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Dear Sirs,

NSIP: A417 Missing link - Deadline 4
User Code: TR010056
Further advice on Disapplying SSSI Consents
Comments on Ullen Wood lighting proposals

Natural England is a non-departmental public body. Our statutory purpose is to ensure that the natural environment is conserved, enhanced, and managed for the benefit of present and future generations, thereby contributing to sustainable development.

Further advice on Disapplying SSSI Consents

This letter provides NE's advice in response to the joint advice note prepared by Burges Salmon LLP, dated 19 January 2022.

Disapplying SSSI Consent is listed as a 'matter outstanding' in Natural England's Statement of Common Ground (SoCG) with National Highways. Section 1.1 of the SoCG contains an accurate summary of NE's advice on the legal position. This is repeated below for ease of reference:

Since Highways England is a body to which s.28G of the Wildlife and Countryside Act 1981 (WCA 1981) applies (a s.28G authority), this situation would not be governed by s.28E WCA 1981. Even if s.28E WCA 1981 did apply, it is not legally possible to disapply a requirement to obtain consent under s.28E in a DCO in England.

As such and if applicable (which it is not in this case), the usual s.28E notice/consent process would need to be followed. Instead, it is for the Secretary of State (SOS) (as the decision-maker in relation to the DCO and also as a s.28G authority) to give notice to Natural England under s.28I WCA 1981 if the operations to be permitted by the DCO are likely to damage any of the flora, fauna or geological or physiographical features by reason of which the SSSIs are of special interest.

Natural England then has 28 days (beginning with the date of the notice) to provide its advice, following which the SOS may decide whether to grant the DCO. The SOS must take Natural

England's advice into account in deciding whether to grant the DCO and what (if any) protective provisions should be included in the DCO.

If the DCO is granted, Highways England can then carry out the operations permitted by it in reliance on the reasonable excuse defence in S.28P(4)(a) WCA 1981, which says that if the operations in question were permitted by a s.28G authority which has acted in accordance with section s.28I (i.e. followed the correct process for obtaining Natural England's advice, as outlined above), then this will be a reasonable excuse for any failure by a s.28G authority to obtain Natural England's assent (under s.28H WCA 1981) before carrying out any damaging operations.

As stated at 1.1. of the SoCG under 'Natural England position', NE considers that, if S28I advice is obtained in this way, NH can then carry out the operations permitted by it in reliance on the reasonable excuse defence in S.28P(4)(a) WCA 1981, which says that if the operations in question were permitted by a s.28G authority which has acted in accordance with section s.28I (i.e. followed the correct process for obtaining Natural England's advice, as outlined above), then this will be a reasonable excuse for any failure by a s.28G authority to obtain Natural England's assent (under s.28H WCA 1981) before carrying out any damaging operations.

While we take the point that other owners/occupiers may have S28E duties, as acknowledged by Burges Salmon in their note (see paragraph 8.4), the reasonable excuse defence (that the damaging operation has been permitted by a public body acting in accordance with section 28I) is capable of applying to operations which would otherwise constitute an offence under both S28E and S28H.

This [Planning Inspectorate guidance note](#) sets out on p.6 the process for dealing with potential impacts on SSSIs in relation to NSIPs. As per the guidance document, under S28I, the Secretary of State must notify NE before authorising the carrying out of operations likely to damage the special interest features of a SSSI.

Paragraph 8.7 of the Burges Salmon advice confirms that they do agree with the above assessment, while stating that it is 'preferable' to use the disapplication route instead. Natural England cannot follow the logic of the arguments raised here; and the suggestion that the requirements under S28I were not drafted with the DCO examination and consenting process in mind is clearly rebutted by the Planning Inspectorates own guidance note (see above).

During the DCO consenting process, there will be a proper examination of the impacts of the Project on SSSIs (as referred to in paragraph 8.9 of the Burges Salmon advice) and S28I will operate to ensure that, in line with its general statutory duty in relation to SSSIs, NE has input into what is finally agreed with regard to DCO obligations relating to SSSIs.

There is a suggestion within the Burges Salmon advice note that disapplication of S28E (and/or S28H) would mean that, should a new SSSI(s) be notified within the Order area, National Highways could still carry out works that may affect the new SSSI(s), by relying on the disapplication. This highlights a concern for NE that impacts on any such new SSSI(s) would not have been considered/mitigated for (and legally secured) at the DCO consenting stage. NE has a general statutory duty in relation to SSSIs and that general duty would be better served through the S28I route in this situation – as this would mean that any impacts on new SSSI(s) would need to be considered/mitigated/mitigation secured through the S28E/S28H consenting/assenting route.

Natural England does not agree with Burges Salmon's analysis at Paragraph 6.3 of its advice note. While SoS has the *power* under s.120 to disapply statutory provisions which relate to any matter for

which provision may be made in the order, it is not required to do so on application by an applicant – rather, the decision is at the discretion of the SoS, acting reasonably in all the circumstances of the case. In this case, there is an established process for dealing with SSSIs in relation to NSIPs, as described above and set out in the Planning Inspectorate’s own advice note (i.e. SoS to obtain S28I advice) and NE would argue that it would not be reasonable for the SoS to disapply S28E (and/or S28H) in these circumstances.

Further arguments about the operation of s.150 in these circumstances are not relevant, because S28E/S28H are not (as described above) the correct consenting route in this case – rather, S28I is the operative provision.

Finally, paragraphs 7.1-7.2 refer to previous occasions where S28E has been disapplied. We are not aware of the facts/circumstances of these cases – however, NE’s general position on the interaction between the SSSI consenting regime and the NSIP consenting regime remains as outlined in the SoCG.

The position set out above is based on advice received from Natural England’s Legal Service Team. Any further correspondence on this matter can be directed to me in the first instance.

Comments on Ullen Wood lighting proposals

Gloucestershire County Council has raised concerns around the Ullen Wood roundabout being unlit. The consultants working on this scheme have indicated that lighting the roundabout would have significant environmental impacts, including on the landscape of the Cotswolds Area of Outstanding Natural Beauty and on the bat mitigation currently proposed. These impacts are a cause for concern. Natural England’s responses to this NSIP to date have all been based on the scheme being unlit in its entirety.

Gloucestershire County Council has suggested that the below ground infrastructure required to light the roundabout is installed as a part of the roundabout construction, but not turned on unless there is a serious need. If this approach is taken, then Natural England needs to understand the mechanism for making this decision in the future, and we would want to be reassured that environmental impacts would be taken into consideration. We would also want to be reassured that all available steps are being taken to further manage down the residual safety risks, e.g. reducing speed limits and rumble strips. The inclusion of these measures as a part of the road would make it less likely that the lighting will ever be needed.

Yours faithfully



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