant changes that have been made to the dDCO since the original submission version.**

- 3.2.2 Mr Boswall noted that the Applicant introduced some minor changes to the dDCO at Deadline 1, as set out in the Table of Amendments to the Draft Development Consent Order (Document 3.3, REP1-005).

3.3 Agenda Item 3.3

- 3.3.1 **The ExA asked the Applicant to briefly explain the relationship between the dDCO and the Environmental Management Plan (EMP) and associated Record of Environmental Actions and Commitments (and the associated annexes) in securing mitigation.**
- 3.3.2 Mr Boswall, on behalf of the Applicant, confirmed that the Environmental Management Plan (EMP) (Document Reference 6.4 Rev 1 ES Appendix 2.1 EMP (REP2-006)) was submitted with the application and sets out how the mitigation measures identified in the Environmental Statement are to be delivered.
- 3.3.3 The EMP will be a certified DCO document and its contents are secured under Requirement 3, which provides for an iterative process whereby the EMP construction-stage and EMP end of construction stage must be prepared in consultation with the relevant local authorities, approved by the Secretary of State (SoS), and implemented.
- 3.3.4 Jessica Postance, on behalf of the Applicant, confirmed that the EMP (design stage), which was the first iteration submitted with the application, contains information on the measures, commitments and actions used to manage and mitigate environmental effects during the construction and operation of the scheme. These commitments are listed in the Register of Environmental Actions and Commitments (REAC).
- 3.3.5 Mrs Postance referred the ExA to the Applicant's response to the ExA's Written Question 1.1.18 (Document 8.4, REP1-009), which provided further detail on the approach taken to mitigation. The Applicant produced the management plans annexed to the EMP to provide further detail on the mitigation proposals to key stakeholders. The Applicant is continuing to respond to comments made by consultees and the ExA, and provided an updated version of the EMP incorporating additional commitments at Deadline 2 (Document 6.4, REP2-006). The Applicant will continue to consider further requests for amendments from stakeholders throughout the examination.

3.4 Agenda Item 3.4

- 3.4.1 **The ExA noted that any questions in relation to the dDCO Schedules would be dealt with under agenda item 4.**
- 3.4.2 **The ExA asked the Applicant to comment on the points raised by the Cotswolds Conservation Board at Deadline 1 in relation to the definition of 'maintain' under the dDCO, and whether or not the definition is sufficient to secure the maintenance period of at least 30 years' necessary to establish appropriate mitigation planting.**
- 3.4.3 Mr Minhinick, on behalf of the Applicant, confirmed that the definition of "maintain" is sufficient and adequate to enable the Applicant to effectively maintain the authorised development, including any mitigation proposed. In relation to the period required to establish mitigation, Mr Minhinick suggested that this is a matter that will be addressed at the Issue Specific Hearing on Environmental Matters, as this is governed by the EMP rather than the definition of maintain.

- 3.4.4 With reference to Article 3 and the disapplication of legislative provisions, the ExA asked the Applicant to provide an update on discussions with Natural England discussions in relation to s.28E of the Wildlife and Countryside Act 1981.
- 3.4.5 The Applicant confirmed during the Hearing that sections 28E and 28H of the WCA 1981 ought to be disapplied and that this is a lawful and appropriate approach.
- 3.4.6 As previously confirm by the Applicant in its Response to Examining Authority's Written Questions (at paragraphs 1.3.13, 1.4.21, and 1.5.6), the Applicant intended to engage with Natural England on this issue at an organisational level in order to ensure consistency across its projects. The Applicant was hopeful that an agreed resolution could be reached during the course of the examination, however, this is no longer expected to be achievable. The Applicant will continue to engage with Natural England at a local level in respect of this scheme.
- 3.4.7 The Applicant's position is that both ss.28E and 28H ought to be disapplied and that the ExA (and the SoS) can be satisfied that it is legal, necessary, and expedient to do so. As requested by the ExA, the Applicant's legal position on the disapplication of ss. 28E and 28H in National Highways' orders and the justification for doing so is set out in the legal note attached at Appendix A prepared by the Applicant's legal advisers. This note has been shared with Natural England. The Applicant considers that this addresses action ISH1-AP1.
- 3.4.8 The ethos of the Planning Act 2008 and the mechanisms that exist for the drafting of DCOs can provide for a one stop shop for the consenting of NSIPs. The primary reason it is considered necessary and expedient to disapply the need for SSSI consents in the dDCO is to enable the delivery of the NSIP without the additional hurdle of seeking to obtain separate consents from NE.
- 3.4.9 Controls to protect the Crickley Hill and Barrow Wake SSSI and specific mitigation to compensate impacts, including the replacement grassland and the creation of habitat stepping-stones, are set out in the Environmental Management Plan (ES Appendix 2.1 EMP (Document Reference 6.4)) and the Environmental Masterplan (ES Figure 7.11 (Document Reference 6.3)). These measures are to be secured by way of the dDCO requirements. The Applicant therefore considers that there are adequate safeguards in place to protect the SSSI, and that the statutory controls under ss.28E and 28H are unnecessary.
- 3.4.10 **During the Hearing, the ExA asked the Applicant to confirm how the provisions on SSSI consents under the WCA 1981 would interact with the ability to transfer the benefit of the Order under Article 10.**
- 3.4.11 In the event that the rights and powers required to deliver the scheme were transferred by National Highways to a third party under Article 10, the transferee would either be subject to s.28E as an owner/occupier or s.28G as a public body. The entities referred to within Article 10(5) at sub-paragraphs (a) to (d), to whom the benefit of the order may be transferred for the purposes of specified utilities diversions, are likely to be s.28G authorities for the purposes of the WCA 1981. This is on the basis that they are statutory undertakers under s.28G(3)(e).
- 3.4.12 The Applicant can confirm that there are existing utilities within the Crickley Hill and Barrow Wake SSSI that will need to be diverted. Work No. 23 relates to a diversion of BT Openreach apparatus along Birdlip Link Road to be installed in proposed road verge that falls within the SSSI. There is also existing Severn Trent Water apparatus within the SSSI west of Air Balloon Cottages that is

