

Date: 30 March 2022
Our ref: 387356
Your ref: TR010056



National Infrastructure Planning
Temple Quay House
2 The Square
Bristol
BS1 6PN

Customer Services
Hornbeam House
Crewe Business Park
Electra Way
Crewe
Cheshire
CW1 6GJ

T 0300 060 3900

BY EMAIL ONLY

Dear Sirs,

NSIP: A417 Missing link

User Code: TR010056

Answers to Examining Authorities Further Written Questions received 17 March 2022, and addendum to Rule 17 Request for further information

The proposed disapplication of legislation relating to SSSI

2.3 Biodiversity, Ecology and Natural Environment (including Habitats Regulations Assessment (HRA))

2.5.12.

Natural England

Section 28E (H, G)

a) What are NE's comments in relation to the Applicant's Legal Note on the Disapplication of S28E and H of the WCA1981 contained at Appendix A of the Summary of the Applicants Oral Submissions at Issue Specific Hearing 1 (ISH1) [REP3-009]?

a) What are NE's comments in relation to the Applicant's Legal Note on the Disapplication of S28E and H of the WCA1981 contained at Appendix A of the Summary of the Applicants Oral Submissions at Issue Specific Hearing 1 (ISH1) [REP3-009]?

1. Statement of common ground with Appendix A

1.1. Natural England ("**NE**") is a non-departmental public body. NE's 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. Section 28G of the Wildlife and Countryside Act 1981 (the "**Act**") also places a general duty on NE to take reasonable steps to further the conservation and enhancement of SSSIs.

1.2. NE agrees that the Applicant is a section 28G authority for the purposes of the Act (see section A.3 of Appendix A).

1.3. NE agrees with the Applicant's summary of the s.28H duty on section 28G authorities (see section A.4 of Appendix A).

1.4. NE agrees with the Applicant's analysis of offences and the circumstances in which there will be a reasonable excuse under the Act (see section A.5 of Appendix A). Specifically, NE agrees that, where the SoS grants a DCO and has acted in accordance with s.28I of the Act, this will provide a 'reasonable excuse' under s.28P(4)(a) for either: (i) failure by an

owner of occupier of SSSI land to notify/obtain NE consent under s.28E before carrying out certain operations; and/or (ii) failure by a section 28G authority to notify NE under s.28H before carrying out certain operations.

2. The Secretary of State's duty in relation to authorising the DCO

2.1. The SoS is also a section 28G authority for the purposes of the Act.

2.2. Accordingly, in relation to SSSIs, the SoS is under both a general duty to take reasonable steps to further the conservation and enhancement SSSIs (s.28G) and a specific duty to consult with NE before permitting operations likely to damage any of the flora, fauna or geological or physiographical features by reason of which an SSSI is of special interest (s.28I). The SoS must comply with the process outlined in s.28I, including taking into account NE's advice when deciding whether to permit the proposed operations.

2.3. Consistent with its duty under s.28I, the SoS is consulting with NE about the proposed operations in this case before reaching its decision. Therefore, if the SoS follows the process outlined in s.28I, including taking into account NE's advice which it has already provided, the Applicant will be able to carry out the operations permitted by the DCO without the need to separately notify or obtain NE's consent. Owners and occupiers of SSSI land will also be able to allow the Applicant to carry out operations permitted by the DCO on their land without need to separately notify or obtain NE's consent.

2.4. NE notes that the Applicant does not disagree with the above assessment (see para. A.8.3.4 of Appendix A).

3. NE position on the proposed disapplication of s.28E and s.28H of the Act

3.1. NE notes that the s.28I process is being followed and that, as envisaged by that process, it has been consulted on and had the opportunity to provide advice in relation to the impact of the NSIP on the notified features of the SSSIs and the control mechanisms to be put in place under the DCO to mitigate any such impacts. NE provides further advice on the proposed Environmental Management Plan below.

3.2. Provided that the SoS now takes NE's advice into account and follows the process outlined in s.28I, then should the DCO then be granted, the Applicant may carry out and owners/occupiers of SSSI land may permit the Applicant to carry out operations permitted by the DCO on their land without need to separately notify or obtain NE's consent. It is therefore difficult to understand why disapplication of s.28E or s.28H of the Act would be necessary in these circumstances – and as outlined below, there may be risks associated with such an approach.

3.3. The Applicant's justification for disapplication of s.28E and s.28H of the Act is described at paragraph A.8.3.4 of Appendix A: "*we think it is clearly preferable to use the disapplication route*", 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 it "*would avoid any risk of procedural challenge when 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*".

3.4. NE cannot foresee a situation where there is a need to enquire on a case by case basis whether the reasonable excuse 'defence' applies. The Applicant will have a reasonable excuse under the Act wherever operations that would otherwise constitute an offence are carried out in compliance with the DCO and any conditions attaching to it. As such, the Applicant will simply need to ensure compliance with the DCO at all times.