proposed to be stopped up and abandoned, as associated development. The Applicant also notes that there may be existing apparatus within the SSSI along Cold Slad Lane, subject to detailed pre-construction surveys, but no diversion works are expected to be needed in this area.

- 3.4.13 The Applicant considers that the potential for entities other than National Highways to undertake works under the Order pursuant to Article 10 further emphasises the need to address the requirements for SSSI consents comprehensively, to remove the ambiguity in the underlying statutory code.
- 3.4.14 The Applicant will update Article 3 to include s.28H of the WCA 1981 in an updated version of the dDCO to be submitted at Deadline 4. The Applicant considers that this addresses action ISH1-AP2.
- 3.4.15 **The ExA asked the Applicant to comment on the Joint Councils' request for an additional requirement in relation to the protection of watercourses, in the event that consents under the Land Drainage Act 1991 are disapproved.**
- 3.4.16 Mr Minhinick noted that the Applicant is seeking to disapply s. 23 (prohibition on obstructions etc. in watercourses) of the Land Drainage Act 1991 under Article 3(1)(e) of the dDCO. Section 23 is a prescribed consent for the purposes of s.150 of the Planning Act 2008 and the applicant therefore requires Gloucestershire County Council's (GCC) agreement to include this disapplication within the DCO. The Applicant confirmed that discussions are ongoing with GCC and that the Applicant has proposed that it hopes will enable agreement to the inclusion of the disapplication of s.23.
- 3.4.17 **The ExA asked GCC to confirm its position on Article 4 within the dDCO, and its placement within Part 1 on preliminary matters.** The Applicant notes that GCC accepted the position of Article 4 within the dDCO and agreed that this article should remain where it is.
- 3.4.18 **The ExA noted that the National Trust has asked for the limits of deviation under the dDCO to be reduced to zero where it is an affected landowner, and asked the Applicant to confirm if this is a reasonable and feasible request.**
- 3.4.19 Mr Minhinick suggested that the National Trust has misunderstood how the limits of deviation apply to the authorised development alongside compulsory purchase proposals within the dDCO. The limits of deviation cannot extend beyond the Order limits and will not have a direct impact on the boundaries of the land that could be acquired if the dDCO is made.
- 3.4.20 **The ExA asked the Applicant to explain the relationship between Article 8 (Limits of deviation) and Article 40 (Felling or lopping of trees and removal of hedgerows) in the context of protections for woodland.**
- 3.4.21 Mr Minhinick confirmed that the protective measures for ancient woodland and veteran trees form part of the EMP that is secured by Requirement 3 of the dDCO. Those protections would not be affected by the limits of deviation.
- 3.4.22 The ExA noted that the scheme has designed to be unlit but there are ongoing discussions between the Applicant and GCC in relation to the potential for lighting at the Ullenwood roundabout.
- 3.4.23 **The ExA asked the Applicant to confirm whether the Ullenwood roundabout has been designed to be safe without lighting other than car headlights?**

- 3.4.24 Jason Prosser, on behalf of the Applicant, confirmed that appropriate risk assessments have been undertaken to confirm that the roundabout will be safe without lighting.
- 3.4.25 The ExA the Applicant to confirm the status of discussions with GCC in relation to making Ullenwood roundabout lighting compatible.
- 3.4.26 Mr Minhinick referred the ExA to the Applicant's response to the Joint Council's Local Impact Report at Deadline 2 (Document 8.2, REP2-13) from paragraph 4.1.8 onwards. The Applicant is carrying out assessments to confirm the consequential impacts, if any, of putting in place infrastructure that would facilitate the future lighting of the Ullenwood roundabout. The Applicant confirmed the these assessments are anticipated to be completed on or around Deadline 4, with a view to any changes emerging from assessments to be agreed with GCC and submitted by Deadline 6.
- 3.4.27 Mr Minhinick confirmed that, in the event that the Ullenwood roundabout is to be made lighting compatible, the consequences of this in connection to the examination of the scheme would be relatively limited. This change would not involve any additional land and the works involved would not be significant.
- 3.4.28 Mr Minhinick explained that the works are sufficiently modest as to be covered by the description of the associated development detailed at the end of Schedule 1 to the dDCO. However, an additional named covering the works could, if preferred. In the event that the Applicant agrees with GCC to introduce the change, following the outcome of the assessments, the Applicant would provide further information to the ExA in relation to the nature of the change. This is noted as action ISH1-AP3.
- 3.4.29 **The ExA asked the Applicant to confirm its position on the deemed approval mechanisms within Articles 15 and 19, noting the request from GCC for these provisions to be removed.**
- 3.4.30 Mr Minhinick confirmed that the Applicant does not agree to the removal of these provisions and that discussions are ongoing with GCC to come to an agreed position on this. The Applicant notes that GCC confirmed in the Hearing that it is now satisfied that these provisions can be retained.
- 3.4.31 The ExA asked GCC to explain its concerns about Article 16 and the need for, if any, approval and maintenance provisions in relation to private means of access.
- 3.4.32 The Applicant and GCC agreed to discuss any remaining concerns about Article 16 separately.
- 3.4.33 The Applicant notes that GCC confirmed that no amendments to Article 16(6) are required.
- 3.4.34 **The ExA noted that the Applicant has been asked to address specific questions in relation to Article 20 and the Cotswold Way National Trail by way of a Rule 17 request for further information. The ExA asked the Applicant if it had any further comments to be made on Article 20 during the Hearing?**
- 3.4.35 Mr Minhinick confirmed that the Applicant would provide a full response to the Rule 17 request at Deadline 3. That is being provided as part of the Applicant's D3 submissions, and the Applicant considers that this addresses action ISH1-AP5.

- 3.4.36 In response to comments made GCC on the level of detail provided on the Cotswold Way diversion within the application documents, Mr Minhinick noted that the Cotswold Way National Trail Diversion Report (Document 7.11, APP-427) prepared in consultation with stakeholders contains a significant amount of detail on the nature of the diversion. The underlying public rights of way that sit underneath the national trail designation are regulated by the dDCO, principally by way of the Schedules, the rights of way and access plans (Document 2.5 (Rev 1), AS-039) and the Public Rights of Way Management Plan (Document 6.4 ES Appendix 2.1 – EMP Annex F, APP-323). The detailed design of the scheme, as a nationally significant highway project, is not a matter that requires approval from GCC. Requirement 3 of the dDCO requires the EMP and its constituent plans, including the Public Rights of Way Management Plan to be prepared and consulted on with the relevant planning and highway authorities, and to be submitted for approval by the Secretary of State.
- 3.4.37 The Applicant agreed to provide further detail on the mechanisms to control the design of the scheme, including the Cotswold Way crossing, at Deadline 3. The Applicant has provided a detailed response on the proposals to control the detailed design of the scheme, including an explanation as to the historical background to those mechanisms, at Appendix B.
- 3.4.38 **The ExA asked the Applicant to confirm whether works to a meteorological station mentioned by the Applicant in its written representations need to be incorporated within the description of the authorised development at Schedule 1 and, if not, why not.**
- 3.4.39 The Applicant has reviewed this question since the Hearing and can confirm that the existing weather station to be replaced on a like-for-like basis as part of the scheme is located just south of the existing A417/B4070 junction in the western verge of the A417.
- 3.4.40 At this stage it is anticipated that the proposed weather station would be located to the east of the existing location at approximately Ch. 3+950 of the proposed A417 mainline (just north of Cowley overbridge). It would be positioned adjacent to the proposed verge on the eastern side of the mainline. The exact location of the proposed weather station would be subject to refinement as part of design development at the detailed design stage.
- 3.4.41 The Applicant's view is that the replacement of this station is associated development that is ancillary to the nationally significant infrastructure project and that the additional powers for associated development at the end of Schedule 1 would be capable of authorising those works. The Applicant considers that this addresses action ISH1-AP6.

3.5 Agenda Item 3.5

- 3.5.1 The Applicant notes that there were no questions from third parties.

4 ITEM 4 – SCHEDULE 2, requirements

4.1 Agenda Items 4.1

- 4.1.1 The Applicant provided a summary of the requirements within Schedule 2 to the dDCO at agenda item 3.1.

4.2 Agenda Item 4.2

- 4.2.1 **The ExA asked the Applicant to confirm its position on the request from the National Trust for the Applicant to be subject to an express requirement to provide a low carbon construction plan.**
- 4.2.2 The Applicant confirmed that Commitment CC7 under the EMP requires the contractor to develop and implement a plan to reduce energy consumption and associated carbon emissions. This commitment is secured by way of Requirement 3 of the dDCO. The Applicant considers that this addresses action ISH1-AP7.
- 4.2.3 The ExA noted that GCC has requested a prescribed consultation period of no less than 21 days to be incorporated within the dDCO, and asked the Applicant to confirm its position on this.
- 4.2.4 Mr Minhinick confirmed that the Applicant does not consider that a prescribed consultation period is appropriate, or necessary in practice. National Highways is in the course of delivering a number of nationally significant projects across the country. Every National Highways project has a dedicated projects page that includes a requirement register, being a comprehensive list of documents exchanged and engaged on with interested parties in the process of discharging requirements, including local authorities, highway authorities and the Secretary of State as the approving body. That process is effective and is the approach taken on a large number of projects to date. The Applicant therefore does not consider it necessary to include the requested consultation period, which could result in unnecessary delays. Further detail on the practicalities of the process for discharging requirements is set out in Appendix B.
- 4.2.5 **The ExA asked the Applicant to comment on GCC's request for a community engagement plan to be produced as an annex to the EMP.**
- 4.2.6 During the Hearing Mr Minhinick referred to an existing commitment in the EMP relating to a community engagement plan. The Applicant would like to clarify that the existing commitments around community engagement within the EMP are detailed in relation to the responsibilities of the Community Relations Manager. These are set out in Table 2-1 (Main roles and responsibilities during construction) of the EMP (Document Reference 6.4 Rev 1 ES Appendix 2.1 EMP (REP2-006)).
- 4.2.7 There is also a requirement for the Applicant to provide a public liaison officer, to manage access to existing private property, business and community receptors during construction (Commitment PH5).
- 4.2.8 The Applicant is considering whether a specific commitment for a separate community engagement plan would be beneficial, and will provide an update to the ExA at a later deadline.
- 4.2.9 **The ExA asked the Applicant to provide an update on Historic England's suggested amendment to Requirement 9 of the dDCO.**
- 4.2.10 Mr Minhinick confirmed that the Applicant is actively discussing the drafting of Requirement 9 with Historic England and GCC. The Applicant will provide an update once the parties have agreed the revised wording.
- 4.2.11 **Further to comments from GCC on Requirement 15, the ExA asked the Applicant to comment on whether the dDCO should provide for re-**