- 3.5. Whether or not s.28I was drafted with the DCO examination and consenting process in mind is not a relevant consideration. Annex C to the Planning Inspectorate Advice Note 11¹ is clear that the practical application of the Act is that the SoS should follow the process outlined in s.28I when granting DCOs, as it is doing in this case.
- 3.6. Further, the Applicant appears to suggest that a risk of procedural challenge may arise if the SoS fails to 'strictly' comply with s.28I. A decision by the SoS to disapply the law on the basis of the Applicant's concern that the SoS may not strictly comply with it, has no sound legal basis. Pursuant to public law principles, any decision to disapply the law within a DCO is at the discretion of the SoS, acting reasonably in all the circumstances of the case. The Applicant has failed to put forward any rational reason for the SoS to exercise its discretion to disapply S.28E and S.28H of the Act, which is simply unnecessary given that the process outlined in s.28I is being followed in this case. It follows that any decision by the SoS to make such disapplication within the DCO may itself be open to legal challenge, on the basis of unlawfulness, unreasonableness and/or irrationality.
- 3.7. NE is also concerned that a decision to disapply s.28E and/or s.28H within the DCO could have unwanted practical implications in relation to any SSSIs that are designated in the future. Where operations permitted by the DCO could have impacts on any such new SSSI(s), it follows that these impacts would not have been considered/mitigated for (and legally secured) at the DCO consenting stage. A decision not to disapply s.28E and s.28H on the other hand would mean that any impacts on new SSSI(s) would need to be considered/mitigated/mitigation secured through the usual s.28E/s.28H consenting/assenting route, as prescribed by the Act.

4. Previous disapplication of s.28E

- 4.1. The Applicant refers in Appendix A to previous occasions where s.28E has been disapplied. NE has not rehearsed the specific facts/circumstances of these cases. However, it is NE's general position that it is unnecessary to and indeed that s.28E should not be disapplied in this way, for the reasons outlined above.

b) What are NE's comments regarding the supplementary statements made by the Applicant on this matter in [REP5-008]? The Applicant states that Annex C (as defined above) does not expressly cover s.28E and s.28H of the Act.

1. As outlined above, where the SoS follows the process outlined in s.28I of the Act, there is no need to notify or obtain separate consent from NE under s.28E or s.28H of the Act. The Applicant agrees with this analysis in its reply. This is the practical outcome of following the s.28I process as outlined in Annex C – there is no need for Annex C to expressly reference this.
2. The Applicant also states in its reply that it "*does not consider it is appropriate for the delivery of an NSIP to be reliant on a statutory defence to criminal proceedings, particularly where the defence is dependant on a process that is outside the Applicant's control*". The 'reasonable excuse' provisions in s.28P(4)(a) are not a statutory defence to criminal proceedings. S.28P(4)(a) simply provides that, where s.28I is complied with as in this case, the Applicant will have a reasonable excuse for not separately notifying NE under s.28H.
3. The Applicant states further that "*NSIPs are subjected to extensive environmental impact assessment, wide ranging public consultation, and a public examination during which suitable controls to protect SSSIs can be addressed. The SoS also has the ability to consult with stakeholders prior to determination. In this context, the duties under sections 28E and 28H are unnecessary and create uncertainty. The purpose of the DCO regime is to provide a one stop shop for NSIPs, and legislative requirements can be disapplied for that purpose.*" EIA is a

¹ Available [here](#).

standalone process that is separate to the SSSI consenting regime, while public consultation can be no substitute to statutory consultation. The Applicant also refers to the 'ability to consult with stakeholders prior to determination' – NE is one such stakeholder and consultation with NE is a statutory requirement under s.28I.

4. The Applicant also states that the SoS could disapply Section 28I on the basis that the DCO process effectively satisfies the section 28I duty. NE can see no rational thinking in an argument for disapplying a process on the basis that it has in effect been applied.
5. Finally, the Applicant refers again to previous cases where s.28E has been disapplied – NE's comments on this remain as set out above.

c) Given that any new SSSIs (or potential new SSSIs) within the Order limits are likely only to become established and designated post-construction of the development, what concerns are there regarding potential works within those future SSSIs that are associated with the operation or maintenance of the Proposed Development?

Natural England is not aware of any specific SSSI's that may be designated.

NE's concerns about the potential impacts on any SSSI(s) that may be designated in the future are set out above. The SSSI consenting regime operates to address these concerns and should not be disapplied within the DCO.

d) The Applicant has proposed measure BD63 in the Environmental Management Plan. Would this give Natural England confidence of a consultative and iterative approach to SSSI development should section 28E be disapplied, or if not, why not?

As stated above, NE is satisfied that (in compliance with s.28I) the SoS has consulted with and NE has had the opportunity to provide advice in relation to the EMP. There is therefore no need for disapplication of s.28E or s.28H.

Page 56 of the EMP includes the following: *BD63 - All works within a SSSI will be subject to a method statement to be agreed and signed off by Natural England - Assumption that Section 28 assent is disapplied by the DCO.*

We are satisfied that measure BD63 would ensure Natural England is further engaged with the operations that will take place within the SSSI boundary, but not necessarily those which are to be undertaken outside the site boundaries but which nonetheless may affect them. Natural England is not necessarily seeking to approve all method statements but wishes to be consulted by the developer before works commence. If clause BD63 were to be taken forward into the final DCO it will perhaps be better if the wording was changed so that the developer has to 'consult' Natural England.


e) Other than complete removal of the disapplication from Article 3 of the dDCO, are there any other forms of resolution to this matter that Natural England considers important and relevant?

So far as NE is concerned, the statutory s.28I consultation process in relation to SSSIs is being followed, meaning that NE has nothing further to add.

If you have any queries relating to the advice in this letter please contact me on

[REDACTED]

Yours faithfully



Hayley Fleming
Senior adviser – Planning for a Better Environment
West Midlands Area Team