consultation on alterations or additional information relevant to details to be submitted for approval under the requirements.

- 4.2.12 Mr Minhinick explained that the Applicant does not agree that there is a need for such a provision. For the reasons set out in Appendix B, there will be effective consultation with key stakeholders including GCC. The proposed mechanism for the discharge of the DCO requirements is tried and tested, and is working from a day-to-day perspective on a number of projects around the country.
- 4.2.13 The ExA asked the Applicant to respond to comments from GCC on the need for a mechanism by which the Joint Councils can recover costs incurred in relation to the discharge of requirements and monitoring.
- 4.2.14 Mr Minhinick explained that it would not be appropriate to incorporate any provision for payment of costs associated with consultation within the dDCO requirements.

5 ITEM 5 – Schedule 8, protective provisions

- 5.1.1 The ExA invited the Applicant to comment on what it is doing to reach an agreement on the protective provisions.
- 5.1.2 Mr Minhinick noted that Schedule 8 provides protective provisions for statutory undertakers where their apparatus, duties and functions might be affected by scheme. The provisions under Part 1 (For the protection of electricity, gas, water and sewerage undertakers) and Part 2 (For the protection of operators of electronic communications code networks) have not been expressly requested by any party but do provide general protection to statutory undertakers affected by the scheme. These protective provisions adopt standard wording used on other National Highways schemes. National Highways has consulted on these provisions with the statutory undertakers that have been identified as being affected by the scheme. Further details on this consultation and the status of discussions with the relevant statutory undertakers can be found within the Statement of Commonality, the latest version of which is being submitted at Deadline 3 (Document 7.3, Rev 2). That latest position was explained by the Applicant.
- 5.1.3 Part 3 of Schedule 8 is for the protection of the Environment Agency (EA) and covers works that might affect drainage. The drafting is based on the EA's preferred terms that have been used on other projects. The Applicant is engaging with the EA and seeking to obtain its express agreement to the protective provisions, noting that the EA has not previously made any submissions to the ExA on the matter of the protective provisions specifically.
- 5.1.4 In response to the ExA's suggestion, and action point ISH1-AP9, the Applicant is making a further attempt to contact those undertakers it has not previously been able to obtain a positive response from in respect of the protective provisions.
- 5.1.5 **The ExA asked the Applicant to comment on the potential for protective provisions for GCC to be included within the dDCO.**
- 5.1.6 Mr Minhinick confirmed that productive conversations between the Applicant and GCC are ongoing. The Applicant hopes to come to an agreed position that avoids the need for protective provisions in favour of GCC.

6 ITEM 6 – planning obligations and any other consents, licences or agreement

- 6.1.1 The EXA asked the Applicant to clarify whether designated funds could be used to address recreational pressure on protected habitats, as suggested by Natural England.
- 6.1.2 Mr Minhinick confirmed that the Applicant is looking at the use for designated funds for a number of initiatives within the vicinity of the scheme. The Applicant agreed to provide an update on designated funds at Deadline 4 as action ISH1-AP12.
- 6.1.3 **The ExA asked the Applicant to explain how newly created habitats could be managed under s.253 agreements with landowners, and how such agreements interact with the EMP.**
- 6.1.4 Mr Minhinick noted that the use of s.253 agreements is commonplace in the management of mitigation in connection with schemes of this sort. The Applicant agreed to provide further detail on the s.253 mechanism as part of this written summary as action ISH1-AP13.
- 6.1.5 An agreement under s.253 of the Highways Act 1980 allows a highway authority to enter into an agreement with any owner of land adjoining or near a highway in order to restrict or regulate the use of that land for the purpose of mitigating any adverse effect which the construction, improvement, existence or use of a highway has or will have on its surroundings. Such agreements may make provision for the planting and maintenance of trees, shrubs, or plants on the land and for restricting the lopping or removal of trees, shrubs or other plants from the land.
- 6.1.6 Section 253 agreements are local land charges that run with the land, and are binding on successors in title in the same way as planning agreements under s.106 of the Town and Country Planning Act 1990.
- 6.1.7 A s.253 agreement can therefore be used by National Highways where it wishes to enter into an agreement with a landowner to secure mitigation planting on, or use of, land near the highway, without depriving the landowner of the land in its ownership. The obligation to secure the mitigation would be expressed in the agreement itself and would usually make reference to a management plan setting out the respective obligations of National Highways and the landowner in carrying out and maintaining mitigation works. A s.253 agreement can also make provision for the payment of compensation by National Highways to the landowner, in consideration of them carrying out any works as specified in the agreement.
- 6.1.8 In the event of non-compliance, National Highways can enforce against any breach of the terms of a s.253 agreement on a contractual basis.
- 6.1.9 An agreement under s.253 therefore provides National Highways with a means of securing the mitigation measures set out in the EMP on land outside of its ownership. However, the primary obligation to deliver any essential mitigation as part of the scheme remains with National Highways as the undertaker.

Appendix A Legal note on the disapplication of SS.28E and 28H of the WCA 1991

A.1 Executive summary

- A.1.1.1 This joint advice note has been prepared by Burges Salmon LLP and agreed with BDB Pitmans LLP on behalf of National Highways Limited (“**National Highways**”).
- A.1.1.2 Sections 28E and 28H of the Wildlife and Countryside Act 1981 (the “**Act**”) provide two alternative consenting mechanisms for operations likely to damage a site of special scientific interest (a “**SSSI**”). Broadly, s.28E relates to owners and occupiers of land, and s.28H to a variety of public bodies.
- A.1.1.3 This note sets out the relevant statutory provisions, how they would apply to nationally significant infrastructure projects (“**NSIPs**”), and our recommendation as to how SSSI consents are addressed within National Highways development consent orders (“**DCO**”). Our recommendation is that both ss. 28E and 28H of the Act should be disapplied in National Highways’ DCOs, in the interests of certainty and the expeditious delivery of NSIPs. Importantly, the consenting process for DCOs ensures that the protection for SSSIs provided by sections 28E and 28H of the Act, and Natural England’s (“**NE**”) functions under those provisions, are preserved.
- A.1.1.4 This note has been prepared to inform discussions with NE, as the regulatory body in respect of SSSIs in England and Wales, with the aim of agreeing general principles for any given project at an organisational level.

A.2 Section 28E consent

- A.2.1.1 Section 28E provides that the owner or occupier of any land included in a SSSI shall not carry out, or cause or permit to be carried out, on that land any operation likely to damage the SSSI, without the consent of NE¹.
- A.2.1.2 Under s. 28E(2), the duty to notify (and obtain consent from) NE of operations in an SSSI under s.28E(1) does not apply to an owner or occupier being an authority to which s.28G applies (a “**Section 28G Authority**”).

A.3 Section 28G authorities and the general duty

- A.3.1.1 Under subsection 28G(3)(f) a “public body of any description“ will be a Section 28G authority.
- A.3.1.2 National Highways is a government-owned, arm’s-length company, created pursuant to the Infrastructure Act 2015. The Cabinet Office’s Public Bodies

¹ Either expressly, or through an approved management agreement or scheme.

Handbook² identifies arm's length bodies as a category of public body. National Highways is therefore a public body for the purposes of section 28G.

- 1.1 Under s.28G(2) of the Act, a Section 28G Authority is under a general duty to take reasonable steps to further the conservation and enhancement of the SSSI, when exercising its functions.

A.4 Section 28G authorities – duty in relation to carrying out operations under S.28H

A.4.1.1 Whilst not subject to s.28E, a Section 28G Authority must give notice to NE before carrying out, in the exercise of its functions, operations likely to damage any of the flora, fauna or geological or physiographical features by reason of which a SSSI is of special interest (s.28H(1)).

A.4.1.2 In response to a notice, NE may either:

- a. assent to the proposed operations (with or without conditions); or
- b. refuse to assent to the proposed operations.

A.4.1.3 In the event that NE refuse to assent to the operations but the Section 28G Authority intends to proceed anyway, or NE assents but the Section 28G Authority proposes to carry out the operations other than in accordance with the terms of NE's assent, there is a mechanism by which NE can be notified of that intention so as to allow the operations to proceed. When doing so the Section 28G Authority is then subject to certain statutory safeguards concerning those operations, including a requirement to restore the site.

A.5 Offences and the reasonable excuse defence

A.5.1.1 Where a person, or Section 28G Authority, contravenes ss. 28E or 28H (as the case may be), without reasonable excuse, they will be guilty of an offence and liable on summary conviction, or on conviction on indictment, to a fine.

A.5.1.2 For the purposes of these offences, it is a reasonable excuse for a person to carry out an operation (or to fail to comply with a requirement to send a notice about it) if the operation in question—

- a. was authorised by a planning permission, or otherwise permitted by a Section 28G Authority; or
- b. was an emergency operation where notified to NE.

A.5.1.3 A DCO granted by the Secretary of State would comprise a permission granted by a Section 28G Authority³, and accordingly the DCO for the Scheme (if made) would amount to a "reasonable excuse" for these purposes.

A.6 Disapplication of legislation under a DCO

A.6.1.1 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.

A.6.1.2 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

² <https://www.gov.uk/government/publications/classification-of-public-bodies-information-and-guidance>

³ Provided the procedures of section 28I of the Act are followed.

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.

- A.6.1.3 Where a consent or authorisation is not prescribed for the purposes of s.150, the relevant statutory provisions can be disapplied without consent from the relevant regulatory body (pursuant to s.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 s.120.
- A.6.1.4 Sections 28E, 28G and 28H of the Act are not consents or authorisations prescribed for the purposes of s.150 of the Planning Act 2008 in England.⁴ Consent from NE to disapply these sections is therefore not required to disapply those provisions in DCOs relating to NSIPs in England. Those provisions can be disapplied by virtue of s.120 of the Planning Act 2008.

A.7 Examples of disapplying SSSI consents

- 1.2 The disapplication of s.28E of the Act has precedent in the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016 and the A303 (Amesbury to Berwick Down) Development Consent Order 2020 (albeit the latter has since been quashed for reasons not relevant to this note).
- 1.3 In relation to the A14 and A303 Stonehenge schemes, Natural England did not challenge the disapplication of s.28E, and ss. 28G, 28H and 28I were not the subject of discussion during examination.

A.8 Analysis

A.8.1 National Highways as Section 28G Authority

- A.8.1.1 National Highways is a Section 28G Authority for the purposes of promoting highways NSIPs. National Highways is a public body and the operations involved in developing the strategic road network would flow from the proper exercise of its statutory functions.

A.8.2 Relevance of section 28E

- A.8.2.1 That National Highways is a Section 28G Authority does not mean that s.28E is no longer relevant. Section 28E applies to any owner or occupier of any land included in a SSSI where they '*carry out, or cause or permit to be carried out*' any operations on that land. This provision would therefore apply in principle to any owners or occupiers of land who permit National Highways to carry out works on their land within the SSSI. It is important that s.28E is disapplied to prevent National Highways' works comprising an offence on third party land by that third party landowner or occupier (if for example works were carried out by agreement with that landowner rather than through the exercise of compulsory acquisition powers).
- A.8.2.2 The s.28E duty would also apply in respect of any new SSSI that is notified by Natural England under s.28 of the Act in respect of land within the Order limits of

⁴ However, we note that s.28E is a prescribed consent in Wales pursuant to Part 2 of Schedule 2 to The Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015. We also note that until 2015 s. 28E was a "prescribed consent" for the purposes of the Planning Act 2008 in England.

a made DCO. There is therefore potential for additional owner/occupiers to be subject to s.28E throughout the life of a NSIP.

A.8.3 Reasonable excuse defence

- A.8.3.1 In principle, the reasonable excuse defence is capable of applying to operations which would otherwise constitute an offence under both s.28E and s.28H.
- A.8.3.2 We understand, from correspondence with NE on specific National Highways schemes, that NE consider that National Highways could carry out the operations permitted under a DCO in reliance on the reasonable excuse defence in s.28P(4)(a) of the Act. This defence may also be available to any owner/occupiers subject to s.28E.
- A.8.3.3 We infer from this that NE considers the DCO examination and determination process to be equivalent to the notification process required under s.28H of the Act in terms of purpose and function, subject to compliance with s.28I by the SoS in determining the application.⁵
- A.8.3.4 Whilst we do not disagree with NE's assessment, we think it is clearly preferable to use the disapplication route instead. This is because it provides greater clarity, since there is no need to enquire on a case by case basis whether the reasonable excuse defence applies, and would avoid any risk of procedural challenge where the authorisation process under s.28I is not strictly complied with, noting that the requirements under s.28I were not drafted with the DCO examination and consenting process in mind.
- A.8.3.5 We would also note that there is some uncertainty about whether a statutory defence (of "reasonable excuse") would be available in relation to operations carried out on land which may become a notified SSSI under s.28 of the Act following the grant of the DCO, as strictly the requirements of s.28I would not have been complied with in relation to such land.

A.8.4 Mitigation and requirements

- A.8.4.1 The impact of an NSIP on the notified features of relevant SSSIs is considered in detail as part of the DCO consenting process, and the control mechanisms to be put in place under a DCO should be appropriate to protect the notified features of SSSIs in so far as that protection is consistent with the delivery of the NSIP.

A.9 Conclusions and recommendation

- A.9.1.1 We recommend that, as a general point of principle to be agreed with NE, both ss.28E and 28H of the Act are disapplied within National Highways DCOs. The disapplication would only apply in respect of works permitted by the DCO.
- A.9.1.2 In our view it would be much better to remove any potential ambiguity in the underlying statutory code to enable the efficient delivery of an NSIP. That approach is a better fit with the DCO regime offering a "one-stop shop" for consents for NSIPs. We consider that NE's acceptance that a DCO would

⁵ We note that in its Written Representation dated 15 June 2015 in connection with the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016, Natural England accepted that the notice requirements of subsections 28I(2) to (4) were satisfied by way of the Secretary of State's determination of the DCO application for the scheme (section 1.7, footnote 45).

amount to a reasonable excuse defence supports this approach, which has been accepted in previous DCOs.

- A.9.1.3 The protection of SSSIs, and NE's involvement within the approval process, would then be provided for within the DCO and its consenting process, as appropriate on a case-by-case basis.
- A.9.1.4 We would note that we are not aware that the issues raised in this note have been explored in any great detail in the context of past DCOs.
- A.9.1.5 We would invite NE to comment on this recommendation, with a view to agreeing an approach with National Highways on a national basis.

Burges Salmon LLP

BDB Pitmans LLP

19 January 2022

Appendix B Submissions on discharge of requirements and mechanisms to control detailed design

B.1 Background and context

- B.1.1.1 The Applicant considers that it would assist the ExA to provide some additional context on and history to the proposed mechanism for the discharge of requirements in National Highways DCOs.
- B.1.1.2 The proposed approach is in accordance with the existing procedure that has been in operation for National Highways DCOs since National Highways (formerly Highways England) became a government-owned company in 2015. It is an approach that has been accepted on all National Highways orders since The A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016.
- B.1.1.3 The Secretary of State for Transport's role in discharging DCO requirements is particular to National Highways orders; the usual approach would be for DCO requirements to be discharged by the relevant local planning authority.
- B.1.1.4 The Secretary of State's responsibility for discharging National Highways DCO requirements is based on previous practice under the Highways Act 1980 regime, when the Secretary of State delegated their functions to the Highways Agency. It also reflects similar internal processes to those employed by the Department of Transport in taking other quasi-judicial decisions (for example, in deciding whether to make a DCO or a Transport and Works Act Order).
- B.1.1.5 The justification for the Secretary of State discharging National Highways' DCO requirements is that the Department for Transport has the resources and the necessary expertise to perform this role. This approach also recognises that National Highways has significant expertise and experience in delivering nationally significant highway schemes.
- B.1.1.6 The dDCO requirements ensure transparency and scrutiny in the discharge of requirements by way of prescribed consultation with the relevant local authorities and the requirement for an online register (as further detailed below).

B.2 Controls relating to detailed design

- B.2.1.1 The Applicant notes that concerns have been raised by key stakeholders, including GCC, in respect of the controls included within the dDCO in relation to the detailed design of the scheme and, in particular, the crossings.
- B.2.1.2 The dDCO requirements effectively limit the ability of the applicant to depart from those preliminary details that are present within the application documents as a whole, which have been the subject of detailed assessment and are now being examined.
- B.2.1.3 The detailed design is principally controlled under Requirement 11, which ensures that any departures from the preliminary design shown on the works plans and general arrangement plans must be approved by the Secretary of

State and cannot give rise to any materially new or materially worse environmental effects. Further controls over the eventual design are included within the EMP, which is secured under Requirement 3. The Applicant would point to the following controls that have been developed to control the appearance of the scheme crossings and the Air Balloon Way in consultation with key stakeholders, as described in the Design Summary Report (Document 7.7, APP-423):

| ID | Commitment |
|------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| GP8 | National Highways would engage with all key environmental stakeholders prior to and during the detailed design process, as well as during construction of the scheme. |
| BD41 | <p>All planting, including hedgerows on the Gloucestershire Way crossing and the Cowley and Stockwell overbridges must be delivered as shown on the Environmental Masterplan and delivered and managed as detailed in the LEMP.</p> <p>Planting of woody species of a height of at least 3m will be undertaken in areas considered to be of high collision risk for wildlife with particular regard to bats and barn owls.</p> <p>Planting of all habitats will comprise species appropriate to the AONB and of local provenance. A small proportion of non-native trees would be considered to offer resilience to climate change as detailed in EMP Annex D Landscape and Ecological Management Plan.</p> |
| BD49 | The creation of the re-purposed A417 would require the protection of existing verge habitat (including those where musk orchid are present near Barrow Wake). This would include fencing of areas of higher ecological value to be agreed with the ecologist and pollution prevention measures such as dust control. |
| BD54 | The Gloucestershire Way crossing bridge deck would include 25 metres (wide) of calcareous grassland and two native species-rich hedgerows three metres wide and at least 2 m high. |
| BD55 | Cowley overbridge would include a 3m wide grass verge with a native species rich hedgerow. |
| BD56 | Stockwell overbridge would include two 3m wide verges each with a native species-rich hedgerow. |
| L5 | Where practicable, structures would be designed to be sympathetic to the character of the Cotswolds AONB, using suitable facing materials such as locally sourced materials to fit existing vernacular and exposed rock faces. Facings may also include areas for colonisation with local species to visually break up the surfaces. |
| L6 | Footpath link across the Cotswold Way crossing to be realigned keeping the Cotswold Way National Trail close to its original route. The crossing will form part of the Cotswold Way National Trail and would be designed to allow views out in places to the Cotswolds AONB landscape. |
| L7 | Gloucestershire Way crossing designed to cater for walkers and other users of the Gloucestershire Way long distance footpath, to integrate the scheme into the landscape, improving connectivity and provides quieter areas to facilitate wildlife corridors. |
| L8 | Gloucestershire Way crossing planting to feature a mosaic of habitats including calcareous grassland, groundcover shrub and small tree/ scrub as two |

| | |
|------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | distinct native species-rich hedgerows at least 2m high to support wildlife movement. Vegetation on bridge to be managed and maintained to ensure it thrives. |
| L9 | Hedgerow(s) on Stockwell and Cowley overbridges. Vegetation on bridge to be managed and maintained to ensure it thrives. |
| L10 | Detrunked sections of the A417 are to be repurposed to a 'purpose-designed' width for footpath, bridleway and cycle access, with areas of restored landscape. Former road to be resurfaced with locally appropriate toppings, such as crushed stone. |
| L11 | Linear tree planting to be extended across the demolished section of the Existing A417 road to connect landscape features, increase biodiversity and create additional wildlife habitat. |
| L12 | Levels of the old A417 alignment are to be rationalised in places through infilling using excavated materials to restore land to original grades. |
| L21 | Bridges and structures to be of high architectural quality, finished in locally sourced material and other materials suitable to the local vernacular. |
| L26 | Cowley (Ch 4+040) and Stockwell (Ch 4+725) overbridges would be positioned low in the landscape, reducing their visual effect, and helping to integrate them into the surrounding landform. |

- B.2.1.4 The dDCO also provides for consultation with prescribed consultees, as appropriate, before relevant details can be submitted to the Secretary of State for approval. This is secured by way of Requirement 4, which requires the Applicant to prepare and submit a summary report setting out the consultation undertaken by the undertaker to inform any details submitted for discharge, where prescribed, and the undertaker's response to that consultation. A copy of the summary report must be provided to the relevant consultees.
- B.2.1.5 Requirement 4(3) provides that Applicant must ensure that any consultation responses are reflected in the details submitted to the Secretary of State for approval under this Schedule, where it is appropriate, reasonable and feasible to do so, taking into account considerations including, but not limited to, cost and engineering practicality. Where the Applicant has not adopted the recommendations of consultees, the Applicant must explain in its summary report why this is the case (Requirement 4(4)).
- B.2.1.6 The Secretary of State must consider all relevant information including the views of consultees before discharging any requirement.
- B.2.1.7 The Applicant would also draw the ExA's attention to Requirement 15(3), which disapplies the deemed consent provision under Requirement 15(2) where a consultee considers that the subject matter of the application is likely to give rise to any materially new or materially worse environmental effects in comparison with those reported in the environmental statement.
- B.2.1.8 To ensure transparency, the Applicant must produce and maintain a public register of the requirements under Requirement 17 of the dDCO. The register must set out in relation to each requirement the status of the requirement, in terms of whether any approval to be given by the Secretary of State has been applied for or given, providing an electronic link to any document containing any approved details. Requirement 17 has been included in all recent National

Highways orders. In practice, these registers are placed on the dedicated project website for each National Highways scheme.

- B.2.1.9 The requirements register tracks the discharge 'journey' of each requirement. In practice, it includes:
- a. documents produced for the discharge;
 - b. internal approvals gained by the applicant;
 - c. consultation with relevant parties undertaken; and
 - d. progress with gaining approval from the SoS
- B.2.1.10 National Highways has incorporated this process into its standard project control framework, which governs how its major improvement projects are delivered.
- B.2.1.11 The Applicant would direct the Joint Councils to examples of existing registers on the individual project pages on National Highways' website, for further reassurance as to the level of engagement with consultees during the detailed design process.
- B.2.1.12 In response to action ISH2-AP12, the Applicant is continuing to investigate DCOs where design details affecting sensitive landscapes were reserved. Provisionally, the Applicant confirms the following made DCOs reserved details that could have an impact on sensitive landscapes:
- B.2.1.13 The National Grid (Hinkley Point C Connection Project) Order 2016;
- B.2.1.14 The York Potash Harbour Facilities Order 2016; and
- B.2.1.15 The Cornwall Council (A30 Temple to Higher Carblake Improvement) Order 2015.
- B.2.1.16 Additionally, the draft DCO for the A303 Stonehenge scheme, which is currently being re-determined, would also reserve details that could impact a sensitive landscape.
- B.2.1.17 The Applicant has not been able to obtain all the relevant documents from the PINS website as these have been archived, but will make further attempts to do so and provide an update at a future deadline.

B.3 Enforcement

- B.3.1.1 Local planning authorities are responsible for enforcing the terms of the DCO, including the requirements, under Part 8 of the Planning Act 2008. Under section 161, it is an offence to breach the terms of a DCO. This Part gives local planning authorities the power to carry out certain actions to ensure compliance, such as the right to enter land, require information, serve notice on the undertaker requiring certain action and applying for an injunction to restrain any prohibited actions.
- B.3.1.2 It is inherent within the terms of the DCO that the Secretary of State's functions under Schedule 2 must be carried out properly and correctly, including carrying out consultation in line with the various principles laid down in case law. By the very nature of the Secretary of State's position, it is unlikely that they would exercise their functions incorrectly or unconscionably but, should they do so, it would be a breach of the terms of the DCO. In the circumstances, the likely process in respect of any breach would be through application for judicial review.

B.4 Further consideration

- B.4.1.1 The Applicant considers that the amount of detail that has been provided on the design of the scheme and the level of engagement that has been undertaken with stakeholders goes beyond what would usually be expected for a scheme of this type. This reflects the fact that this is a landscape-led project.
- B.4.1.2 However, having considered the comments made by the ExA and third parties during the recent hearings, the Applicant is reflecting on what further controls and reassurances could be built into the detailed design process. Further to action point ISH2-AP13, the Applicant will provide an update on any further provisions that could be offered, if any, at the next possible deadline.